1896
July 10.

Before Mr. Justice Ghose and Mr. Justice Hill.

DHUNPUT SINGH (PLAINTIFF) *v.* MAHOMED KAZIM ISPAHAIN AND OTHERS (DEFENDANTS.) *

Landlord and Tenant—Disturbance, by Landlord, of peaceable possession—Suspension and apportionment of Rent.

Where the act of a landlord is not a mere trespass, but something of a graver character, interfering substantially with the enjoyment, by the tenant, of the demised property, the tenant is entitled to a suspension of rent during such interference, even though there may not be actual eviction.

If such interference be committed in respect of even of a portion of the property, there should be no apportionment of rent where the whole rent is equally chargeable upon every part of the land demised.

But if the interference is in respect of only a certain portion of the demised property, the rent for which is separately assessed, there should be apportionment.

Babu *Saroda Churn Mitter* and Babu *Promothonath Sen* for the appellant.

Dr. *Rash Behari Ghose*, Babu *Digumber Chatterjee* and Babu *Dwarkanath Chuckerbutty* for the respondents.

THE facts of this case and the arguments adduced appear sufficiently from the judgment of the Court (GHOSE and HILL, JJ.), which was as follows :—

These two appeals arise out of two suits for rent.

The plaintiff in both those cases is the zemindar of Pergunnah Haveli, within which the properties (Lot Saefgunge and Lot Mirzapore) in respect of which rent is claimed are situate. Both these properties had been leased to certain individuals, described as the Iranees, in *patni* under two different leases. In execution of a decree upon a mortgage bond executed by the Iranees, the plaintiffs purchased the two *patnis* and some other properties on the 2nd February 1891 (the sale being confirmed on the 16th April 1891, 21st Magh 1298 *mulki*), and obtained symbolical possession in November 1891. The principal efendant in these two suits, Babu Chutterput Singh, had purchased the same properties in execution of another decree, upon an earlier mortgage

* Appeals from Original Decrees Nos. 341 and 342 of 1894 against the decrees of H. F. Matthews, Esq., District Judge of Zillah Furneah, dated the 26th of September 1894.

against the Iranees on the 8th March 1890, and in due course obtained possession through the Court.

It appears that shortly after the plaintiff was put into formal possession of the two *patnis* and the other properties, he attempted to realize rent, and thus to obtain actual possession; and in this he was opposed by Chutterput, the result being the institution of a proceeding by the Magistrate under section 145 of the Code of Criminal Procedure on the 12th September 1892. The Magistrate, after enquiry, found that Chutterput was in possession, and accordingly confirmed him in such possession on the 13th March 1893 (1st Choit 1300 *mulki*).

The present suits were brought on the 21st September 1893, and they are for recovery of rent on account of the two *patnis* Saefgunge and Mirzapore, for the years 1298, 1299 and 1300 *mulki* after allowing credit to the defendant Chutterput for certain sums received from him. Both the Iranees and Chutterput Singh were made defendants; though the rents were claimed against the latter only, upon the ground that he was in possession of the *patnis*.

Both the suits have been dismissed by the Court below upon the ground that in consequence of disputes between the two parties as to the ownership of the properties leading to violent disturbances and breaches of the peace, the defendant Chutterput could not be regarded as having been in undisturbed possession of the two *patnis* during the term for which the rents are claimed; that the plaintiff interfered with the peaceful possession and collection of rent by the defendant, and himself realized some rent from the *raiyats*; that he (the plaintiff) had treated the defendant as a trespasser and cannot now be allowed to treat him as a tenant; and that the plaintiff's proper remedy is not a suit for rent but for damages or mesne profits.

Against this decree, the plaintiff has preferred the two appeals now before us. The appeal No. 341 relates to Saefgunge, and the other appeal 342 to Mirzapore.

It seems to us that the two cases do not stand upon the same footing, as erroneously supposed by the District Judge. He has mixed up the facts of the two cases and treated them as one,

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and it is owing to this that he has fallen into a serious error, as will be presently shewn, as regards one of the cases. No doubt, there are some matters common to both the cases, which have already been noticed; but there are some distinctive features which differentiate the two cases.

We propose therefore to deal with the cases separately.

But before we do so, it would be just as well to refer to one point which has been raised before us by the learned Vakil for the defendant-respondent in both the appeals. It is this: that the plaintiff does not treat the defendant as the rightful *patnidar*, and yet sues him for rent upon the simple ground that he is in possession of the *patnis*, and therefore the plaintiff has no cause of action. It is unnecessary to discuss this point, because the plaintiff has put in a petition in both the cases asking that the plaints be amended so as to make it clearly appear that the defendant is the real *patnidar* of the two properties in respect of which the rent has been claimed, and upon this being done the learned Vakil for the defendant has waived the point.

