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honestly believes to be genuine, but which may after all turn out to be unfounded." This is part of the law of England, and I am therefore bound by it.

I think therefore that the wife is entitled to the relief which she claims.

Order made in the usual form for the Registrar to decide what costs the husband can pay and how they should be paid, and I direct the reference to be treated as an urgent reference. Costs of this application costs in the cause.

*Mr. Aetoom.* Does the order include costs already incurred?

**STEPHEN J.** Yes.

*Mr. Aetoom.* I ask that the order be not made to include former costs.

**STEPHEN J.** I cannot accede to that.

*Mr. Senha.* I ask for an order, as in *Kelly v. Kelly* (1), either to pay or to give security.

**STEPHEN J.** The proper order is to make the order in the ordinary form. Costs of this application costs in the cause.

Attorney for Petitioner. *Leslie and Hinds.*

Attorney for Respondent. *S. P. Simmons.*

D. G. M.

## APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Brett.*

SURJA PERSHAD NARAIN SINGH

v.

REID.\*

*Mesne profits—Possession—Principle of assessing amount of mesne profits—Civil Procedure Code (Act XIV of 1882) s. 244—Second appeal—Determination of mesne profits.*

Where a decree-holder was in constructive possession by letting out the lands to tenants, before ouster by the judgment-debtor, the mesne profits should be

\* Appeal from Order No. 22 of 1901, against the order of Babu Bhagwati Charan Mitter, Subordinate Judge of Saran, dated the 21st of December 1900.

(1) (1869) 3 B. L. R. 71.

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measured by what would be a fair and reasonable rent for the lands, if the same had been let out to tenants during the period of unlawful occupation of the wrong-doer.

There is, however, no general principle which can be made applicable to every case of the kind. The proper principle of assessing mesne profits in such cases will depend upon the character of the possession held by the decree-holder before ouster.

*Raghu Nandan Jha v. Jalpa Pattap* (1) distinguished.

THE plaintiffs, Surja Pershad Narain Singh and others, appealed to the High Court.

This appeal arose out of an application by the decree-holders for ascertainment of mesne profits and realisation thereof from the judgment-debtors. An account was given of mesne profits due, and it was prayed that notices might issue to the judgment-debtors.

The judgment-debtors, L. D. Reid and others, objected that the mesne profits demanded, amounting to Rs. 1,02,940-4-3, was calculated on a wrong principle and grossly exaggerated; that the lands of which it was held that they had been in wrongful possession were *raiya* lands; that the utmost they could be asked to pay was the rent thereof paid by the raiyats from whom they had obtained the same, and that as regards the lands covered by the zurpeshgi deeds, the decree-holders had no right to recover anything from them.

After several adjournments the case was argued before the lower Court on the question of the proper principle upon which mesne profits should be assessed, which in the opinion of that Court it was necessary to be decided before entering into the merits of the case. Upon the preliminary point so argued, the lower Court passed the following order on the 21st December 1900:—

“The decree-holder claims the value of the produce of the land, which the judgment-debtor actually received during the period of his unlawful possession. According to the judgment-debtor, however, the rent which could have been obtained from the land, if the decree-holder had been in possession during those years, is the only fair measure of mesne profits.

“The point has been authoritatively decided by the High Court, following certain judgments of the Privy Council and Full Bench and Divisional Benches, in the case of *Raghu Nandan Jha v. Jalpa Pattap* (1), where it has been held that the proper principle was to ascertain what would have been a fair and reasonable rent from the land, if the same had been let to a tenant during the unlawful occupation of the wrong doer.

“Following the above ruling, I find the point raised in favour of the judgment-debtor and order the production of evidence accordingly.”

(1) (1897) 3 C. W. N. 748.

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*The Advocate-General (Mr. J. T. Woodroffe), Dr. Asutosh Mukerjee and Babu Biraj Mohan Masumdar* for the appellants.

*Babu Umakali Mukerjee and Babu Kubwant Sahai* for the respondents.

**GHOSE AND BRETT JJ.** This appeal arises out of an application made by the decree-holders, who are the appellants before us, for ascertainment and recovery of mesne profits due to them, the lands in respect of which such mesne profits were claimed having been decreed to them against the defendants, the judgment-debtors.

There seems to have been a contest between the parties as to the principle upon which such mesne profits should be ascertained. The decree-holders apparently claimed the value of the produce of the lands which the judgment-debtors, during the period of their unlawful possession, actually received, while, on the other hand, the judgment-debtors contended that all that the decree-holders were entitled to receive was the rent at which they might have been able to let out the lands, if they had continued to be in possession, and had not been disturbed in such possession by the defendants.

The Subordinate Judge did not go into the facts upon which any principle could be applied, but following the case of *Raghu Nandan Jha v. Jalpa Pattap* (1), held that the proper principle was to ascertain what would have been a fair and reasonable rent for the lands, if the same had been let to a tenant during the period of unlawful occupation by the defendants; and he accordingly ruled the point raised between the parties in favour of the judgment-debtors, and directed the ascertainment of mesne profits. The words used in the last portion of his order constitute "an order for the production of evidence accordingly." This, however, means, as we have just indicated, the production of evidence as regards the amount of mesne profits recoverable, in accordance with the view accepted by the Subordinate Judge.

Now, looking at the case to which the Subordinate Judge refers in his judgment, it will be found that the decree-holder there before the ouster by the defendant was in constructive posses-

(1) (1897) 3 C. W. N. 748.

sion of the lands by letting them out to tenants; and having regard to that fact, the learned Judges, following certain rulings quoted in their judgment, held that the proper principle applicable to the case was to ascertain what would be a fair and reasonable rent for the land, if the same had been let out to a tenant during the period of unlawful occupation of the wrong-doer. As we have already mentioned, no facts were gone into by the Subordinate Judge in this case when he laid down the principle enunciated in his judgment. We need hardly say that there is no general principle which could be made applicable to every case of the kind. What the Subordinate Judge ought to have done was to ascertain precisely what the facts were and what the nature of the possession of the plaintiffs was before the ouster, and then to have determined the principle upon which the mesne profits should be ascertained. We need hardly point out to him any of the cases decided by this Court where, having regard to the character of the possession held by the decree-holder before ouster, the principle for the ascertainment of mesne profits was laid down. We may, however, refer him to the cases of *Sreenath Bose v. Nobin Chunder Bose* (1), *Soudaminee Dabee v. Anund Chunder Haldar* (2), *Nursingh Roy v. Anderson* (3), and *Rookumee Koer v. Ram Tukul Roy* (4).

We are of opinion that the Subordinate Judge should ascertain the precise facts, and then determine the principle upon which mesne profits in this case should be ascertained.

We may here mention that the learned vakil for the respondents raised before us a preliminary objection to the hearing of this appeal, upon the ground that no appeal lay to this Court, because the Subordinate Judge did not determine the amount of mesne profits recoverable by the decree-holders. But having regard to the provisions of s. 244 of the Code of Civil Procedure, it is impossible to say that the question determined by the Subordinate Judge is a question in respect of which a second appeal does not lie to this Court. We accordingly overrule the objection.

We make no order as to costs. Let the records be sent to the Court below without delay.

M. N. R.

*Case remanded.*

(1) (1868) 9 W. R. 473.

(2) (1870) 13 W. R. 37.

(3) (1871) 16 W. R. 21

(4) (1872) 17 W. R. 150.

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