

The 3rd December 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch,
Judges.

Decree-holder—Costs.

Case No. 236 of 1873.

*Regular Appeal from a decision passed by
the Subordinate Judge of Tirhoot, dated
the 28th July 1873.*

Ajoodhya Doss (Defendant) *Appellant,*
versus

Muthoora Doss (Plaintiff), *Respondent.*

*Baboo Hem Chunder Banerjee for
Appellant.*

*Baboo Chunder Madhub Ghose and Aubi-
nash Chunder Banerjee for Respondent.*

A suit by A having been decreed and execution proceedings taken out, the judgment-debtor paid into Court the amount decreed. Subsequently the decree-holder (A) and his cousin (M) put in a petition intimating that the money belonged to them in equal shares, and the Court afterwards held a proceeding in the presence of the Vakeels of both parties and informed A's Vakeel that no steps had been taken by his client to take out the money and that the name of M had been registered with that of A as decree-holders, and the money was available for payment on their joint application. Eventually M sued A for a moiety of the amount. The Subordinate Judge, holding that it was entirely owing to the passive opposition of A that the money could not be drawn out from the Court, decreed the claim with costs.

HELD that the decision of the Subordinate Judge was correct and just.

Kemp, J.—THE point involved in this case is a very simple one, and depends upon whether the Subordinate Judge of Zillah Tirhoot has exercised a wise discretion in awarding costs in this case. The defendant and the plaintiff are cousins, and it appears from the proceedings in the Court below that their *karbar* was jointly carried on. A decree was obtained against one Baboo Gridharee Singh by Baboo Ajoodhya Doss, the defendant in this case, alone. Execution proceedings were taken out by Baboo Ajoodhya Doss, and the judgment-debtor paid into Court the sum of Rs. 53,950-14-10 in full satisfaction of the decree. Subsequently, the

two cousins, the plaintiff and defendant presented a petition to the Court intimating to the Court that the money so paid in belonged to them in equal shares, and the Court on the 20th of May 1873 held a proceeding in the presence of the vakeels of both parties; the vakeel of Baboo Ajoodhya Doss being Babu Oomesh Chunder Roy, who has been examined in this case. The vakeel of the defendant Baboo Ajoodhya Doss was informed that the money had been paid in, but that no steps had been taken by his client up to that date, namely, the 20th of May, to take out the money from the Court; that it appeared that Ajoodhya Doss and Muthoora Doss had presented a petition to the effect that they were entitled to draw this money in equal shares, and that the name of Muthoora Doss had, on the strength of this application, been registered with the name of Baboo Ajoodhya Doss as decree-holders; and the Subordinate Judge evidently shrinking from the responsibility of paying out such a large sum of money as Rs. 53,950-14-10 except on the joint receipt of the two cousins informed the pleader of the defendant Ajoodhya Doss that the money was available to the parties on their both applying to take out the money; that the moiety of the money could not be paid to Muthoora Doss contrary to the terms of the decree; and that if Ajoodhya Doss would not join Muthoora Doss in taking out this money, the *jowabdihee* or responsibility would be with him Ajoodhya Doss. Subsequently to this order, it is in evidence in the deposition of Baboo Oomesh Chunder Roy who was not cross-examined in any way by the pleader for the defendant, that he frequently asked his client Baboo Ajoodhya Doss to take out this money, but that Ajoodhya Doss would not give him any decisive answer. It appears then that the plaintiff was advised to bring this suit, and he therefore sues to recover the half of this sum of Rs. 53,950 with interest from the 20th of May 1873, the date of the Subordinate Judge's order to date of suit with costs.

