

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Prinsep.

SHURNOMOYEE (DEFENDANT) v. PATTARRI SIRKAR (PLAINTIFF).*

1878
Aug. 8.

Limitation Act (IX of 1871), sched. ii, arts. 40, 109.—Suit for Mesne Profits misappropriated.

The defendant obtained a decree in a suit brought against the plaintiff for arrears of rent and for ejectment, in execution of which he evicted the plaintiff from his holding, and, after getting possession thereof, carried away certain crops which were then standing on the land. The plaintiff appealed from the decree obtained by the defendant, and on appeal it was set aside, on the plaintiff depositing the rent due, and the plaintiff recovered possession of his tenure. *Held*, that a suit for the value of the crops carried away by the defendant, while in possession under his decree, was not barred by s. 11 of Act XXIII of 1861. *Held* also, that such a suit was a suit "for profits of immoveable property belonging to the plaintiff wrongfully received by the defendant" within the meaning of Act IX of 1871, s. 109, and not a suit for "compensation for any wrong, malfeasance, nonfeasance, or misfeasance independent of contract" within the meaning of art. 40 of the same Act.

Baboo Sreenath Dass and Baboo Gooroodass Banerjee for the appellant.

Baboo Bhubany Churn Dutt for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court which was delivered by

MITTER, J. (PRINSEP, J., concurring).—The plaintiff brings this suit to recover from the defendant Rs. 634 and 11 annas under the following circumstances. The plaintiff alleges that he holds a mukurari jote of 65 bighas 10 cottas 5 chittaks and 2 gandas of land, bearing a rental of Rs. 13-11-3; that the defendant, who is the landlord, brought a suit for arrears of rent and ejectment, and having obtained a decree, with an order of

* Special Appeal, No. 2024 of 1877, against the decree of A. J. R. Bainbridge, Esq., Judge of Zilla Moorshedabad, dated the 23rd of July 1877, affirming the decree of Baboo Biprodass Chatterjee, Munsif of Azeemgunge, dated the 30th of April 1877.

1878
 SHURNOMOYEE
 v.
 PATTARRI
 SIKKAR.

ejection, on the 7th November 1873, evicted the plaintiff from the jote on 21st Pous 1280 (4th January 1874); that at that time crops,—*viz.*, kulye, wheat, and job,—were standing upon the land; that the defendant, the landlord, after taking possession of the jote, carried away the crops through her servants and laborers; that, against the decree which was passed by the first Court on the 7th November 1873, the plaintiff preferred an appeal; that, on appeal, that decree was modified, and the plaintiff was allowed fifteen days time to deposit the rent which was decreed against him; that, thereupon, he deposited the rent within the time allowed, and recovered possession of the tenure in execution of the decree; and that the present suit is brought for the value of the crops which were carried away by the defendant while she was in possession under the decree of the 7th November 1873. These facts have been substantially found to be correct by the Courts below.

Two questions have been raised before us in special appeal: first, that this suit would not lie, inasmuch as the question which is now raised ought to have been raised before the Court executing the decree of the Appellate Court; and that, under the provisions of s. 11 of Act XXIII of 1861, a separate suit for compensation for the loss sustained by the plaintiff in consequence of the defendant taking away his crops will not lie. The other contention is, that, supposing that this suit was not barred by the provisions of s. 11 of Act XXIII of 1861, it would be barred by limitation under art. 40, sched. ii, of Act IX of 1871.

As regards the first contention, two cases have been cited before us: one, the case of *Duljeet Gorain v. Rewul Gorain* (1); and the other, the case of *Bibee Hamida v. Bibee Bhudhun* (2). We find also that, upon the same point, there is a case of *Joykurun Lall v. Ranee Asmudh Kooer* (3) taking a contrary view. The question which has been decided in these cases is, whether a separate regular suit will lie for the recovery of mesne profits appropriated by a person who obtains possession of an immoveable property in execution of a decree which is

(1) 22 W. R., 435.

(2) 20 W. R., 238.

(3) 5 W. R., 125.

subsequently set aside by a Court of appeal. In the cases of *Duljeet Gorain v. Rewul Gorain* (1) and *Bibee Hamida v. Bibee Bhudhun* (2) it has been held that a separate suit will not lie, and that the matter must be enquired into in the execution department under s. 11 of Act XXIII of 1861. It appears that the decision in *Joykurun Lall v. Ranees Asmudh Kooer* (3) was not brought to the notice of the Judges who decided the other two cases. In that decision it was held, that a separate suit will lie, and that the cause of action to the plaintiff in a case like that accrues on the date on which the decree of the first Court is reversed by the Court of appeal. But without expressing any opinion upon this question of law, we think that the plaintiff's suit in this case is not barred by s. 11 of Act XXIII of 1861. The point raised in those cases is, whether a separate suit will lie where the defendant receives mesne profits to which he would be entitled but for the reversal of the decree of the Court of first instance. In this case, upon the facts already stated, it is clear that, whether the decree of the Court of first instance was reversed or not, the plaintiff would be entitled to maintain this suit. The decree of the first Court was a decree for ejectment of the defendant from the tenure, and in execution of that decree, on the 21st Pous 1280 (4th January 1874), possession was taken of the land in suit. At that time there were crops standing upon the land. Under the decree the defendant, landlord, was not entitled to the crops which were then standing: those crops belonged to the tenant who had raised them. That being so, it is quite clear that the question which was raised in the cases quoted before us does not arise in this case, because, as has been already pointed out, the question in those cases was with reference to mesne profits to which the defendant would be entitled but for the reversal of the decree of the Court of first instance. In this case, whether the decree was reversed or not was quite immaterial, and in either case the plaintiff would be entitled to maintain this suit. We think, therefore, that the provisions of s. 11 of Act XXIII of 1861 do not bar the maintenance of this suit.

1878
 SHURNOMOYEE
 v.
 PATTARRI
 SIKKAR.

(1) 22 W. R., 435.

(2) 20 W. R., 238.

(3) 5 W. R., 125.

1878
 SHURNOMOTEE
 v.
 PATTARRE
 SIKKAR.

Then as regards the question of limitation, we think that the present case falls within the provisions of art. 109 of the second schedule to Act IX of 1871. It is contended that art. 40 of that schedule applies to this case. Article 40 is to the following effect: "For compensation for any wrong, malfeasance, nonfeasance, or misfeasance, independent of contract and not herein specially provided for." Therefore it is clear that if there be any specific provision in any other part of this schedule to the Act for a case for compensation for any wrong, malfeasance, nonfeasance, or misfeasance independent of contract, then art. 40 will not apply; and therefore the question that we have to determine is, whether the present suit would come within art. 109. If it comes within that article it is quite clear that art. 40 will not apply. Article 109 says: "For the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant." In this case the standing crops were the property of the plaintiff, and the present suit is substantially of the nature mentioned in art. 109, because the claim is for Rs. 634-11 annas which represent the profits which the plaintiff would have realized from the crops standing on the land. Therefore it is substantially a suit for the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant. That being so, the provisions of art. 109 apply to this case, and art. 40 has no application to it. The present suit has been brought within the time allowed as the period of limitation under art. 109.

We, therefore, overrule both the objections, and dismiss the special appeal with costs.

Appeal dismissed.