himself at some length in a collateral inquiry, as to whether or not the petitioner applied for a copy of the Ameen's report on the 13th September as he said he did. But we do not find that any investigation was made into the foundation of the complaint which was made by the petitioner to the effect that the decision which was passed against him on the 13th September was passed without his knowledge and without any opportunity having been given to him of being heard. It seems to be even doubtful on the face of the judgment recorded by the Moonsiff whether the judgment-creditor himself was present on the 13th September. The facts, so far as we can ascertain them, seem to be that the Ameen's report was filed in the serishta on the 24th August, and four days after that date, namely, on the 28th August, the Moonsiff passed an order by which the 13th September was fixed for the hearing of any objections to this report. When the 13th September came, according to the Moonsiff's judgment, the case was put before him, possibly only by the officers of the Court, and then, inasmuch as no objection had then been filed, he made the order which is now complained of.

We further see that no day was originally fixed for the return of the Ameen's report, and that consequently there was no reason on that ground why the petitioner should expect it to be filed on the 24th or on any other day. We are not told how it came about that the Court passed its order on the 28th August. Of course, if both parties were at that time present, that fact would have been a complete answer to the present appeal. But the respondent is quite unable to assure us, either by a reference to the matter on the record or in any other way, that the parties were, both of them, before the Court on the 24th August, or that the petitioner ever had, at any time, notice that the 13th September was fixed for the hearing of this matter before the Moonsiff.

Under these circumstances, it appears to us that the order of the Moonsiff was bad, and ought to be set aside. And accordingly we set aside that order, and remand this case to the Judge, with directions that he send it back to the Moonsiff in order that the Moonsiff may fix a day for the hearing, and give reasonable notice to both parties of the time which he may so fix.

Both the costs of this appeal and the costs which have been incurred in the Courts below must abide the event.

Pleader's fees in this Court are assessed at one gold mohur.

The 2nd December 1873.

Present:

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

Mesne-profits—Damages—Issues.

Case No. 180 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 18th December 1872, modifying a decision of the Moonsiff of Mudhepore, dated the 17th September 1872.

Bhookun Singh and others (Plaintiffs), *Appellants,*

versus

Bohuree Singh and another (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellants.

Moonshee Mahomed Yusuf for Respondents.

A claim to mesne-profits is a claim for such damages as will reasonably indemnify the claimant for loss occasioned in regard to rents and profits in consequence of wrongful dispossession, and as a foundation, therefore, for such claim, the question as to plaintiff's having been wrongfully kept out of possession by defendant must be first put in issue and determined.

Phear, J.—We are of opinion that in substance the decision of the Lower Appellate Court is right. This is a suit for mesne-profits, and we need hardly remark (because the matter has been often explained by this Court before) that mesne-profits or wassilat is only another term for damages which the plaintiff is entitled to, or alleges he is entitled to, as a consequence of his having been wrongfully deprived of the use and profits of land by the conduct of the persons against whom the suit is brought. It is competent to a plaintiff, who desires to recover mesne-profits, either to ask for them in the suit wherein he proposes to try the principal question as to the wrong, or to bring in the first instance a suit merely for the purpose of putting in issue, and determining the question whether or not the conduct of the person from whom he desires to get mesne-profits was wrongful in respect to keeping him out of the possession or enjoyment of the land. And then, in

the event of his succeeding in this the primary suit, he may, by virtue of section 10 of the Civil Procedure Code, bring another suit against the defendants of the first suit or their representatives in order to obtain from them the mesne-profits, that is, to get from them such damages as will reasonably indemnify him for the loss occasioned to him in regard to rents and profits by the wrongful conduct and ouster which had been established in the first suit.

In the present instance, it appears that the plaintiff had brought a suit limited to the recovery of land against certain defendants; and afterwards, having succeeded in the first suit, he brought the present suit for mesne-profits against the same persons defendants, joined with other persons, namely, one Bohuree Singh and others. At the time of the hearing of this suit, one Bajah Singh intervened and claimed to be made a defendant, and was in fact made a defendant by the Court. In this state of things, it is quite plain that the issues which had to be tried between the plaintiff and the several defendants varied very greatly indeed, so much as in effect to constitute different actions; for, as between the plaintiff and those persons who had been defendants in the first suit, and against whom he had already obtained a decree giving him the possession of the land, the only question which was to be tried was the question to what extent each of them had, by his conduct, caused the plaintiff loss in the way of preventing him from having enjoyment of the profits of the land during the time that he had been kept out of it. But, as against the new parties defendants, there was a preliminary question of vital importance to be tried before any right to damages in the shape of mesne-profits could be even declared to have accrued to the plaintiff, namely, the question whether they had, at any time, kept him, or done anything to keep him, wrongfully out of the enjoyment of the land in respect of which the mesne-profits were sought. It seems to us in effect that there is thus before us at least two suits, two perfectly distinct suits, united in one. And, indeed, so far as this double suit is a claim to recover mesne-profits from parties altogether new, it is an attempt to make persons answerable for no wrong of their own, but for a wrong which had already been established against other persons entirely strangers to them. The Lower Appellate Court seems to have felt that this was the case; and on that ground to have thought it right to dismiss the suit against the appellant Bohuree Singh and Bajah Singh, that is to say, against the strangers. We do not desire to go so far as to say that under no circumstances could there be a combination of suits, so to speak, of this peculiar kind, properly made and tried as one; although it is obvious that such a proceeding must necessarily, to say the least of it, be always most inconvenient. But here certainly there seems to be no reason whatever either why Bohuree Singh should have been made a party to this suit by the plaintiff, or why the Court should have made Bajah Singh a party upon his own intervention. As to Bajah Singh, it seems to be perfectly clear that no decision passed in a suit for mesne-profits only, brought by the plaintiff against other persons, could have possibly affected him. The Court was wrong when, in the exercise of its discretion under section 73 of the Civil Procedure Code, it placed Bajah Singh upon the record. And for that reason alone we are disposed to think that the decree which the first Court passed against Bajah Singh was a wrong decree. But it is clearly a wrong decree in another respect, namely, that it never was determined by the first Court, and no issue even was raised to the effect, whether or not Bajah Singh had wrongfully, for any period of time, kept the plaintiff out of possession of the land in respect of which mesne-profits were sought. The fifth issue which was raised in the first Court shows very distinctly that no issue of the kind just mentioned was ever contemplated, because it is couched in these terms: "Whether or not the objection that "Bajah Singh has a right can be allowed in "this suit without instituting a suit for "determination of right." It seems that there has not been, as regards Bajah Singh at any rate, a trial of the fundamental issue which was necessary in order that the plaintiff might have a foundation upon which he can claim mesne-profits at all.

