

## APPELLATE CIVIL.

1900  
March 3.

*Before Mr. Justice Knox.*

ABDUL GHAFUR (DEFENDANT) v. RAJA RAM (PLAINTIFF).\*

*Civil Procedure Code, section 211—Mesne profits—Interest on mesne profits not given by decree—Interest not obtainable in execution—Costs of collection of rents by a trespasser in possession not to be set off against mesne profits—Execution of decree.*

A plaintiff sued for cancellation of a certain lease, and for ejection of the defendant as a trespasser, and for mesne profits with interest on such mesne profits. The decree which he obtained was a decree for cancellation of the lease and ejection of the defendant, and ordered that mesne profits should be ascertained in the execution department, but was silent as to interest. *Held* that interest on the mesne profits could not be obtained in execution of the decree. *Hurro Durga Chowdhri v. Surul Sundari Debi* (1) and *Kishna Nand v. Kunwar Partab Narain Singh* (2) referred to.

*Held* also that as the defendant had thrust himself into an estate and not acted in the exercise of a *bond fide* claim of right, he was not entitled to charge collection expenses in reduction of the mesne profits. *McArthur and Co. v. Cornwall* (3) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

KNOX, J.—This appeal arises out of proceedings taken in execution of a decree passed on the 7th of December 1896 in favour of one Babu Raja Ram, respondent to this appeal. In order to understand the points which arise for determination, it will be necessary to state briefly the circumstances which gave rise to the suit in which this decree was passed. One Musamat Sahab Jan was the original owner of the property, over which between the years 1882 and 1884 she made three successive mortgages in favour of the ancestor of Raja Ram. Upon these mortgages Raja Ram obtained a decree for sale on the 4th of August 1890. After the decision had been passed, Sahab Jan, on the 7th of November 1890, executed a lease over the same property in favour of Sheikh Abdul Ghafur, the present appellant, and three days later she preferred an appeal to the High Court from the decree in favour of Raja Ram. This appeal was

\* First Appeal No. 169 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th August 1899.

(1) (1881) I. L. R., 8 Cal., 332.

(2) (1884) L. R., 11 I. A., 88.

(3) L. R., 1892, A. C., 75.

eventually dismissed. Upon its being dismissed, Raja Ram put the property to sale and himself purchased it. The sale was confirmed on the 20th of September 1895, and an order for delivery given seven days after. Raja Ram applied for mutation of names to be effected over the property. Abdul Ghafur resisted the application, and it was rejected. Raja Ram had therefore to sue for possession, and he did so on the 5th of September 1896, asking for further mesne profits in respect of the property, both for the time during which he had been kept out of possession and from institution of the suit until delivery of possession with interest upon the same. On the 7th of December 1896 the Court gave him a decree, which is now under execution. It is a decree for possession by which the lease given to Abdul Ghafur is to be cancelled. As regards the mesne profits, the Court added that the plaintiff is decidedly entitled to the profits from the date of his purchase, but it reserved inquiry into the amount thereof, which was to be decided in the execution department. Neither in the judgment, nor in the decree which followed, was any mention made of the interest upon mesne profits for which Babu Raja Ram had asked. On the 3rd of July 1899 Babu Raja Ram instituted proceedings in execution. He asked for mesne profits, including interest. The judgment-debtor took exception to the sum of Rs. 719-12-8 at which the plaintiff had assessed the sum he claimed as mesne profits. The objection raised by him was threefold. He first contended that he should be allowed a proper sum for the expenses of collection incurred by him in getting in the rents. The second objection was that the decree-holder was not entitled to interest; and the third, that the decree-holder was not entitled to any sum on account of the sir lands, of which Sahab Jan had, by virtue of the decree, become an ex-proprietary tenant. He also took exception to the sum of Rs. 12-14 as pleader's fee on the ground that the decree did not award it. All these objections were overruled, and Abdul Ghafur now comes to this Court, and renews these objections. There was a further plea taken in appeal, namely the second plea, but this was expressly abandoned by the learned vakil for the appellent.

