

1871
C. A. 25.

APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*RAGHU NATH DAS (PLAINTIFF) *v.* ASHRAF HUSAIN KHAN AND ANOTHER
(DEFENDANTS). **Act X of 1877 (Civil Procedure Code), s. 111—Set-off: Mortgage.*

The usufructuary mortgagee of certain land sued the mortgagor for the money due under the mortgage. The mortgagor alleged that the mortgagee had committed waste and was liable to him for compensation which he claimed to set-off. Held that under s. 111 of Act X of 1877 the amount of such compensation could not be set-off.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: On the 12th September, 1869, Ashraf Husain Khan and Sharif-un-nissa, who each owned a certain share in a garden, jointly gave Hingan Lal a usufructuary mortgage of their shares for a term of five years. Hingan Lal's interests under this mortgage were sold in the execution of a decree, and were purchased by Raghu Nath Das, who in January, 1878, sued Ashraf Husain Khan and Sharif-un-nissa, the term of the mortgage having expired, to recover Rs. 569-4-0, the money due under the mortgage. The defendants claimed to set-off their shares of a sum of Rs 1,161-1-4, being the value of certain trees which they alleged had existed in the garden, and which Hingan Lal had either cut down or destroyed, and of the materials of certain buildings which they alleged had existed in the garden, and which Hingan Lal had pulled down and sold the materials of. The Court of first instance, in giving the plaintiff a decree, allowed the defendants a set-off of Rs. 275 on account of the acts of waste committed by Hingan Lal. On appeal by the plaintiff the lower appellate Court held that the defendants were entitled to a set-off on such account, but reduced the amount to Rs. 150.

The plaintiff appealed to the High Court, contending that the set-off claimed by the defendants could not be allowed.

The Senior Government Pleader (Lala Juala Prasad) and Munshi Hanuman Prasad, for the appellants.

* Second Appeal, No. 1031 of 1878, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 9th September, 1878, modifying a decree of Babu Parmoda Charn Banarji, Munsif of Benares, dated the 22nd June, 1878.

Mir Akbar Husain, for the respondents.

The judgment of the Court, so far as it related to the above contention, was as follows :

JUDGMENT.—We are of opinion that the plaintiff's objection to the set-off allowed by the Courts below is valid. Under s. 111, Act X of 1877, it is only an ascertained sum of money legally recoverable that can be the subject of set-off, and it is necessary that in such claim both parties fill the same character as they fill in the plaintiff's suit, the claim must be certain and determinate and actually due and in the same right and of the same kind. The claim by the defendants in this suit, for estimated damages to property mortgaged as security for money lent, does not meet the requirements of the law, so as to be capable of being set-off against the plaintiff's claim for the money lent.

It has been held that mesne profits is in the nature of damages and is not a debt so as to form a subject of set-off (1); and it was held in a suit by a carrier for the price of the carriage of goods that the defendant cannot set off the amount of damages claimed against the plaintiff for injury to the goods, but must sue to recover the damage in a separate suit (2). We must therefore allow the plaintiff's appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

EMPRESS OF INDIA v. BALDEO SAHAI.

Attempt to obtain an Illegal Gratification—Act X L V of 1860 (Penal Code), s 161—Act X of 1872 (Criminal Procedure Code), ss. 2 8, 351—Warrant case—Defence—Right of accused person to cross-examine the witnesses for the prosecution—Power of the Court to summon material witness.

To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectually in implicit as in explicit terms.

Where, therefore, B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that any thing might be effected by "kar-awai," and on the overture being rejected,

- (1) *Rutcerummom Opadhya v. Grijahund Opadhya*, 7 Wym. Rep., 218.
 (2) *Scanlan v. Herrold*, 10 W. R., 295.

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