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REFERENCE
UNDER
SECTION 57
OF ACT
NO. II OF
1899.

of a receipt requiring a one anna stamp, the duty is not leviable, consequently section 42 has no application, and the Court is not justified in acting under clause (1) of section 42.

The following opinion was pronounced:—

KNOX, BLAIR, and BANERJI, JJ.—The questions which are referred to us are (1) whether, in applying the proviso (b) of section 35 of Act No. II of 1899, the Court should or should not levy the duty of one anna as well as the penalty of one rupee; and (2) when a receipt is admitted under the proviso, whether it should or should not be endorsed as required by section 42.

Our answers to both the questions are in the negative.

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April 7.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DUNGAR MAL AND OTHERS (OPPOSITE PARTIES) v. JAI RAM

(PETITIONER).*

Civil Procedure Code, section 211—Mesne profits—Allowance of expenses of collection of rents to a trespasser against whom a decree for mesne profits has been passed—Principle upon which such expenses should be allowed or disallowed.

In estimating the mesne profits which the owner of land is entitled to recover from a trespasser the costs of collecting rents, which are ordinarily incurred by the owner, should be allowed to the trespasser only where such trespasser entered on the land in the exercise of a *bona fide* claim of right. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bona fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. *Altaf Ali v. Lalji Mal* (1) followed. *McArthur v. Cornwall* (2), *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (3) referred to. *Abdul Ghafur v. Raja Ram* (4) distinguished.

In the suit out of which this appeal arose the plaintiff claimed possession as the adopted son of one Tika Ram of lands which

* First Appeal No. 19 of 1901 from an order of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 3rd of December, 1900.

(1) (1887) L. L. R., 1 All., 518. (3) (1900) L. R., 27 I. A., 110.
(2) (1892) L. R., 1892 A. C., 75. (4) (1901) I. L. R., 23 All., 252.

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had been the property of Tika Ram. Of these lands the defendants, notwithstanding that they knew the plaintiff to be the adopted son of Tika Ram, had forcibly dispossessed the plaintiff, and they further, acting in collusion with other parties, set up a forged will purporting to have been executed by Tika Ram, the effect of which, if genuine, would have been to defeat the claim of the plaintiff. The plaintiff obtained a decree for possession and mesne profits. On the plaintiff's applying for execution of his decree for mesne profits the defendants pleaded in reduction of the amount claimed that they were entitled to set off the expenses incurred by them in the collection of rents during the time that they were in possession. The Court executing the decree (Additional Subordinate Judge of Moradabad) referring to the cases of *Sharaf-ud-din v. Fatehyab Khan* (1) and *Abdul Ghafur v. Raja Ram* (2), disallowed the defendants' contention and passed an order fixing the amount of the mesne profits payable by the defendants. Against this order the defendants appealed to the High Court raising the same plea as to the non-allowance of collection expenses.

Pandit *Sundar Lal* (for whom *Munshi Gokul Prasad*), for the appellants.

Mr. *A. E. Ryves*, for the respondent.

STANLEY, C.J. and BURKITT, J.—The suit in this case was instituted by the plaintiff to recover possession of lands of which he had been wrongfully dispossessed by the defendants, and also for mesne profits. A decree was passed in favour of the plaintiff, and mesne profits have been awarded. In estimating the amount of mesne profits the defendants claimed to be entitled to credit for collection charges. This the learned Subordinate Judge disallowed on the ground that the defendants under the circumstances were not entitled to set off the alleged collection charges against any portion of the plaintiff's claim. An appeal has been accordingly taken against the decree in so far as it disallowed to the defendants the costs of collection. The facts of the case disclosed before us show that the conduct of the defendants in dispossessing the plaintiff of his property was very wanton and malicious. It appears that the property belonged to one Tika Ram deceased

(1) Weekly Notes, 1898, p. 23.

(2) (1901) I. L. R., 23 All., 252.

