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linquishment, subsequently referred to, is not a qualification of the statement that the plaintiff's ancestor once held the tenure, but is a perfectly fresh and distinct fact. There was, therefore, nothing wrong in law, and nothing contrary to the rule laid down in *Pulin Behari's* case, in reading against the defendant so much of his written statement as stated that the plaintiff's ancestor once held the tenure, and was in possession thereof until he relinquished it.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

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Mesne Profits—Act XXIII. of 1861, *s.* 11—*Act VIII. of* 1859, *ss.* 196 *and* 197.

See also 15 B. L. R. 392.

Mesne profits are in themselves simply damages which do not exist as an obligation to be discharged until they have been awarded by a Court competent to do so. Therefore, according to section 11 of Act XXIII. of 1861, "mesne profits payable at the time of execution" must mean mesne profits which have been at that time directed to be paid by a decree of Court. The two portions of section 11 of Act XXIII. of 1861 are in direct connection with sections 196 and 197 of act VIII. of 1859.

A. obtained a decree against B. for recovery of possession of certain property, and for mesne profits up to the date of the suit, but the decree was silent as to mesne profits after that time. *Held*, A. was not barred by the provisions of section 11 of Act XXIII. of 1861, from bringing a suit against B. for mesne profits, during the time that A. was kept out of possession after the decree.

THIS was a special appeal from the decision of the Principal Sudder Ameen of the 24-Pergunnahs, affirming a decision of the Sudder Ameen.

Baboos *Ramesh Chandra Mitter* and *Hem Chandra Banerjee* for appellant.

Baboo *Ananda Chandra Ghosal* for respondent.

The facts of this case are fully stated in the judgment of the High Court, which was delivered by

PHEAR, J.—In the year 1269 B. S. (1862), Dhanmani Chowdhrain sued Haramohini Chowdhrain to recover certain property,

* Special Appeal, No. 3043 of 1867, from a decree of the Principal Sudder Ameen of the 24-Pergunnahs, affirming a decree of the Sudder Ameen of that district.

with mesne profits in respect thereof up to date of filing the suit, and in 1270 B. S. (1863), a decree was given in favor of the plaintiff, according to the terms of a solehnama filed dy the defendant. This decree, while it awarded a rough sum by way of set-off against mesne profits up to the date of suit, as claimed by the plaintiff, was silent as to mesne profits after that time. It seems, however, that the plaintiff, although she thus obtained a decree by consent for recovery of possession of the property in the year 1270 (1863), did not, in fact, get possession until the year 1272 (1865). She alleges that she was kept out of possession during this period by the wrongful act of the defendant in the original suit, and the suit now before us, is a suit brought by her against the defendant to obtain mesne profits for the period during which she was so kept out of possession. In her plaint, she claimed mesne profits for the whole time from the year 1269 (1862), when, as we have said, the original suit was instituted, to the year 1272(1865), when she filed the present suit. Both the lower Courts have passed a decree in her favor, but they have not given her mesne profits for the time during which she was out of possession before 1270 (1863), that is, for the time which elapsed previously to the decree in the last suit Both the lower Courts have confined their decrees for mesne profits to the interval between the date of the consent decree in the original suit in 1270 (1863), and the date of the institution of the second suit in 1272 (1865). Against the decree of the lower appellate Court in this suit, the defendant now appeals to this Court upon substantially three grounds of special appeal.

The first is that the present suit "being on account of mesne "profits said to be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, is under the provisions of section 11, Act XXIII. of 1861, not maintainable." In some slight degree this objection seems to be founded upon a misapprehension of the plaintiff's claim. The plaintiff did not say that mesne profits which she claimed were "payable in respect of the subject-matter of a suit," &c. Still no doubt, if, on the substance of the plaint and written statement taken together, it appears that the mesne profits claimed by the plaintiff are "payable in respect of the

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"subject-matter of a suit between the date of the institution of "the suit and execution of the decree," the claim does fall within the words of section 11, Act XXIII. of 1861, and the present suit would, consequently, be barred. We must, therefore, in deciding upon the merits of this objection, see whether the mesne profits claimed by the plaintiff are "payable in respect "of the subject-matter, &c."

