

1901

IN THE  
MATTER OF  
THE  
PETITION  
OF  
ALAMDAR  
HUSAIN.

merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as section 476 contemplates. The opinion spoken of by section 476 no doubt is a judicial opinion founded on evidence. If such an opinion has been formed, this Court ought not in revision to interfere merely on the ground that it disagrees with it: the case must go on. In the present case I see no reason whatever to doubt that the Collector formed a serious, deliberate, judicial opinion that there was ground for inquiry. I think myself that there was ground for inquiry, although I guard myself against expressing any strong opinion as to that. Here is a man who swore to certain events taking place in his presence at a certain time and on a certain occasion before the Tahsildar and upon inquiry being made, the Tahsildar contradicts the whole of what he says, and declares it to be absolutely untrue. The Collector had before him the statement of this man, who was examined as a witness before him, and of whose veracity he had an opportunity of judging, and also had the Tahsildar's contradiction. I think that there is no cause for interfering in revision. The application is dismissed.

## APPELLATE CIVIL.

1901

March 11.

*Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.*

ABDUL GHAFUR (JUDGMENT-DEBTOR) v. RAJA RAM (DECREE-HOLDER).\*

*Civil Procedure Code, section 211—Execution of decree—Mesne profits—Allowance of collection expenses to a trespasser against whom a decree for mesne profits has been passed.*

Ordinarily in the case of a decree for mesne profits against a trespasser in possession of immovable property the collection expenses incurred by him during the period of his possession will be allowed; it is only when the trespass is of a very aggravated character that the Court, in the exercise of its discretion, may refuse such expenses. *McArthur & Co. v. Cornwall* (1) followed. *Hurro Doorga Chowdhurani v. Maharani Surat Soondari Debi* (2)

\* Appeal No. 21 of 1900 under section 10 of the Letters Patent,

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

(2) (1881) L. R., 9 I. A., 1.

*Girish Chunder Lahiri v Shoshi Shikhareswar Roy* (1), *Altaf Ali v. Lalji Mal* (2) *Sharf-ud-din Khan v. Fatehyab Khan* (3), and *Shitab Dei v. Ajudhia Prasad* (4) referred to.

1901

---

ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Muhammad Ishaq*, for the respondent.

STRACHEY, C.J.—This is an appeal by a judgment-debtor in execution proceedings from the decision of Mr. Justice Knox, reported in I. L. R., 22 All., 262. The decree declared the plaintiff entitled to recover mesne profits, but reserved inquiry as to the amount to which he was entitled for proceedings in execution. In giving mesne profits to the decree-holder, Mr. Justice Knox has not allowed the appellant any deduction on account of the expenses of collection incurred by him in getting in the rents of the property during the period of his wrongful possession. It is necessary to see in what circumstances the appellant obtained and continued in possession of the property. There was a decree for sale on a mortgage passed against one Sahib Jan on the 4th of August, 1890. The decree was confirmed on appeal by the High Court. It was not executed for five years. At the sale in execution of the decree the decree-holder himself was the purchaser. The sale was confirmed on the 20th September, 1895, and an order for delivery of possession was made seven days afterwards. In attempting to get possession the purchaser was resisted by the appellant, who was in possession. Hence the suit by the purchaser and his decree for possession and for mesne profits, which is now in execution. The appellant had obtained possession under a lease from the mortgagor Sahib Jan. The lease was executed in his favour on the 7th November, 1890, four months after the decree for sale and three days before Sahib Jan's appeal against that decree was presented to the High Court. From the execution of the lease until the confirmation of the auction sale in execution of the decree, a period of more than five years, nothing was ever done to question the appellant's possession under the lease. It is important to observe that the decree-holder claims no mesne

(1) (1900) I. L. R., 27 I. A., 124.

(2) (1877) I. L. R., 1 All., 518.

(3) (1897) I. L. R., 20 All., 208.

(4) (1887) I. L. R., 10 All., 13.

1901

ABDUL  
GHAFURv.  
RAJA  
RAM.

profits for the period of five years prior to the confirmation of the sale. The claim for mesne profits relates only to the period from the date of confirmation.

Now what are the grounds on which the learned Judge has disallowed the appellant's claim to charge his expenses of collection in reduction of the profits which he received and which have been recovered by the respondent? His grounds are, that at the time when the appellant took the lease on the 7th November, 1890, he must have been aware of the respondent's decree for sale against the lessor on the previous 4th of August; that he must also have known that Sahib Jan was about to present an appeal against that decree; that he must also have known that the appeal was "purely for the purpose of gaining time;" that his action in taking the lease was "purposely taken either to delay or abet the delaying of the just claims of the decree-holder;" and that consequently the case was not one of a trespasser entering on an estate in the exercise of a *bond fide* claim of right, but of one who, "in defiance of the rights of another, thrust himself into an estate." I cannot agree with the view of the learned Judge. So far as regards the taking of the lease and the original possession of the appellant his motives appear to me to be immaterial, because in my view there was nothing wrongful about his action: he was not a trespasser, and his possession was lawful. When the lease was executed, that is, after the decree for sale, but five years before actual sale, the judgment-debtor Sahib Jan was still owner of the property subject to the decree, and had a perfect right to make a lease of it subject to the rights which the decree created. She exercised that right, and the lessee remained in possession for five years without question. That during the whole of this period the appellant's possession was not wrongful, but lawful, is not denied by the respondent, for he makes no claim for mesne profits during that period, which, had he thought the possession wrongful, he certainly would have done. His decree only entitles him to mesne profits after the confirmation of the sale. There is, therefore, no ground for treating the original taking of possession by the appellant, or the continuance of his possession up to the confirmation of sale on the 20th September, 1895, as wrongful, and this destroys the whole foundation of the learned Judge's decision