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and that he had adopted the plaintiff as his son. This fact was known to the defendants, but notwithstanding it they forcibly took possession of all the property of Tika Ram, and not content with this, they also, acting in collusion with other parties, set up a forged will purporting to have been executed by Tika Ram, the effect of which, if genuine, would have been to defeat the claim of the plaintiff. Under such circumstances the trespass of the defendants was of a very aggravated character, and it appears to us that if, in any case, the Court is entitled to disallow collection expenses to a trespasser, this is such a case. Reliance has been placed by the appellant's pleader upon a decision of their Lordships of the Privy Council in the case of *McArthur & Co. v. Cornwall* (1). According to the head-note to that case, it would appear to have been held that the measure of damages in every case such as the present is "the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management, and that, 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 plaintiff." On reading the judgment of Lord Hobhouse, who delivered the judgment of their Lordships, it seems to us that the head-note to that case is expressed in too wide language, for his Lordship appears from the judgment to have confined his observations to the case before him, and not to have laid down a general principle which would be applicable to all cases. His Lordship says (at page 88) :—"Assuming in Cornwall's (*i.e.* the plaintiff's) favour that such conduct (*i.e.* the conduct of the defendants) would authorize what is in its nature a fine or penalty, and is not damage to the plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question), their Lordships cannot take so severe a view of the conduct of the defendants." Then the judgment goes on to show that the conduct of the defendants was not misconduct of an aggravated character, and proceeds thus:—"To say,

(1) (1892) L. R., 1892 A. C., 751.

however, that for such a piece of disobedience to the law, they (the defendants) shall be disentitled to charge their expenses on the land against their receipts from it and shall be fined into the bargain, and all for the benefit of Cornwall, is going beyond the point warranted by any principle or any decided case known to their Lordships." In that case, we may observe, the plaintiff had been guilty of grave misconduct; for example, after incurring liability to the defendants he had mortgaged his property fraudulently, he had also executed a fraudulent conveyance, and then directly a judgment was obtained against him by the defendants, had left the island where the property was situate in breach of a pledge made to the defendants, leaving his labourers to shift for themselves, and the defendants to recover their debt as best they could. The defendants then, no doubt wrongfully, took possession of the property, but, as their Lordships held, this was not under the circumstances a very serious infraction of the law. Another case which has been strongly relied upon by the learned pleader for the appellant is the case of *Abdul Ghafur v. Raja Ram* (1). This was a Letters Patent appeal from the decision of Mr. Justice Knox, who had, under the circumstances of that case, disallowed collection charges. The learned Chief Justice, Sir Arthur Strachey, disagreed with the decision of Mr. Justice Knox, holding upon the facts that the justice of the case did not require that the appellant should be deprived of the expenses of collection, and that the mesne profits should not include anything more than the actual profits received from the land after deducting the collection charges. In this case the learned Chief Justice relied upon the decision of their Lordships of the Privy Council in the case to which we have referred, but treated it apparently as only laying down the principle that unless justice demand otherwise, collection charges should ordinarily be given. He observes that it is only when the trespass is of a very aggravated character that the Court, in the exercise of its discretion, may refuse such charges. Now that Lord Hobhouse, in the case to which we have referred, did not intend to lay down a rule that collection expenses should be allowed in every case, appears to us

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to be apparent from his judgment in the case of *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (1), in the course of which, at page 124, he observes that "mesne profits are in the nature of damages which the Court may mould according to the justice of the case."

In the case of *Ataf Ali v. Lalji Mal* (2), it was held by the majority of a Full Bench of this Court that in estimating the mesne profits which the owner of the land is entitled to recover from a trespasser the costs of collecting rents which are ordinarily incurred by the owner should be allowed to the trespasser only when such trespasser entered on the land in the exercise of a *bond fide* claim of right. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bond fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. We are prepared to accept this statement of the law, which has been followed and acted on in this Court. In the case before us, as we have said, the trespass was of a very aggravated and malicious character, and was such as, in our opinion, disentitled the appellant to favourable consideration from the Court. We therefore disallow his appeal with costs.

The respondent has filed an objection to the decree on the ground that a sum of Rs. 200 has through an error in addition been disallowed. It is admitted by the pleader for the appellant that a sum of Rs. 154 was allowed instead of the sum of Rs. 354. This error will, therefore, be corrected, and the sum of Rs. 354 will be allowed instead of Rs. 154, that is, the amount of the decree will be increased by Rs. 200.

Appeal dismissed and objection allowed.

(1) [1900] L. R., 27 I. A., 110.

(2) (1887) I. L. R., 1 All., 518.