APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

DHUNPUT SINGH (PLAINTIFF) *v.* SARASWATI MISRAIN AND OTHERS (DEFENDANTS).* 1891 *December* 8.

Rent Suit—Arrears of rent—Suit for arrears of patni rent for period during which zamindar had been in possession as purchaser at a sale which was subsequently set aside—Trespasser.

In a suit by a zamindar against his patnidars for arrears of patni rent for the years 1294, 1295 and part of 1296, it appeared that the patnidars had been out of possession during a portion of that period when the zamindar himself had been in possession, having purchased the tenure at a sale held in proceedings instituted by him under the Regulation. It appeared, however, that the sale had been set aside owing to the proceedings having been instituted against the predecessor of the patnidars who was then dead, and thereupon the zamindar gave notice to the patnidars to retake possession which they accordingly did. During the time he was in possession the zamindar himself collected some of the rent. The lower Court dismissed the claim for rent for the period during which the plaintiff was so in possession on the ground that he was a wrong-doer and trespasser, and that consequently the defendants could not be held liable for rent during that period.

Held, that this was no reason for refusing the plaintiff a decree for such arrears, as upon the authority of the decision in *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1), the plaintiff could not be treated as a trespasser, and that he was entitled to recover the actual arrears outstanding for the period in question, but not the interest thereon.

THE facts of this case, as to which there was no dispute at the ultimate hearing in the lower Court, were as follows:—

The plaintiff sued the defendants, who were the patnidars, for arrears of patni rent for the years 1294, 1295, and the first two instalments of 1296. It appeared that in Jeyt 1294, the tenure was sold at the instance of the plaintiff, and purchased by himself, but that on its appearing that the proceedings under the Regulation had been taken against the predecessor of the patnidars, who

* Appeal from Original Decree No. 289 of 1889, against the decree of F. Taylor, Esq., District Judge of Purnea, dated the 22nd August 1889.

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was then dead, the sale was set aside in Pous 1295. The plaintiff gave the defendants notice of the reversal of the sale in Falgoon or Cheyt 1295, and called on them to resume possession. There was no dispute as to the rates of the rent claimed, and that the plaintiff had himself collected some rent during 1294 and 1295.

The case first came on for hearing on the 8th February 1889, and the following issues were settled :—

1. Are the defendants liable for the rents sued for ?

2. What is the amount of collection made by the plaintiff in 1294 and up to Sawan 1296 ?

3. Is plaintiff entitled to any collection charges ? If so, how much ?

4. Is the plaintiff entitled to interest upon the arrears of rent ?

On the same day the defendants' pleaders informed the Court that they had no objection to the amount of rent claimed, but that they objected to the interest claimed on the arrears.

On the 19th June the case was referred to two arbitrators for the purpose of ascertaining what amount the plaintiff actually collected during the period he was in *khas* possession, and whether any, and if so what amount of rent claimed by the plaintiff was barred by limitation owing to the negligence or misconduct of the plaintiff.

On the 14th August 1889 the arbitrators made their award, finding that Rs. 2,935-9-7 had been collected by the plaintiff, and as no evidence had been produced by either party on the second point, holding that no portion of the rent claimed was barred by limitation. The case then came on before the District Judge on the 22nd August 1889, for decision upon the issues which had been fixed.

The following is the material portion of his judgment :—

"There is no question about the liability for the rents of 1296. As to the liability for 1294 and 1295, I consider that as the dispossession was by plaintiff's own act, he cannot hold the defendants liable for rent for those years, or for any part of them, as his collections appear to have extended up to the end of 1295. It is no answer on plaintiff's part to say that the defendants will be better able to collect the unrealized balance than he

would himself. I do not also think it would be fair to make the defendants liable even for the part not collected by the plaintiff on the ground that it is not barred by limitation. Had defendants been in possession they might have realized it before now; and though plaintiff may have used all diligence in realization, the defendants would be hampered in their attempts to realize for those years, by the very fact that they had not been in possession and had no actual accounts to aid them.

"This is due to plaintiff's own voluntary action, and he must take the consequences.

"The defendants have referred to the case of *Kadumbinee Dossia* v. *Kasheenath Biswas* (1). The principle there enunciated is in the favour of the defendants. The plaintiffs have referred to the decision in *Bhyrub Chunder Mojoomdar* v. *Haro Prosunno Bhuttacharjee* (2), the head note of which is in their favour, but it does not appear to me that the head note is in accordance with the facts of the case. The note says: 'An allegation of wrongful ejectment of defendant by plaintiff is no answer to a suit for rent during the period of dispossession.' It is true that the second paragraph of the judgment at first sight seems to contain the enunciation of this principle; but the sentence is not clear, and the principle is not consistent with the facts of the case. In the case the dispossession was from 1271 to Sawan 1276, and the rent of 1276 was sued for. There is nothing to show that any rent was due during the first three months of 1276, and it does not follow 'that the rent sued for *does* * * relate to the period of dispossession.' The word '*not*' seems to have been left out.

"For the above reasons I find, on the first and fourth issues, that plaintiff is only entitled to the rent with interest thereon, according to the kabuliyat, for the first two instalments of 1296. It will be unnecessary to decide the other issues."