Upon turning to the section itself, we find that it runs thus:—'All questions regarding the amount of any mesne profits "which in the terms of the decree may have been reserved for "adjustment in the execution of the decree, or of any mesne "profits or interest which may be payable in respect of the "subject-matter of a suit between the date of the suit and the "execution of the decree, shall be determined by order of the "Court executing the decree and not by separate suit." It is clear that there is some distinction between the first part of the clause, as we have quoted it, and the second portion which follows after the disjunctive 'or.' The first part, in distinct words, refers to mesne profits which may have been reserved for adjustment in execution of the decree; the second refers to mesne profits or interest which may be 'payable' in respect of the subject-matter of a suit. Now 'payable' can only be rightly spoken of that which is due to some one under an obligation already existing. Mesne profits, then, which are essentially of the nature of damages, can only be' payable' when they are due under an order of Court. They do not merely, in the shape of mesne profits, spring from a liability under a contract, either express or implied. They must not be confounded with rent, although they are generally measured by reference to rent. They are in themselves simply damages which do not exist as an obligation to be discharged, until they have been awarded by a Court competent to do so. Hence, as it seems to us, 'mesne, profits payable at the time of execution, must mean mesne profits which have been at that time directed to be paid by a decree of Court; and this construction seems to us to follow naturally from the arrangement of the section itself. As we have already said, the first part of the section refers to mesne profits which, although they have been the subject of decree,

have not been ascertained by the decree, but have been directed to be adjusted in execution; the second refers to mesne profits which have been not only the subject of decree, but actually ascertained and made matter of specific order and direction.

Sections 196 and 197 of Act VIII. of 1859 give authority to the Court to reserve the adjustment of mesne profits until execution in the one case, and to order and direct mesne profits to be paid up to the date of execution in the other case; so that the two portions of section 11, Act XXIII of 1861, seem really to be in direct connection with sections 196 and 197, Act VIII. of 1859. If this construction of Section 11 is correct, then it follows that the mesne profits payable in respect of the subject-matter of a suit, and which are forbidden to be sued for in any separate suit, are merely the mesne profits which have been directed to be paid by the decree in the first suit; and, consequently, the force of section 11, so far as it operates to deprive Civil Courts of the jurisdiction to entertain a claim for damages put forward by a plaintiff, applies solely to damages sought in the character of mesne profits which have been already awarded by a decree of a Civil Court in a previous suit. And thus the objection which has been made by the special appellant in this case falls to the ground, for it is admitted, so far as the present special appellant is concerned, that not only were the mesne profits, which are now the subject of consideration, never matter either of decision, or even consideration, in a former suit, but that they are sought by the plaintiff as recompense for loss resulting to her in consequence of the conduct of the defendant, which has been exhibited by her since the passing of the decree in the former suit.

A decision of the Madras High Court, *Chennapa Naidu* v. *Pitchi Reddi* (1) has been referred to by the special appellant, for the purpose of showing that the construction which we have just put upon section 11, is not the proper construction which that section ought to bear, and if we take the bare words of the judgment of the Court, as they are reported, no doubt it would appear very much as if the Madras High Court

(1) 1 Madras. H C R. 453.

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took a different view of the section from that which we have just now expressed. But it is clear that that judgment is given with much conciseness. Probably it was delivered orally in Court without any explanation of the original facts of the case, and there is reason we think for inferring that, before the suit for mesne profits had been brought which was there disposed of, the same matter of claim for mesne profits had been the subject of a decision of a Civil Court under one or other of the sections 196 or 197 of Act VIII. of 1859, and in truth the High Court in its judgment says, that—"Inasmuch as the amount collected "as mesne profits was improperly returned to the defendants, an "appeal was, by the express words of the section, open to the "plaintiffs." Something, therefore, had clearly occurred in the Court below which had laid open to the plaintiffs a remedy by appeal in the original suit, and it was not necessary in any sense for the plaintiffs to seek the same remedy by means of an independent original suit. But whatever were the real facts of that case, there is, we think, so much doubt as to whether or not the decision is strictly applicable to the case which is now before us, that we do not think that we are bound, even if it be substantially an expression of opinion different from that which we now entertain, to defer to it.

