The Weekly Reporter.

CIVIL RULINGS

The 22nd April 1874.

Present :

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

Mesne-profits—Set-off.

Case No. 1267 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th March 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 1st October 1872.

Gocool Coomar (Defendant), *Appellant,*

versus

Baboo Bhichook Singh (Plaintiff), *Respondent.*

Baboo Taruck Nath Dutt for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

An indefinite claim for damages, in the nature of unascertained mesne-profits, cannot be pleaded as a set-off against a specific claim for rent of later years. Such damages must be sued for separately.

In a suit for rent, a defendant has no right to set off against the plaintiff's claim money in deposit with the plaintiff, unless such money was due and payable to the defendant at the time the suit was brought.

Phear, J.—On this special appeal various objections have been made to the decision of the lower Court, and we think they may be conveniently stated in the following way:—

The defendant first objects that the plaintiff has not made out his right to receive rent in varying shares for the three years as alleged in the plaint, or indeed any share at all.

And, secondly, he objects that he has not been allowed to set off against the plaintiff's claim the amount of profit which he would have received if he had been let into possession of the property during the first eight months of his lease as he was entitled to.

And, thirdly, he complains that the lower Courts have wrongly refused to credit him, as against the claim of the plaintiff, with a certain sum of money which was deposited with the plaintiff under the terms of the agreement of tenancy or pottah.

And, fourthly, he objects that the plaintiff has not made out by any evidence his right to recover interest upon the kists of the arrears of rent within the year, and therefore the lower Courts are wrong in awarding him this interest.

We think that the three first of these objections fail. The defendant, in his written statement, set up a very specific defence to the plaintiff's claim, but he never said "You are not entitled to the share of the rent to which you say you are." And it seems to us that there is nothing in the written statement, as it has been represented to us, from which we ought to infer that the defendant disputed the plaintiff's right to the share of the rent which he sued for, or in any way put him to the proof of it. The parties went to trial without any issue being raised upon this point; and we are told that, on the appeal to the Lower Appellate Court, it was not made a subject of appeal that such an issue had not been framed. Under these circumstances, we think it is too late now for the defendant to put forward this objection for the first time.

Then, as to the second objection, it seems to be very clear that under cover of it the defendant sought to set off against the plaintiff's claim for rent money which is due to him, if at all, in the shape of unascertained damages. The substance of this objection is that, if he had been allowed, as he ought

to have been, to enter upon possession and enjoyment of the land, which is the subject of lease, eight months before he was let into it, he would have put into his pocket a certain margin of rents and profits, namely, the difference between the net receipts which he would have got from the land and the payments which he would have had to make to the lessors in the shape of rent. Plainly this claim is of the nature of a claim for damages, and it can only be ascertained by a trial what the amount of the loss sustained by the defendant in this way actually was. We think that an indefinite claim of the nature of damages of this sort cannot be set up as a set-off against the specific claim of the plaintiff for rent of later years which is made in this present suit. It must be made the subject of a separate suit if the defendant has really any ground whatever to make a claim for substantial damages.

Again, with regard to the third objection, the defendant has manifestly no right to ask that the deposit-money should be set off against the plaintiff's claim, unless it is money which is, at the present time, or rather was, at the time when the suit was brought, due from the plaintiff, and payable to the defendant. But it seems that there is no evidence before the Court upon which this could be established. It is admitted that the money was deposited under the terms of the lease, whatever those were, to meet the requirements of certain provisions in the lease. But the lease is not in evidence in this case; and we have no means of knowing whether this sum of money was, at the time when the suit was brought, money in the hands of the plaintiff due and payable to the defendant. And, unless it was so, the defendant had no right to claim that it should be set off against the plaintiff's claim; or, in other words, that he should be credited with it as against the plaintiff.

But, while we think that the three first objections put forward by the special appellant fail, we are also of opinion that the fourth and the last is good. The plaintiff claims to be paid interest, not only in respect of his share of the annual rent which, the defendant admits, is due from him to the lessors as from the date when it became due, but he also asks for interest upon the kists of this rent which, he says, became due during the currency of the different years from the dates in each year at which they so became due. The defendant's admission, however, did not extend to this length; and, in the absence of the kubooleut or pottah, we are unable to say whether the plaintiff in entitled, on the terms of the lease, to interest for default of payment of the different kists in the manner alleged by him. We have already said that the kubooleut upon which the plaintiff sues was not admissible, and was not admitted in evidence. We are thus without the means of knowing whether the plaintiff's claim could be rightly established in this respect or not. Of course this objection does not in any way affect the lawfulness of the arrear of interest from the end of the year, when, undoubtedly, the annual rent became due according to the admission of the defendant. Consequently, the allowing of this objection will have only the effect of diminishing the amount which has been awarded by way of interest by the lower Courts to the extent of the interest on the different kists within the year. The decree of the Lower Appellate Court must be modified to this extent. Substantially, however, we think that the appeal has failed, and that the respondent ought to have his costs of this Court.

The 22nd April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Possessory Suit—Wrongs and Remedies—Right to Relief.

Case No. 621 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 21st December 1872, reversing a decision of the Moonsiff of Lushkerpore, dated the 21st June 1872.

Bishnoo Pershad Bunnick (Plaintiff), *Appellant,*

versus

Ram Coomar Deb and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Bykunt Nath Doss* for Appellant.

Baboo Debendro Narain Bose for Respondents.

A plaintiff, proving a wrong done to him, though not exactly to the extent of which he complains, is entitled to relief though not to the extent or on the ground on which he asks it.

Case in 12 W. R. 248 explained.

Markby, J.—It appears that in this case the plaintiff turned the defendant out of