Against the decree drawn up in accordance with this judgment the plaintiff appealed to the High Court.

Babu *Sri Nath Das*, Babu *Sarada Churn Mitter*, and Babu *Dwarka Nath Chuckerbutty* for the appellant.

Babu *Akhoy Kumar Banerji* for the respondents.

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The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows :—

This is an appeal by the plaintiff in the suit.

The suit was to recover arrears of patni rent for the years 1294, 1295, and part of 1296. It seems that the defendants, the patnidars, were out of possession for a part of that period. The patni was sold under the Regulation at the instance of the plaintiff in the month of Jeyt 1294, and the plaintiff himself became the purchaser. That sale was set aside in the month of Pous 1295; and we are told that the reason why the sale was reversed was that the proceedings under the Regulation were taken not against actual living patnidars, but against their predecessor who was then dead. The plaintiff appears to have given notice to the defendants that they were at liberty to resume possession shortly after the reversal of the sale; and it appears that the plaintiff while in possession did collect some portion of the rent of each year.

The issues in the case were settled on the 8th February 1889, and the first issue raised was whether the defendants were or were not liable for the rent claimed.

We find, however, from the order-sheet that on the 8th February the defendants' pleader informed the Court that they did not intend to dispute the amount of the arrears claimed, but they objected only to interest being charged upon those arrears. Subsequently in the month of June, on the application of both parties, the case was referred to arbitration in order that they might ascertain what amount the plaintiff had himself realized during the time he was in possession, and the arbitrators were directed to ascertain whether any portion of the rent due had become barred by limitation through any default on the part of the plaintiff. The arbitrators made their return showing the amount which had been collected by the plaintiff, and reporting that there was nothing to show that any portion of the arrears was barred by limitation owing to any default on the part of the plaintiff. Then on the case coming back to the District Judge, he dismissed the claim altogether for 1294 and 1295, and made a decree in favour of the plaintiff only for the arrears

due for 1296 with interest on that amount. The reason why the Judge dismissed the claim for 1294 and 1295 was that he considered that "as dispossession was plaintiff's own act, he cannot hold the defendants liable for rent for those years, or for any part of them, as his collections appear to have extended up to the end of 1295." The District Judge appears to have considered that the plaintiff must be regarded as a wrong-doer and trespasser in respect of the years 1294 and 1295, because the sale which he had caused to be held under the Regulation was set aside for some defect in the proceedings.

It seems to us that this is not a sufficient reason for refusing the plaintiff the arrears which have been found to be actually due. In the case of *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1) the Privy Council held that the zamindar cannot be said to have committed an act of trespass, because when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act. Their Lordships say they "cannot treat this as an act of trespass or hold that in bringing this suit she is a person seeking to take advantage of her own wrong." That was a case somewhat similar to this, for the zamindar had caused a patni to be sold under the Regulation, but had by inadvertence omitted the prescribed formalities. We think that in the present case too we ought to follow the decision of the Privy Council, and hold that the plaintiff was not a trespasser in this instance. But we think him still entitled to the actual arrears outstanding for the years in question, but not to interest upon the arrears of 1294 and 1295. Thus what we come to is practically what the defendants themselves expressed their willingness to accept in 1889 just after the issues had been fixed.

We accordingly decree this appeal to that extent, namely, in addition to the amount decreed to the plaintiff for 1296, he will also recover the amount outstanding for 1294 and 1295 and ascertained by the arbitrators. The amount already collected by the plaintiff will be deducted from the gross jama of these two years, and the balance will be paid, without interest, to the

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plaintiff; and interest on the amount decreed will run from this date at six per cent.

We notice that one of the respondents in this appeal was not represented by pleader.

The appellant will get costs in proportion to the amount decreed.

Appeal decreed in part.

H. T. H.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

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LUKHUN CHUNDER ASH (PLAINTIFF) *v.* KHODA BUKSH MONDUL (DEFENDANT).*

Court Fees—Act VII of 1870, *s.* 16, *and Schedule I, Art.* 1—*Court-fee payable where partial relief granted—Appeal against decree by instalments, how valued—Valuation of Appeal.*

The court-fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value of the relief which he claims and the relief granted by the decree appealed against.

Where a decree was made payable by three instalments and the plaintiff appealed on the ground that it should not have been made so payable:—*held* that the court-fee should be calculated upon the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned in the decree.

THE plaintiff sued to recover the sum of Rs. 1,285-2-7½ gs., being the rent and cesses payable by the defendant in respect of his dur-patni right in certain mauzas for the years 1296 and 1297 B.S. At the hearing the defendant appeared in person and admitted the claim, stating that there had been inundations, in consequence of which the tenants of the mehal in suit had failed to pay rent. The defendant therefore prayed the Court to allow him to pay the amount claimed by three instalments. The Subordinate Judge considered the case a fit one for payment being allowed to be made by instalments, and gave the plaintiff a decree

* Appeal from Appellate Decree No. 295 of 1891, against the decree of F. F. Handley, Esq., District Judge of Nuddea, dated the 28th of January 1891, affirming the decree of Babu Brojo Behari Shome, Subordinate Judge of Nuddea, dated the 25th of November 1890.