in regard to the collection expenses. Now let us consider the period after the confirmation of sale. No doubt, as soon as the sale was confirmed, the lease, which was always subject to the rights created by the decree for sale, had no effect as against the respondent, who had purchased under the decree. Therefore, after the confirmation of sale, the appellant ought to have given up possession when required to do so, instead of which he resisted the respondent's application for mutation of names and attempted to get possession. It was his continuance in possession after the confirmation of the sale and his resistance to the purchaser that was wrongful, not his original entering into possession. So that the sum and substance of his wrong-doing is that his possession after the 20th September, 1895, was illegal, and, it may be assumed, illegal to his knowledge. Is that a sufficient reason for disallowing his collection expenses when allowing the respondent mesne profits? The objection of a suit for mesne profits is to compensate the owner of land for being kept out of possession and deprived of the profits of the land. The measure of the compensation is ordinarily the loss which he has suffered. If he is placed in the same possession as if he had all along been in possession that is all he is ordinarily entitled to, and it is not reasonable that he should receive any additional benefit, or that the person in wrongful possession should not only make compensation but be fined as well. The ordinary meaning of the profits of land, as observed by the Privy Council in *Hurro Doorga Chowdhurani v. Maharani Surut Soondari Debi* (1), is the amount which might have been received from the land deducting the collection charges. I do not mean that in all cases the Court would be compelled to allow such deductions. As the Privy Council said in *Girish Chunder Lohiri v. Shoshi Shikhareswar Roy* (2), "mesne profits are in the nature of damages which the Court may mould according to the justice of the case." The question is, whether the justice of this case requires that the respondent should recover mesne profits without deducting the necessary expenses of collection which, if he had been in possession as purchaser from the date of confirmation of sale, he would himself have been obliged to pay. I can see no justice in giving him

1901

---

 ABDUL  
 GHAFUR  
 v.  
 RAJA  
 RAM.

(1) (1881) L. R., 9 I. A., 1 at p. 5. (2) (1900) L. R., 27 I. A., 110, at p. 124.

1901

ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

that additional benefit. We have been pressed with certain rulings. The first is the decision of the Full Bench in *Altaf Ali v. Lalji Mal* (1). All that the majority of the Court there held was that when the trespass is "altogether tortious and malicious" without any *bonâ fide* belief of the trespasser in the rightfulness of his possession, and in defiance of the rights of another, it is not imperative on the Court in estimating the damages to allow him even such charges as would ordinarily, but voluntarily, be incurred by the owner. That only shows that the Court has a discretion in the matter, and that discretion must depend on circumstances and in particular on the Court's view of the trespasser's conduct. In the present case I do not take the same view of the trespasser's conduct as Mr. Justice Knox, and I do not think that it requires to depart from the ordinary rule. In *Sharf-ud-din Khan v. Fatehyab Khan* (2) the point before us was not discussed or decided, but there are expressions in the judgment which indicate that some allowance on account of expenses, though not on account of decrees for rent, may properly be made to a wrong-doer in possession. In *Shitab Dei v. Ajudhia Prasad* (3) at page 15 it is said:—"The defendants cannot claim, being tort-feasors, to deduct the costs of the collection of money they have wrongfully collected." That is all that is said on the point, and if it means that a tort-feasor ought not in any case to be allowed to deduct the costs of collection, the proposition is, I think, much too widely stated. That is clearly shown by the decision of the Privy Council in *McArthur & Co. v. Cornwall* (4), which is of course of superior authority to all the other cases cited. That was a suit for recovery of land and damages for conversion of its produce. The defendants were in a possession which was found to be illegal. Up to the time when a decree was passed in 1886 the illegality of their possession was disputed, and the Privy Council thought that their conduct up to that decree, or at least up to their failure to to give leave to appeal from it, was in some degree excusable. After that date their Lordships say that it was less excusable; that "the illegality of their possession, though disputed before, was then made manifest," and that their retention of the land

(1) (1877) I. L. R., 1 All., 518.

(2) (1897) I. L. R., 20 All., 208.

(3) (1887) I. L. R., 10 All., 13.

