

1902

FEB. 10, 11.

APPELLATE
CIVIL.

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*Before Mr. Justice Ghose and Mr. Justice Brett.*SURJA PERSHAD NARAIN SINGH *v.* REID.*
[10th, 11th February, 1902.]*Mesne profits—Possession—Principle of assessing amount of mesne profits—Civil Procedure Code (Act XIV of 1882) s. 244—Second appeal—Determination of mesne profits.*

Where a decree-holder was in constructive possession by letting out the lands to tenants, before ouster by the judgment-debtor, the mesne profits [623] should be measured by what would be a fair and reasonable rent for the lands, if the same had been set out to tenants during the period of unlawful occupation of the wrong-doer.

There is, however, no general principle which can be made applicable to every case of the kind. The proper principle of assessing mesne profits in such cases will depend upon the character of the possession held by the decree-holder before ouster.

Raghu Nandan Jha v. Jalpa Pattap (1) distinguished.

THE plaintiffs, Surja Pershad Narain Singh and others, appealed to the High Court.

This appeal arose out of an application by the decree-holders for ascertainment of mesne profits and realisation thereof from the judgment-debtors. An account was given of mesne profits due, and it was prayed that notices might issue to the judgment-debtors.

The judgment-debtors, L. D. Reid and others, objected that the mesne profits demanded, amounting to Rs. 1,02,940-4-3, was calculated on a wrong principle and grossly exaggerated; that the lands of which it was held that they had been in wrongful possession were *raiyyati* lands; that the utmost they could be asked to pay was the rent thereof paid by the raiyats from whom they had obtained the same, and that as regards the lands covered by the *zurpeshgi* deeds, the decree-holders had no right to recover anything from them.

After several adjournments the case was argued before the lower Court on the question of the proper principle upon which mesne profits should be assessed, which in the opinion of that Court it was necessary to be decided before entering into the merits of the case. Upon the preliminary point so argued, the lower Court passed the following order on the 21st December 1900:—

“The decree-holder claims the value of the produce of the land, which the judgment-debtor actually received during the period of his unlawful possession. According to the judgment-debtor, however, the rent which could have been obtained from the land, if the decree-holder had been in possession during those years, is the only fair measure of mesne profits.

“The point has been authoritatively decided by the High Court, following certain judgments of the Privy Council and Full Bench and Divisional Benches, in the case of *Raghu Nandan Jha v. Jalpa Pattap* (1), where it has been held that the proper principle was to ascertain what would have been a fair and reasonable rent from the land, if the same had been let to a tenant during the unlawful occupation of the wrong doer.

“Following the above ruling, I find the point raised in favour of the judgment-debtor and order the production of evidence accordingly.”

* Appeal from Order No. 22 of 1901, against the order of Babu Bbagwati Charan Mitter, Subordinate Judge of Saran, dated the 21st of December 1900.

(1) (1897) 3 C. W. N. 748.

[624] *The Advocate General (Mr. J. T. Woodroffe), Dr. Asutosh Mukerjee and Babu Biraj Mohan Mazumdar* for the appellants.

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Babu Umakali Mukerjee and Babu Kulwant Sahai for the respondents.

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GHOSE AND BRETT, JJ. This appeal arises out of an application made by the decree-holders, who are the appellants before us, for ascertainment and recovery of mesne profits due to them, the lands in respect of which such mesne profits were claimed having been decreed to them against the defendants, the judgment-debtors.

There seems to have been a contest between the parties as to the principle upon which such mesne profits should be ascertained. The decree-holders apparently claimed the value of the produce of the lands which the judgment-debtors, during the period of their unlawful possession, actually received, while, on the other hand, the judgment-debtors contended that all that the decree-holders were entitled to receive was the rent at which they might have been able to let out the lands, if they had continued to be in possession, and had not been disturbed in such possession by the defendants.

The Subordinate Judge did not go into the facts upon which any principle could be applied, but following the case of *Raghu Nandan Jha v. Jalpa Pattay* (1), held that the proper principle was to ascertain what would have been a fair and reasonable rent for the lands, if the same had been let to a tenant during the period of unlawful occupation by the defendants; and he accordingly ruled the point raised between the parties in favour of the judgment-debtors, and directed the ascertainment of mesne profits. The words used in the last portion of his order constitute "an order for the production of evidence accordingly." This, however, means, as we have just indicated, the production of evidence as regards the amount of mesne profits recoverable, in accordance with the view accepted by the Subordinate Judge.