1900

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 ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

1900

ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

I deal first with the issue—"Is or is not the decree-holder entitled to interest upon the mesne profits? The contention raised by the appellant is that as this interest was in express terms claimed, but the decree gained does not award it, it must be taken to have been in the discretion of the Court refused. To this it is replied that as the question of mesne profits was left to be determined by the executing Court, that Court had the power to confirm the decree that was passed, and was bound to construe the term mesne profits as including interest. This contention is based upon what may be termed the explanation clause to section 211 of the Code of Civil Procedure. It is therein stated that mesne profits of property mean certain profits which are defined "together with interest on such profits." I find myself unable to hold that the term "mesne profits" in the Code of Civil Procedure necessarily carries with it as an essential ingredient interest on such profits. It may, of course, and ordinarily does, include such interest, but it seems to me that section 211 leaves the matter in the discretion of the Court which determines the original suit. It is for that Court to say upon a consideration of the facts of the case whether any interest shall be allowed, and if allowed, at what rate it is to be allowed. If that Court in express terms refuses to grant interest, or if, when such interest is claimed, it passes a decree, the terms of which are silent as regards interest, it seems to me that in either case the Court which executes the decree, even when the amount of mesne profits is left for future inquiry, cannot add to the original decree interest which, as I consider, the original Court refused to grant. To do so would be, as was pointed out in a somewhat similar case by their Lordships of the Privy Council in *Hurro Durga Chowdhurani v. Surnat Sundari Debi* (1) to add to the decree. The case *Kishna Nand v. Kunwar Partab Narain Singh* also decided by their Lordships of the Privy Council (2) confirms me in the belief that the question whether interest is or is not to be allowed in awarding mesne profits is a matter for decision of the Court which determines the original suit. In this last case the explanation added to section 211 was expressly

(1) (1881) I. L. R., 8 Calc., 332.

(2) (1884) L. R., 11 I. A., 88.

considered. I therefore hold that the decree-holder is not entitled to any sum as interest upon the mesne profits awarded.

As regards the question whether the judgment-debtor is entitled to charge the expenses of collection against the receipts which he has received from the land during the period he was in wrongful possession, I hold that he is not so entitled. The learned vakil for the appellant took his stand upon the decision of this Court, *Ataf Ali v. Lalji Mal* (1). His contention was that Shaikh Abdul Ghafur entered upon the property with a *bona fide* belief that he was entitled to do so under the lease he had obtained from Musammat Saheb Jan. In any case the learned vakil argued that this issue had been expressly raised by him in his written statement, and the question whether the lease was or was not a *bona fide* lease had been left undetermined. Shaikh Abdul Ghafur should therefore be given an opportunity of having this issue tried before he was fined by the refusal of the Court to allow his collection charges. He was, however, prepared that it should be determined here, as the materials for the determination was upon the record, and he pointed to the evidence of Kundan, Shaman Khan and Mangli Khan, which will be found in the printed book of the appellants in First Appeal No. 39 of 1897. All that these witnesses state is that Saheb Jan executed the lease in favour of Abdul Ghafur because she had some difficulty in collecting the rent and paying the Government revenue. This is hardly to be wondered at in the year 1890, seeing that a decree for sale of the property had been obtained, and the tenants must have felt conscious that the property was about to pass out of her hands. The evidence of Kundan above quoted and that of Mehdi Hasan, to be found in the respondent's printed book, page 1, together with the written statement of Musammat Saheb Jan Bibi at page 3 of the same book, satisfies me that Abdul Ghafur must have been cognizant of the fact that the decree ordering the sale of this very property had been obtained on the 4th of August, 1890, and he must also have known that the appeal, which he virtually filed on the very last day possible, was purely for the purposes of gaining time. This is a case in which he has, in defiance of the rights of another, thrust himself into an estate, and