Now first as to the appeal No. 341.

It appears upon the evidence that Lot Saefgunge consists of 19 *mouzahs*, of which only one *mouzah*, Luchmipore, was held in *khas* possession, the rest being held by *darpatnidars*. The annual rent roll of the whole property is about Rs. 13,000, and the gross collection of Luchmipore is only Rs. 875. It has no doubt been said generally by some of the witnesses that there was a great deal of dispute, and many cases arose between the parties in consequence of the interference of Rai Dhunput Singh with the collection of rent by Chutterput Singh in the Purwaha estate (Saefgunge being a part thereof), and the proceeding before the Magistrate under section 145 of the Code of Criminal Procedure embraced among several other properties Saefgunge as well; but so far as any specific evidence is to be found bearing upon the question of actual interference with the possession of that property, it appears that there was no case either civil or criminal (see the evidence of the witness Mahabeer). The rent from the *darpatnidars* was realized by Chutterput; but the witness Korbanally, the *patwari* called by the defendant, says that both in the years 1299 and 1300 Chutterput's men could not

collect more than Rs. 150 from Luchmipore owing to the interference of Dhunput, and the collection made by him. The witness however does not produce his collection papers shewing what he really collected, and he admits that he has not given credit to the *raiyats* for what they paid to Dhunput Singh. We think that the evidence, so far as it refers to Lot Saefgunge, is wholly insufficient to shew that there was any real, if any, interference on the part of Dhunput Singh with the possession of the *patnidar*, so that he is not in justice entitled to recover the rent claimed. It seems to us to be clear, upon an examination of the evidence, that the ground upon which the District Judge has disallowed the claim of the plaintiff has no application to this case. There is no other defence to this action except that which was accepted by the District Judge. And it follows, therefore, that the plaintiff should obtain a decree for the rent claimed in this case. The decree of the Court below will accordingly be reversed and this appeal decreed with costs.

Regular Appeal No. 342:—

We now proceed to deal with the other appeal (342), which relates to Lot Mirzapore, and which we think stands upon a somewhat different footing. In Lot Mirzapur, several of the *mouzahs* have also been let in *darpatni*, and three *mouzahs* only are held *khas*. There is no evidence as to any interference by Dhunput with the collection of rent in one of these three *mouzahs*, Tangha Majna; but there is evidence shewing such interference in respect of the other two *mouzahs*, Bishenpore and Purmanandpur. The evidence discloses that after the plaintiff had obtained symbolical possession in November 1891, there was not only the proceeding before the Magistrate under section 145 in regard to the possession of Mirzapore, but Dhunput Singh's *tehsildars* collected some rent from some of the *raiyats* of the said two *mouzahs* between Aughrain 1299 and Aughrain 1300 *mulki*. The rents actually collected appear to be small, but still it is impossible to say that there was not an active interference on the part of Dhunput with the enjoyment of possession by Chutterput, so far as those two *mouzahs* are concerned. Then we have the fact that Dhunput Singh, so soon as he made his purchase, asserted his title to the whole of Mirzapore and the other properties

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comprised in the Purwaha estate, and appointed an European Manager and a large number of *burkandazes* evidently with the object of overawing the *raiyats* of the whole estate and compelling them to pay their rents to him. And the result was the institution of several criminal cases, though no doubt there is no evidence of any such case in connection with Mirzapore itself. It may be possible that Chutterput had no quiet enjoyment of any of the properties until his possession was formally confirmed by the Magistrate on the 13th March 1893 : but of this there is no distinct evidence, and we find Chutterput asserting before the Magistrate that he was in possession of the whole of the properties.

Upon these facts, two questions arise : (1) whether there was an eviction of the tenant by the act of the landlord so that the rent which would otherwise be due to the latter should be suspended during the period of such eviction ; (2) whether the rent due upon the Lot Mirzapore may be apportioned, and a proportionate rent allowed to the landlord in respect of such portion of the property as to which there was no interference proved on his part.

In the case of *Upton* v. *Townend* (1) Jervis, C.J., with reference to the question what constitutes eviction, expressed himself as follows :—

"It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved and put out. The word 'eviction'—from *evincere*, to evict, to dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be

(1) 17 C. B. 30 (64).

taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention."

In *Edge* v. *Boileau* (1) where there was a covenant on the part of the lessor for quiet enjoyment, and it appeared that he had sent a notice to the sub-tenants desiring them not to pay their rents to the lessee, but the lessor himself, and threatened them with legal proceedings in default of non-compliance with such notice, it was held that this was a substantial disturbance of the lessee's quiet enjoyment of the property demised, and that the lessee was entitled to sue for damages for breach of covenant of quiet enjoyment.