On the other hand, we have before us a Ruling of a Full Bench of our own Court, *Mudusudan Lal* v. *Bhikari Sing* (1), the judgment in which was delivered by the Chief Justice. In that case the Court was called upon to say "whe-"ther, if the decree itself was silent as to interest, the Court "executing the decree has power to award interest," and in coming to a conclusion upon this matter, all the sections, to which we have just now referred, of Act VIII of 1859, and Act XXIII. of 1861, underwent the consideration of the court. The Chief Justice said in reference to section 11, Act XXIII.—"The latter branch of the section clearly refers to cases in "which payment of mesne profits or interest are provided for "in the decree under section 196 of Act VIII. of 1859, the "former branch to cases under section 197;" and again he says:—"It clearly could not have been intended by words

(1) Case No. 249 of 1865, 15th September 1866.

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"which convey a discretion to determine all questions regarding "the amount of mesne profits or interest payable in respect of "the subject-matter of the suit between the date of the "suit and the execution of the decree, to authorize the Court "executing the decree to determine, it may be contrary to "the terms of the decree, or in the absence of any decision "upon the subject, whether interest or mesne profits were or "were not payable at any rate for the period between the "date of the suit and the date of the decree." It seems to us that the words now quoted from the judgment delivered by the Chief Justice entirely authorize and support the construction which we place upon section 11, Act XXIII of 1861. The judgment of the Full Bench, as a judicial decision, was, no doubt, confined to answering the question relative to interest but the whole reasoning of the Court from the beginning to the end of the judgment coupled mesne profits with interest, and, in fact, the two, that is mesne profits and interest, are exactly similarly situated in the section of the Act, and whatever construction is applicable to the one, is almost of necessity applicable to the other.

We may add that if the special appellant's contention could be upheld, this very remarkable result would follow, namely, that an unsuccessful defendant directed by the court to give up possession of the property held by him to the plaintiff might, with impunity, withold possession from the plaintiff, notwithstanding the decree in which possession of the property is directed to be delivered over, keeping the plaintiff out by main force under every circumstance of aggravation, without the slightest apprehension or risk of having damages assessed against him, which should have any reference to his tortious conduct. The utmost that could be done in such case for the relief of the plaintiff would be this, that the plaintiff should ask the Court executing the decree to assess the amount of mesne profits, having regard solely to the time that he was kept out of enjoyment, and to the annual proceeds of the property. The court in execution has no means of trying any question arising out of the new cause of action, and it would be unable to do more than merely calculate the result of a question in arithmetic. It seems

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to us to be impossible to suppose that the Legislature, by the words which it has used in section 11, Act XXIII. of 1861, intended to deprive a plaintiff, who had been successful in a suit for ejectment, of his right to bring a suit upon a subsequent trespass, and to recover substantial damages in reference thereto, merely because the trespass and the wrongful act had occurred between the passing of the original decree and the obtaining execution thereof, that interval being actually due to the tortious and wrongful act of the defendant himself. Yet this would seem to be the result, if under such circumstances the plaintiff is forbidden to bring a new suit for recovery of mesne profits. It can hardly be that the Legislature meant him to split his damages, and would allow him to sue afresh for such portion of them as could be attributed solely to the tortious character of the defendant's act, while it forced him to recur to the old suit for reimbursement of the loss of profits caused by the same act.

The second of the grounds of special appeal is to the effect, that the terms of the solehnama, upon which the consent decree in the original suit was based, precluded the plaintiff from claiming mesne profits in respect of the time during which she was kept out of possession by the plaintiff, subsequently to the date of that consent decree. Now, of course, it cannot be said *a priori* that any such a condition as this could not possibly appear in the solehnama, but we may venture to say that it is extremely unlikely from the very nature of the case that any thing of the kind should be there. At the time that a solehanama is executed or agreed to, the parties are on friendly terms, and it seems to me exceedingly improbable that at such a time and under such circumstances they should, in the solehnama itself, come to an agreement, say, the plaintiff with the defendant in the present case, that although the defendant is now agreeing to put the plaintiff in possession of the property, still if the defendant should commit a breach of this her agreement, and wrongfully keep the plaintiff out of the future, she will, as part of the consideration for this agreement, abstain from suing the defendant for damages in respect of that anticipated breach of the terms of the solehnama. Still, as I have already said, it is not impossible that something of this sort should be agreed upon, and we have had the solehnama