Now, looking at the case to which the Subordinate Judge refers in his judgment, it will be found that the decree-holder there before the ouster by the defendant was in constructive possession of the lands by letting them out to tenants; and having [625] regard to that fact, the learned Judges, following certain rulings quoted in their judgment, held that the proper principle applicable to the case was to ascertain what would be a fair and reasonable rent for the land, if the same had been let out to a tenant during the period of unlawful occupation of the wrong doer. As we have already mentioned, no facts were gone into by the Subordinate Judge in this case when he laid down the principle enunciated in his judgment. We need hardly say that there is no general principle which could be made applicable to every case of the kind. What the Subordinate Judge ought to have done was to ascertain precisely what the facts were and what the nature of the possession of the plaintiffs was before the ouster, and then to have determined the principle upon which the mesne profits should be ascertained. We need hardly point out to him any of the cases decided by this Court where, having regard to the character of the possession held by the decree-holder before ouster, the principle for the ascertainment of mesne profits was laid down. We may, however, refer him to the cases of *Sreenath Bose v. Nobin Chunder Bose* (2), *Soudaminee Dabee v. Anund*

(1) (1897) 9 C. W. N. 748.

(2) (1868) 9 W. R. 478.

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FEB. 10, 11. *Chunder Haldar* (1), *Nursingh Roy* v. *Anderson* (2), and *Bhookumee Koer*
v. *Ram Tuhul Roy* (3).

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We are of opinion that the Subordinate Judge should ascertain the precise facts, and then determine the principle upon which mesne profits in this case should be ascertained.

We may here mention that the learned vakil for the respondents raised before us a preliminary objection to the hearing of this appeal, upon the ground that no appeal lay to this Court, because the Subordinate Judge did not determine the amount of mesne profits recoverable by the decree-holders. But having regard to the provisions of s. 244 of the Code of Civil Procedure, it is impossible to say that the question determined by the Subordinate Judge is a question in respect of which a second appeal does not lie to this Court. We accordingly overrule the objection.

We make no order as to costs. Let the records be sent to the Court below without delay.

Case remanded.

29 C. 626.

[626] *Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose and Mr. Justice Brett.*

CHOWDHRY KESRI SAHAY v. GIANI ROY.* [8th May, 1902.]

Civil Procedure Code (Act XIV of 1882) ss. 310A, 551—Sale—Sale set aside on deposit of debt within 30 days—‘Date of sale’—Limitation—Limitation Act (XV of 1877) s. 14, Sch. II, Art. 12—Appellate Court, order of—Second appeal—Exclusion of time during which or second appeal was pending.

A property was sold in execution of a decree against the judgment-debtor on the 22nd May 1900. The sale was set aside by the first Court on the 25th May following, but was declared valid by the Appellate Court on the 2nd August 1900. The judgment-debtor preferred a second appeal to the High Court on the 15th August 1900, which appeal was dismissed on the 5th September following. On the 12th September the judgment-debtor applied under s. 310A of the Civil Procedure Code to have the sale set aside on deposit of the requisite sum.

Held, that the application was barred by limitation, not having been made within 30 days from the date of sale; and that, although in computing the period of limitation, the time between the 25th May and the 2nd August may be excluded, the time between the 15th August and the 5th September, spent in prosecuting the second appeal, cannot be excluded.

THE judgment-debtor, Chowdhry Kesri Sahay Singh, appealed to the High Court.

A property belonging to the judgment-debtor was sold on the 22nd May 1900, in execution of a decree against him, in the Court of the Munsif of Shahabad and was purchased by the decree-holder. On the 25th May following, the sale was set aside by the Munsiff on the ground that the Nazir who conducted the sale had no authority to accept the bid and close the sale without his sanction. Thereupon on some date between the 26th and 29th May, the judgment-debtor deposited in Court the full decretal amount with costs. The order of the Munsiff of

* Appeal from Order No. 148 of 1901, against the order of H. R. H. Coxe, Esq., District Judge of Shahabad, dated the 29th of January 1901, affirming the order of Babu D. Bose, Munsiff of Shahabad, dated the 22nd of December 1900.

(1) (1870) 13 W. R. 37.
(2) (1871) 16 W. R. 21.

(3) (1872) 17 W. R. 156.