The Moonsiff thereupon re-heard the case, and decided it in favour of the plaintiff, and the Judge, on the second appeal, has come to the same finding.

It is contended here in the first place that the Judge had no right to make a remand-order at all; that, under section 354 of the Code of Civil Procedure, if he thought that there was anything wanting in the Moonsiff's judgment, or that any evidence had not been taken which it was necessary to take, he should have kept the case on his own file, and directed the lower Court to take such evidence as was necessary, and return its finding on that evidence to him.

It seems doubtful whether section 102 of the Rent Act would not apply to this case, inasmuch as it was a suit for rent less than Rs. 100, in which no issue of right or title, or the right to enhance rent, was involved. But supposing it not to apply, and an appeal from the order of remand passed by the Judge to be allowable, I think that this Court's decision would have to be governed by section 350 of the Procedure Code, inasmuch as the Judge's order, taking it to be an order of remand, does not, in any way, affect the merits of the case or the jurisdiction of the Court. Supposing the order of remand to be a correct one, or rather supposing that no objection could be taken to it at this stage, did the Moonsiff, when the case was remanded to him, act up to the remand-order? It is said he did not, and that, instead of confining himself to calling upon the ex-proprietors to produce their papers, and summoning the other witnesses whom the plaintiff wanted to have summoned, he decided upon other documents which the plaintiff herself produced to which it was not proved that the defendant had attached his signature. It is urged that the Judge gave no order to the Moonsiff to accept those papers, or, in fact, to take any other evidence than that which he himself had pointed out in his order. But, as I have said before, the Judge's words are that there was to be a "re-trial," and I understand by this that the whole case was to be gone into *de novo*, and that the plaintiff was to be allowed to prove her case in any way she could. I do not understand that the Judge's order was ever intended to shut out the evidence now offered by the plaintiff, the less so, as she was, as the Judge says, in a particularly difficult position, not knowing exactly what to bring forward as evidence. It was for the Moonsiff, as it was for the Judge, afterwards on appeal, to decide whether the papers filed by the plaintiff on the remand were genuine or not; but I see no reason why they should be shut out simply on the wording of the Judge's decision. On the contrary, I consider that the wording of the order covered the admission not only of these papers, but also of any others which the plaintiff might have thought proper to produce.

Both appeals must be dismissed with costs.

The 5th December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Wrongful Dispossession—Liability—Damages—Remedies.

Case No. 168 of 1873.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 9th September 1872, reversing a decision of the Moonsiff of Shazadpore, dated the 16th May 1872.

Nudiar Chand Shaha (Plaintiff), *Appellant,*

versus

Prannath Shaha and others (Defendants), *Respondents.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Mr. J. H. Rochfort and *Baboo Sreenath Doss* for Respondents.

A party, who wrongfully takes possession of another's boats, and places them in such a position that, without any neglect on the part of the owner, they become unserviceable until the ensuing rainy season, is responsible for the consequences of his own act, and is not in any way discharged, because the police makes over the boats to the owner at a time when there is no water in the river, and the boats cannot be moved.

A plaintiff is entitled to ask for any remedy which the Court may think proper upon the state of facts disclosed in his plaint, and established by the evidence; and a mistake in asking for a particular remedy will not debar him from some other remedy similar in its nature and not more extensive, provided it requires no change in the facts.

Ainslie, J.—THE plaintiff in this suit seeks to recover possession of two boats from the defendant No. 1, together with damages for the detention of the same, on the allegation that the said defendant colluding with the plaintiff's servant, Sook Chunder Manjee, took possession of the boats, and moved them from Shahzadpore Ghât, where they had been placed by the plaintiff, to Churuck Dehee Ghât, a place within his own estate; and that, in consequence of the drying-up of the Dourah, it was impossible to remove the boats back into the river until the following rainy season. The first Court directed the defendant to make over the boats in question to the plaintiff, or, in default of his doing so, to pay the sum of Rs. 250 as the value thereof, and also to give Rs. 400 damages as compensation for all losses sustained by the plaintiff.

Both parties appear to have appealed to the District Judge. The Judge laid down three issues, but only tried two. The first issue is whether the defendant No. 1, the only party with whom we have to deal here, is responsible for any loss that may have accrued to the plaintiff between the 16th of Pous 1277 and the 16th of Pous 1278 for the non-use of the boats by the plaintiff. The Judge was of opinion that the appellant is not strictly liable for any loss for the non-use of the boats after the date of the order passed by the Deputy Magistrate on the 17th of January 1871, and he found that, in accordance with that order, the plaintiff received the boats into his own custody in Magh 1277, corresponding with January 1871.

Then the next issue was whether the boats are in the possession of the defendant, and is he justly liable for the decree for the restoration of them to the plaintiff, or to pay Rs. 250 in default thereof.

He says that the boats were not in the possession of the defendant; that there is no evidence of any opposition on the part of the defendant to the removal of the boats by the plaintiff; and that, therefore, there can be no decree directing the defendant to make over the boats to the plaintiff. The third issue, which was as to the measure of damages, appears to have been raised by both parties, but it was not decided.

In special appeal it is urged that the order of the Magistrate, releasing the boats from attachment, did not absolve the defendant from the duty of restoring them to the plaintiff. It was said that the withdrawal of the attachment was nothing; that there must be a distinct act of the defendant by which he surrendered the custody of the boats to the plaintiff.