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

1901

---

 ABDUL  
GHAFUR  
v.  
RAJA  
RAM.

was not justified. Nevertheless their Lordships held that the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of after allowing the defendants a proper sum for expenses. The effect of their decision is thus stated in the head-note:—"However wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiffs." With reference to that decision, Mr. Justice Knox says that the case is a peculiar one, and that "the trespassers therein mentioned had hardly passed the line of trespass in exercise of a *bond fide* claim." At all events the Privy Council say that after 1886 the trespass was "unauthorized and wilful in its inception and persistent and definite in its continuance;" that the illegality was manifest; that the defendant's conduct was a piece of disobedience to the law; that they had been more than imprudent, and had been wrong-headed and obstinate. No more than this—if so much—can, in my opinion, reasonably be said of the conduct of the appellant in this case in retaining possession after the period of five years during which his possession under the lease was lawful and never questioned. On the main point in this appeal, therefore, I think that the appellant is entitled to succeed, and that he ought to be allowed a proper sum for his expenses of collection. It will be necessary to remit an issue to the Court of first instance to determine what that proper sum is under the circumstances of the case. There is one other question which is raised by the appeal. The appellant objected in the first Court that the decree-holder was not entitled in the assessment of mesne profits to any sum on account of certain sir lands which, with the rest of the property, was included in the appellant's lease. Now the effect of the sale, which was confirmed on the 20th September, 1895, by virtue of the provisions of the North-Western Provinces Rent Act, No. XII of 1881, was that Sahib Jan became an ex-proprietary tenant of the purchaser in respect of the sir lands. From the date of the confirmation of the sale the purchaser would, as regards the sir lands, possess the proprietary right as owner, Sahib Jan would be the ex-proprietary tenant liable to pay

1901

ABDUL  
GHAFFUR  
v.  
RAJA  
RAM.

rent to the purchaser, and the appellant would be the sub-tenant of Sahib Jan and liable to pay rent to her. There is nothing whatever to show that at any time after the date of the sale Sahib Jan lost any of her rights as ex-proprietary tenant which she acquired by virtue of the sale. So long as the ex-proprietary tenancy subsisted, the appellant as Sahib Jan's sub-tenant would be entitled to possession of the sir lands, and would be liable to pay rent not to the purchaser but to Sahib Jan, the ex-proprietary tenant, his own landlord. His possession of the sir lands would not be a wrongful but a rightful possession in these circumstances. The purchaser would not be entitled to recover rent from him, but would only be entitled to recover such rent from Sahib Jan as might be determined by the Rent Court or by agreement between himself and Sahib Jan. That being so, it appears to me that the objection raised by the appellant with reference to the sir lands was sound, and that no mesne profits ought to be allowed to the respondent in respect of the sir lands. Before deciding this case it is necessary to obtain findings on the following issues under section 566 of the Code :—

(1) What is the proper sum to allow the appellant for the expenses of collection incurred by him during his possession of the property in dispute from the 20th September, 1895 ?

(2) To what amount of mesne profits is the respondent entitled after deducting the sum found to be a reasonable sum for the expenses of collection under the first issue, and excluding all sums claimed by the respondent on account of the sir lands, and also all sums claimed by the respondent as interest on the mesne profits which have been disallowed by Mr. Justice Knox ?

We remit these issues to the Court of first instance, which will take such additional evidence as may be necessary, and on return of the findings, ten days will be allowed for objections.

BANERJI, J.—I entirely concur, and have little to add. I am unable to distinguish this case from that of *McArthur & Co. v. Cornwall* (1). The principle of the ruling of their Lordships of the Privy Council in that case applies, in my opinion, with equal, if not greater, force to this case. That was a case in which the trespass was "unauthorized and wilful in its inception and

1901

---

 ABDEL  
GHAFUR  
v.  
RAJA  
RAM.

persistent and definite in its continuance." In the present case the possession of the appellant was in its inception lawful. The mere fact that a decree for sale had been passed against Sahib Jan did not preclude her from dealing with her property until it was sold in execution of the decree. She was therefore competent to grant a lease of it to the appellant, and by virtue of the lease the appellant lawfully entered into possession. It is his continuance in possession after the confirmation of the subsequent auction sale which was unlawful and rendered him liable to pay mesne profits. His case is not in any way different from that of an ordinary trespasser; and having regard to the rulings of the Privy Council to which the learned Chief Justice has referred, such a trespasser is entitled to charges of collection. The Full Bench case of *Altaf Ali v. Lalji Mal* (1) appears to have been a case of "tortious and malicious" trespass, which this is not. That case is, therefore, distinguishable from the present. I see no reason to hold that the justice of this case requires that the appellant should be deprived of the expenses of collection which the respondent himself would have had to incur had he been in possession, and that the mesne profits in this case should include anything more than the actual profits received from the land after deducting collection charges.

As for the sir lands, assuming that Din Muhammad was a man of straw, and the lease in his favour is in reality a lease in favour of the appellant, the possession of the appellant in respect of the sir is possession as the sub-tenant of Sahib Jan, who, after the auction sale, became the ex-proprietary tenant of the respondent. It has not been suggested that she has, by contract or otherwise, lost her ex-proprietary rights. The respondent cannot therefore have any claim against the appellant for mesne profits in respect of the sir.

I agree in the order proposed.

*Issues remitted.*

(1) (1877) I. L. R., 1 All., 518.