The same remarks, excepting so far as regards the exercise of the discretion of the Court, applies to Bohuree Singh. The plaintiff ought not, in this instance, to have made Bohuree Singh a party defendant, and there has been no issue tried between the plaintiff and the defendant as to whether Bohuree Singh had wrongfully kept the plaintiff from the enjoyment of the property; and if so, during what period he had so kept him out. In truth, as regards both these sets of parties—parties who were strangers to the original suit—the first Court passed a decree for damages without any trial and adjudication as against them of such matter of wrong-

doing as would make them liable to pay damages. That decree was consequently an invalid decree, and the Lower Appellate Court was substantially right in reversing it. For these reasons we think that we ought not, in special appeal, to interfere with the decision which the Lower Appellate Court has passed.

We therefore dismiss this appeal with costs.

But we think it right to add, if it is necessary to do so, that this decree is without prejudice to any right of suit which the plaintiff may be advised he has against Bajah Singh on the cause of action here sued upon, inasmuch as, in our opinion, Bajah Singh was wrongly made a party to this suit by the act of the Court itself.

The 2nd December 1873.

Present:

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

Rent-suit—Land for building purposes—Jurisdiction—Small Cause Court.

Reference to the High Court by the Judge of the Small Cause Court at Bhaugulpore, dated the 16th September 1873.

Gokul Chund Chatterjee, *Plaintiff,*

versus

Mosahroo Kandoo, *Defendant.*

A Small Cause Court has jurisdiction to entertain and determine a suit for the rent of land situated in a village in the interior of a district, and used partially for building purposes.

Case.—UNDER the provisions of section 22 of Act XI. of 1865, I have the honor to refer the above case for opinion to their Lordships the Hon'ble the Judges of the High Court.

The plaintiff sues to recover Rs. 5 from the defendant as rent for 8 cottahs of land, which he let to the defendant at a stipulated rent per annum to enable the latter to build a dwelling-house thereupon. This is an undefended case, the defendant not having appeared, although the summons is proved to have been duly served. The plaintiff, who has entered appearance, says that the defendant has built a few huts on a portion of the land, and on the remainder vegetables are grown which are sold by the defendant. The land in question is situated in a village in the interior of the district, and is not in a town. The point upon which I respectfully solicit the opinion of the Hon'ble High Court is one of jurisdiction. Is such a suit cognizable by the Small Cause Court or by the ordinary Civil Courts under the Rent Law?

The plaintiff contends that "a suit for rent of land used for building purposes is cognizable in the Court of Small Causes," and cites, in support of his statement, High Court ruling noted in the margin. Reading section 6 of Act XI. of 1865 with the ruling above quoted, I have some doubts as to the jurisdiction of the Court in cases of rent for lands situated in villages. The ruling quoted refers probably to rent for similar lands in towns.

Sutherland's Weekly Reporter, Volume XIX., page 308.

The judgment of the High Court was delivered as follows by—

Phear, J.—We are of opinion, on the statement of the facts presented to us by the Judge of the Small Cause Court, that the case substantially falls within the ruling of this Court which is reported in the 19 Weekly Reporter, page 308, and that the Small Cause Court has jurisdiction to entertain and determine the suit.

The 4th December 1873.

Present:

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

Landlord and Tenant—Onus Probandi.

Case No. 194 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 17th September 1872, reversing a decision of the Subordinate Judge of that District, dated the 11th May 1872.

Mohun Mahtoo (Defendant), *Appellant,*

versus

Meer Shumsool Hoda (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Bama Churn Banerjee* for Appellant.

Moonshee Mahomed Yusuf for Respondent.

As long as the relationship which arises out of a lease subsists, the lessee (tenant) is bound to pay to the lessor (landlord) the rents reserved therein. A tenant, denying a landlord's claim to rent on the allegation that the relationship has terminated, is bound to prove his allegation.

Phear, J.—WE are of opinion that the judgment of the Lower Appellate Court is