It appears from the order of the Magistrate that the police was directed to give up the boats into the custody of the plaintiff himself, and there is evidence that they were so delivered. It is not shown that, at any time when the plaintiff attempted to remove the boats, the defendant made any opposition whatever. Under these circumstances, it is quite clear that the order for the restoration of the boats or payment of their value in default of such restoration is bad, inasmuch as the boats are and have been, during the whole of this litigation, under the control of the plaintiff himself, if he chose to exercise it.

The second point is that the Judge is entirely wrong in saying that the plaintiff was bound to go to the expense of dragging the boats from the dry land into the water, and that, in default of doing that, he has no right to claim damages for the detention of the boats in a place where they were not capable of being used. We think that it is quite clear that, if it is established that the defendant wrongfully took possession of the plaintiff's boats, and placed them in such a position that, without any neglect on the part of the plaintiff, they became unserviceable until the filling-up of the river in the rainy season, he must be responsible for the consequences of his own act, and that he is not in any way discharged, because the police made over the boats to the plaintiff in January, when there was no water, and when the boats could not be moved.

Assuming, then, that the defendant wrongfully seized the boats in Jeit 1277, and that the plaintiff was in no way to blame for their detention till the end of the rains of that season (and it has not been suggested that he was to blame in any way for the attachment by the Magistrate), we think it quite clear that the plaintiff is entitled to recover damages for the detention of his boats up to Jeit 1278. The pleader for the special appellant admits that there was no claim in the Court below for damages prior to the 16th of Pous 1277, consequently, if the Lower Appellate Court comes to determine the amount of damages to be awarded to the plaintiff, it will take the period for which they will be calculated from the 16th of Pous 1277 to the end of Jeit 1278.

The third point raised in special appeal does not need to be considered. Before the Judge can come to any conclusion at all as to the right of the plaintiff to recover damages, he

must find as a fact whether or not the defendant was guilty of certain wrongful acts, and whether the detention of the boats was distinctly the result of these wrongful acts. The first Court, no doubt, has found as a fact that this was so, and it has been suggested that the second Court has concurred in that judgment; but we think that we should be going too far to say that the Judge deliberately found as a fact that there were wrongful acts. His words are: "The plaintiff, in my "opinion, should then have taken away the "boats, and he might afterwards have brought "a suit for damages incurred by the wrongful "acts of the defendant which caused the "detention of his boats up to that date," &c. In the mode in which the Judge has dealt with this case, it was not directly necessary to determine whether the acts of defendant were wrongful, and what he says of wrongful acts in the above-quoted passage is rather by way of suggestion as to the form of plaint that might have been adopted than a finding of fact.

Under these circumstances we think that the case should go down to the Judge in order that he may distinctly find whether there was a wrongful act by the defendant by which the boats were removed from the custody of the plaintiff, and whether that wrongful act was the cause of the boats being detained up to the end of the rainy season in the second year. If he finds this as a fact, he will consider what is the proper amount of damages to be awarded.

It has been said by the pleader for the respondent that the plaintiff, having framed his suit for a remedy in a particular form, ought to be restricted to that remedy. Speaking for myself, I think it a good rule to hold a plaintiff strictly to his plaint; but a plaintiff is entitled to ask the Court to give him any remedy which the Court may think proper upon the state of facts disclosed by him in his plaint, and established by the evidence; and, although he may have been mistaken in asking for a particular remedy, that will not debar him from obtaining some other remedy similar in its nature, and not more extensive than what was originally sought, provided it requires no change in the facts as originally alleged. In this suit the facts remain unchanged, though the legal effect of those facts is not what the plaintiff attributed to them.

The costs of this appeal and the costs in the Court below will follow the ultimate result.

The 5th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-proceedings—Appeal—Jurisdiction.

Case No. 224 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 16th April 1873, reversing a decision of the Moonsiff of that District, dated the 13th August 1872.

Mirza Sayefoollah Khan and another (Decree-holders), *Appellants,*

versus

Tirthanund Thakoor (Objector), *Respondent.*

Moonshee Abdool Baree for Appellants.

Baboos Tarucknath Sen and *Tarucknath Dutt* for Respondent.

A person, who was no party to the suit, having objected to an attachment made in the execution-proceedings, and his objection having been overruled, made an application, as if by way of appeal, to the Judge, who reversed the decision of the Moonsiff:

HELD that the order of the Judge was made without jurisdiction.

Phear, J.—THIS matter has come up to us by way of appeal, but the basis of the objection to the Judge's order is that it was made without jurisdiction; and that appears very clearly to be the case. The so-called respondent before us is admittedly no party to the suit; he has not been made a party, and indeed there was no reason why he should have been made a party, to the execution-proceedings in the present suit. He objected to the attachment which had been made of certain property in the course of these execution-proceedings, he himself at that time being an entire stranger to the suit. The decision of the Court, which was charged with the carrying-out of the execution-proceedings, was against him, and his objection to the attachment of this property was overruled. That being so, his remedy was by a separate action if he had need for a remedy at all. Instead, however, of bringing an independent suit, he, in some unexplained way, got the Judge to entertain an application from him as if by way of appeal from the decision of the Moonsiff; and, on the hearing of this application, the Judge reversed the decision of the Moonsiff. It seems to us very plain that there was nothing rightly before the Judge upon which he could exercise his