The answer of Ajoodhya Doss is to this effect that he had no objection to the plaintiff drawing out this money and that he had never made any objection to his doing so, that the suit was an unjust one, that the plaintiff was not entitled to his costs, and that the Court ought to award costs to him, the defendant Ajoodhya Doss. The Subordinate Judge, Baboo Grish Chunder Ghose, says very properly that the issue is a very simple one, and all that he had to consider was whether the plaintiff is to be reimbursed

in so far as costs and interest are concerned in this case. The Subordinate Judge held that it was owing entirely to the passive opposition of Ajoodhya Doss that this money could not be drawn out from the Court, and although he would not award interest he has awarded to the plaintiff the costs of the suit. These costs amount to Rs. 1,560. Therefore, we have in this appeal simply to consider this question whether the Court below has exercised a wise discretion in awarding these costs. We think that looking to the distinct terms of the order of the 20th May 1873 to the effect that Baboo Ajoodhya Doss would be responsible if he did not join his cousin, the plaintiff, in drawing out this money, and also looking to the evidence of Baboo Oomesh Chunder Roy, the vakeel, whose respectability and trustworthiness are not in any way questioned, it was entirely owing to the opposition, to say the least of it, of Baboo Ajoodhya Doss that Baboo Muthoora Doss was kept out of his money and has not got interest on it; and we think, looking to the whole circumstances of the case, that the decision of the Subordinate Judge is a correct and just decision.

During the course of the argument Baboo Hem Chunder Banerjee who appeared for the defendant Ajoodhya Doss, called the attention of the Court to Section 230 of the Code of Civil Procedure. There can be no doubt that under that Section where one or two decree-holders apply for execution of a decree the Court can in its discretion put the parties to terms, that is to say, direct them to give security or call upon the other side to show cause why the decree should not be executed, and the Court can then execute the decree on the application of one of the parties only. This Section does not apply to the present case. Baboo Ajoodhya Doss was the sole decree-holder, and there was a petition by the parties to this suit that they were to take out this money in equal shares, but so far as the judgment-debtor was concerned the decree-holder was Ajoodhya Doss alone. Ajoodhya Doss was informed that the money was available, and that there was nothing to prevent the money being taken out on the joint petition of himself and his cousin; and he was warned that if he threw any obstacles in the way of Baboo Muthoora Doss drawing out his share of the money, the responsibility would be with him.

Under these circumstances, as already stated, we think the decision of the Lower Court a just one and we dismiss the appeal with costs.

The 4th December 1874.

Present :

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

**Mesne Profits—Personal Experience of
Judges—Evidence.**

Case No. 2673 of 1873.

*Special Appeal from a decision passed by
the Officiating Judge of Bhaugulpore,
dated the 21st August 1873, affirming a
decision of the Subordinate Judge of
that district, dated the 21st February
1873.*

Kishen Pershad Singh (Plaintiff), *Appellant,*

versus

Mr. L. G. Crowdy (Defendant), *Respondent.*

*Baboos Moresh Chunder Chowdhry and
Rajendronath Bose for Appellant.*

Mr. M. L. Sandel for Respondent.

In estimating mesne profits for a period of wrongful dispossession, the Lower Courts were held to have pursued an incorrect course in deciding upon the supposed personal experience of the Judges instead of upon evidence laid before them. The Court ought to have done its best to estimate from the evidence before it what would have been the net profits which the dispossessed owner would have earned by the cultivation during that period, had he been in possession.

Phear, J.—THE Subordinate Judge in his judgment thus describes the situation of the parties :—

“ The plaintiff is a tenant cultivating 25
“ beegahs of land situated within the one
“ anna and 16 gundas putti of Mouzah
“ Goodourgawun, Pergunnah Ballia. The
“ defendant ousted him, and sowed indigo
“ for the factory. The plaintiff obtained a
“ decree for possession of 25 beegahs in his
“ cultivation, dated the 23rd February 1871,
“ from the Jumooe Moonsiff's Court, and the
“ Appellate Court's decree, dated the 27th
“ June 1871; and the present suit refers to
“ the wassilat of the aforesaid land for full
“ two years 1277 and 1278 F. S., and for the
“ bhadooe crop of 1279 F. S.”

He then states certain facts with reference to the defence, and eventually he says :—
“ The average estimate of the produce to be
“ adopted in this case is the following, that
“ the plaintiff was deprived of his holding
“ during the years in suit; if he had continued
“ in possession of his holding what profit
“ would he have been deprived of? In other
“ words, this wassilat should be determined