In *Kadumbinee Dossia* v. *Kasheenauth Biswas* (2) where the tenant defendant was dispossessed of the land leased to him, by a third party to whom the landlord (plaintiff) had given a lease of the same land, and assisted him in the dispossession, it was held that the landlord was precluded from suing the tenant for rent during the period of such dispossession, though the latter had recovered a decree for possession with mesne profits.

In *Kristo Soondur Sandyal* v. *Chunder Nath Roy* (3) the landlord, though he had not actually ejected the lessee (a middleman), had interfered in the collection of rents, and encouraged the *raiyats* to deposit their rents with him as superior landlord, and collected their *dakhilas* with a view to ascertain how far the arrears due from the lessee were due to the non-payment of rent by the *raiyats*, the Court held that the landlord was not entitled to recover the rent sued for; and Bayley, J., in delivering the judgment of the Court observed as follows:—

"Now the real right of the zemindar to receive rents from the farmers depends upon his securing to the latter quiet possession, and giving him proper and lawful means of realizing rents from the *raiyats*. In the present case, it is clear from the

(1) L. R. 16 Q. B. D., 117. (2) 13 W. R., 338.
(3) 15 W. R., 230.

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findings of the lower Appellate Court, as quoted above, that the quiet possession and proper and legal means of collecting rents have been directly interfered with."

On the subject of eviction and apportionment of rent, Gilbert in his book on Rents, on p. 178, says as follows :—

"But if the lessor takes a lease of part of the land, or enters wrongfully into part, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such lease or tortious entry. Some have held that there shall be no apportionment in either case, but that the whole should be suspended; for this reason, I suppose, because, by the demise, every part of the land was equally chargeable with the whole rent; and therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This, indeed, may be a good reason why the whole rent service shall be suspended if the lord or lessor disseises or ousts his tenant or lessee of any part of the land; because this is a wrongful act to which the tenant consented not, and, if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract; and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law. Therefore to prevent these inconveniences, and that no man might be encouraged to injure or disturb his tenant in his possession, when, by the policy of the feudal law, he ought to protect him and defend him, these resolutions have been and so the law is at this day, that such disseisin or tortious entry suspends the whole rent, and the lessee or tenant is discharged from the payment of any part of it till he be restored to the whole possession."

In *Neale* v. *Mackenzie* (1), where a lessee to whom one hundred acres of land had been demised, found upon his entry that eight of the acres were in the possession of another party under a prior lease from the landlord, and was thus kept out of possession therefrom, and where, notwithstanding this, the landlord dis-

(1) 1 M. & W., 747 (763).

trained the goods of the lessee for the whole rent due upon the lease, and the lessee sued for damages on account of such distraint, Lord Denman, C.J., in delivering the judgment of the Court, among other matters, with reference to the question of apportionment of rent, observed as follows :—

"In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small as far as the principle is concerned) has taken no interest, and had no enjoyment and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved or any portion of it."

In the case of *Gopanund Jha* v. *Lalla Gobind Pershad* (1) where a tenant sued for rent had been evicted from a portion of the land demised by a title paramount, Peacock, C.J., in delivering the judgment of the Court, thus expressed himself :—

"According to the English law 'if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction,' and if he is evicted from part, the rent is to be diminished in proportion to the land evicted. It is laid down in Bacon's Abridgment, Tit. Rent (M) 'where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry, and it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the law he ought to protect and defend :' and it has been held that when a lessee is evicted by title paramount to that of his lessor, an apportionment of rent may take place in an action brought for the rent. It appears to me that the *onus* is on the lessor, who claims to be entitled to an apportionment to show what is the fair rate of the lands out of which the tenant was not evicted."

The principles to be gathered from these cases are, *first*, that

(1) 12 W. R., 109.

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where the act of the landlord is not a mere trespass, but something of a grave character interfering substantially with the enjoyment by the tenant of the property demised to him, there is a suspension of rent during such interference, though there may not be an actual eviction. And, *second*, that if such interference be in respect of even a portion of the property, there should be no apportionment of the rent, the whole rent being equally chargeable upon every part of the land demised.

Some other cases upon the same subject were quoted before us by the learned Vakil for the appellant, but they do not go any further than this, that though by entry upon the land demised the rent is suspended, yet where there is no eviction but a mere trespass, there is no suspension of rent, and that the mere discontinuance of rent by the *raiyats* does not amount to dispossession [see *Hunt* v. *Cope* (1), *Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty* (2), *Obhoya Charan Bhooia* v. *Koilash Chunder Dey* (3), and Woodfall on Landlord and Tenant, p. 425].