1900

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 ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

1900

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 ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

not a case where he entered upon an estate in the exercise of a *bonâ fide* claim of right. I am not prepared to allow him charges for collection. Reliance was placed upon a passage in *Hurro Durga Chowdhurani v. Surut Sundari Debi* (1) at page 335, in which their Lordships give an opinion that the amount which might have been received from the land deducting the collection charges were the mesne profits of the land. It does not appear what were the facts of that case, and the probability is that the trespasser there was a trespasser in the exercise of a *bonâ fide* claim of right. Reliance was also placed upon *McArthur and Co. v. Cornwall* (2). This case, however, is a peculiar one, and the trespassers therein mentioned had hardly passed the line of trespass in exercise of a *bonâ fide* claim. In the present case I feel satisfied that the action of Sheikh Abdul Ghafur was purposely taken either to delay or abet the delaying of the just claims of the decree-holder.

There remains a question whether or not the decree-holder is entitled to get any rents in respect of the sir land. Here the argument is that as soon as the sale took place Musammat Sahab Jan Bibi became by process of law ex-proprietary tenant of all the sir land held by her at the time when her property passed out of her possession. The decree-holder could not obtain anything from Musammat Sahab Jan Bibi until he at first got a rent fixed by the Rent Court. That being the case nothing could be obtained in respect of these lands. This contention overlooks the possibility which the law also allows of Musammat Sahab Jan Bibi and the purchaser coming to terms by mutual agreement, that is to say, upon the day of or the day after the sale. But it is added that as Mussammat Sahab Jan had, prior to the lease in favour of Sheikh Abdul Ghafur, leased all sir lands to one Din Muhammad, Sheikh Abdul Ghafur could recover nothing. The lease itself refutes this contention. The clause relating to the so-called lease to Din Muhammad confirms me in the view that Din Muhammad was a mere man of straw. Abdul Ghafur in fact entered upon this sir and realized rents from the sub-tenants, as is abundantly proved by the evidence of the patwaris and khationis. The learned vakil for the

(1) (1881) I. L. R., 8 Cal., 332.

(2) L. R., 1892, A. C., 75.

appellant said in the course of his argument that he did not object to pay what his client could have realized from Din Muhammad. This contention appears to me to be entitled to no favour, and I disallow it.

There remains the last item on account of the pleader's fee. On this I hold that the respondent is entitled to pleader's fee in the Court below upon the sum which I now determine to be the sum payable to him.

The result is that this appeal is so far allowed that the appellant is entitled to deduct from the sum awarded against him by the lower Court the amount assessed as interest on the mesne profits. In other respects, the judgment and decree of the lower Court are confirmed. Parties will get costs in this Court and the Court below in proportion to their success and failure in this Court.

[See also in connection with the second point in the case *Sharaf-ud-din Khan v. Fatchiyab Khan* (1)—ED.]

*Decree modified.*

## REVISIONAL CRIMINAL.

1900  
March 24.

*Before Mr. Justice Aikman.*

IN THE MATTER OF THE PETITION OF LACHMAN AND ANOTHER.\*

*Criminal Procedure Code, Sections 133, 135—Order of Magistrate for removal of unlawful obstruction—Application for appointment of a jury Effect of verdict of jury.*

Where a person against whom an order has been made under section 133 of the Code of Criminal Procedure applies for a jury under section 135 of the Code, the applicant is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bona fide* claim of right.

In this case a Magistrate of the first class issued an order to the petitioners to remove certain obstructions to an old passage for cattle. The petitioners filed a written statement and prayed for the appointment of a jury under section 135 of the Code of Criminal Procedure to try whether the order was reasonable and proper. The petitioners themselves nominated two persons; two others were appointed by the complainants, and the Magistrate appointed an umpire. Three of the jurors and the umpire returned

\* Criminal Revision No. 114 of 1900.

(1) Weekly Notes, 1898, p. 28; I. L. R., 20 All., 203.