read out to us with the view of judging for ourselves, whether it does contain a clause to this effect or not. Now it seemed to us clear, on the first reading of it, and we have not since changed our view, not only that there was nothing of the kind in the document, but that all the provisions of the solehnama had reference to the state of the parties at the time that it was entered into, and provided for the settlement of past grievances, and past dues; without reference to any thing future, beyond the undertaking of the defendant, that she would give up the property to the plaintiff. So that it seems to us that the second of the ground of special appeal entirely fails.

The third ground is in effect that there is no legal evidence on the record to support the assessment of mesne profits which the lower appellate Court has made. With regard to this, I am bound to admit, that we have, during the course of the case, had some hesitation as to what our decision in strict law ought to be, but upon the whole, considering that the plaintiff's claim is a claim for damages which by the finding of the Court have been caused to her by the wrongful act of the defendant, damages such as probably in few cases admit of very accurate assessment, and which must be more or less left to the discretion of the Court whose duty it is to assess them, and considering further that in this case especially, the defendant's wrongful act is exhibited in the form of a deliberate breach of an agreement which she had entered into to give up this property, *viz.*, the agreement embodied in the solehnama by way of compromise of the original claim for possession and wasilat, we think that we ought not to look too closely into the evidence to see whether it entirely bears out, to the last figure, the estimate of damages which the lower appellate Court has formed. And we are the less disposed to do so, because, judging even from what has fallen from both parties during the argument, and certainly from the facts stated in the judgment of the lower Courts the amount of damages which have been awarded by way of mesne profits, certainly does not seem to be excessive. Now there is evidence on the record which would enable the lower appellate Court to arrive at some estimate of damage. There is the number of bigas of land in respect of which the claim is made. There is the

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share of the plaintiff in that property. There is the testimony of some of the occupying ryots as to the rent which they pay. And this evidence alone, in default of better, would be sufficient to enable the Court assessing damages to arrive at a very approximately accurate measure of them. We have not enquired whether starting from these data, and pursuing the calculations to the end, the result would be that or nearly that which the lower appellate Court has arrived at in this case. But, on the other hand, it has not been suggested to us for a moment that it would not be so, neither has it been alleged, even in argument, that if another investigation were held solely for the purpose of assessing damages, the result would probably be less than the amount which the lower Courts have decreed. Under all these circumstances we think, that this last objection made by the special appellant must fail as well as the others, and we therefore dismiss the special appeal with costs.

Before Mr. Justice Bayley and Mr. Justice Glover.

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July 9.

SHIB NARAYAN POHRAJ *v* KISHOR NARAYAN POHRAJ.*

Decree for Possession—Mesne Profits—Act XXIII. of 1861, *s.* 11.

A., in execution of a decree of the lower Court against B., obtained possession of certain land therein mentioned. On appeal by B., the High Court reversed the decree of the lower Court, and ordered restitution of the property to B.; but no mention of mesne profits was made in the decree. B. then sued for recovery of mesne profits for the period during which A. had been in possession.

***Held*, that such a suit would not lie. The question of mesne profits ought to have been decided in execution under section 11 of Act XXIII of 1861.**

On the 19th December 1860, the defendants in this case obtained a decree against the plaintiff herein, in the Judge's Court of Cuttack, for possession of several talooks. In execution of this decree, they, on the 30th April 1861, obtained possession of some of the talooks. On the 30th June 1863, the High Court reversed the decree of the Court below, and ordered that the appellant (plaintiff in the present suit) do recover from the defendants possession of the talooks of which he had been dispossessed in

*** Application Nos. 151 and 152, for a review of judgment passed by Bayley and Glover, J. J., on the 24th March 1868, in Regular Appeal, No. 54 of 1867.**