We think that, in the circumstances of this case, the act or acts of the landlord were not mere acts of trespass, but something of a graver character, substantially interfering with and disturbing the enjoyment and possession of the property by the *patnidar*, and that there ought to be a suspension of rent during the period of such interference.

The period during which the landlord is not entitled in our judgment to recover rent is from Aughrain 1299 to Aughrain 1300 *mulki*; and we think that the rents which fell due during this interval of time, according to the *kists* laid down in the *patni* lease should, subject to what we shall presently say with regard to apportionment, be disallowed.

As to the question whether there should be an apportionment of rent in this case (the actual interference by the landlord being only with respect to two of the several *mouzahs* constituting the *patni*), it appears that, though the whole *patni* rent may be taken upon the terms of the *patni* grant to be reserved upon every part of the land comprised in the *patni*, so that in default of payment by the *patnidar* of any part of the rent, the

(1) 1 Cowp., 242. (2) I. L. R., 14 Calc., 649.
(3) I. L. R., 14 Calc., 751.

whole *patni* is liable to be brought to sale, yet the rent payable for each of the *mouzahs* was separately assessed. The true principle upon which an apportionment is not ordinarily allowed is, we apprehend, that every part of the property demised being equally chargeable with the whole rent, it is not possible to determine what should be the proper apportionment when the landlord interferes with the possession of the tenant with respect to a part only, and that the landlord should not be permitted to resume any part of the land demised which may be most advantageous to him. In the present case, so far as the various *mouzahs* which were let out in *darpatni* are concerned, the collection of rent by the plaintiff could have been only from the *darpatnidars* and not from the *raiyats*, and it appears upon the evidence that the *darpatnis* were not interfered with, nor was there any interference in respect of one of the three *khas mouzahs*. In this view of the matter, and as the rents payable on account of the two *mouzahs* Bishenpore and Parmanandpore (also called Purmanpore in some of the documents) as to which there was an interference by the landlord are ascertainable from the *patni* lease, we think that the plaintiff is entitled to recover so much of the rent reserved by the *patni* lease as is assignable upon the property other than the two *mouzahs* Bishenpore and Parmanandpur. The rent in respect of these two *mouzahs* should be suspended and disallowed during the period already referred to.

It was, however, contended before us that if the landlord is entitled in this case to an apportionment of rent the tenant may well claim an equitable set-off for damage caused to him by reason of the unjust interference by the landlord. It is impossible in this case to determine what may be the amount of damage which the defendant sustained in respect of the two *khas mouzahs*, and what, having regard to the acts and conduct of the landlord generally in regard to the whole Purwaha estate, is the extent of equitable set-off which should be allowed to him. And we think that the question, what may be the extent of damage sustained by the defendant, should be left to be determined in a separate action framed for that purpose.

Upon these grounds, we disallow the plaintiff the rents payable for the two *khas mouzahs* Bishenpore and Purmanandpore,

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and which fell due according to the *patni* lease between Aughrain 1299 and Aughrain 1300 *mulki*, and save and except this, allow the rest of the claim.

In the circumstances of the case, we think that each party should bear his own costs both in this and the lower Court.

H. W.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

1896
December 8.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT No. 1) *v.* DIP CHAND PODDAR AND OTHERS (PLAINTIFFS).*

Railways Act (IX of 1890), section 77—Notice of suit—Agent of Manager—Traffic Superintendent—Civil Procedure Code (Act XIV of 1882), sections 147, 149—Practice—Pleadings.

The Traffic Superintendent is not the Manager's agent, and notice to him is not notice to the Railway Administration within section 77 of the Indian Railways Act (IX of 1890).

Under section 77 of the Indian Railways Act it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing.

THE plaintiffs brought this suit against the Secretary of State for India as the Proprietor of the Eastern Bengal State Railway, and against the Bengal Central Flotilla Company, for compensation for goods lost while being conveyed from Calcutta to Noakhali. The plaintiffs alleged that six bales of cotton goods were consigned to them on the 8th of June 1893, and that only five of these were delivered; the other bale was detained at Khulna, where goods are transhipped from the Bengal Central Railway to the steamers of the Bengal Central Flotilla Company, and did not reach Noakhali till the end of September, when the covering was torn and the contents so damaged as to be unsaleable, and the plaintiffs refused to take delivery.

For the Secretary of State it was pleaded that he was not liable, as there was no negligence shown; that the bale was badly packed, and when weighed at Khulna was found to be in excess of

* Appeal from Appellate Decree No. 1252 of 1895, against the decree of W. H. M. Gun, Esq., District Judge of Noakhali, dated the 22nd of May 1895, affirming the decree of Babu Lal Singh, Munsif of Sudharam, dated the 17th of December 1894