APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

1908
April, 23.

LACHMI NARAIN
v.
MAZHAR ABBAS.*

Mesne profits—Zerait land—Rent—Competition rent—Assessment, principle of-

As regards *zerait* land, *mesne profits* should be assessed on the basis of produce or competition rent and not customary rent.

The character of the possession before trespass should be ascertained to arrive at the true measure of damages, because such possession is a fair index of intention as to the mode of occupation, if there were no trespass.

Ijatulla Bhuyan v. *Chandra Mohan Banerjee*(1) and *Gopal Chunder Mandal* v. *Bhoobun Mohun Chatterjee*(2) approved.

Principle upon which *mesne profits* should be assessed on the basis of produce or competition rent discussed. *Thakooranee Dassee* v. *Bisheshur Mookerjee*(3) referred to.

APPEAL by the plaintiff.

On the 29th July 1902 the plaintiff obtained a decree for recovery of possession of 69 bighas and 15 cottas of land as his *zerait* land with mesne profits. The decree directed that mesne profits should be ascertained in the execution proceedings. The decree-holder applied under s. 244 of the Code of Civil Procedure for the determination of the amount of mesne profits from the 18th February 1898 to the date of delivery of possession. There was no dispute as to the amount of mesne profits for the first two years, but the plaintiff contended that as he was entitled to *khas* possession after those two years, the amount of mesne profits for the subsequent period should be assessed on the basis of produce. On the application of the plaintiff a Commissioner was appointed to ascertain the amount of mesne profits, who found after investigation that the total amount of mesne profits calculated on the

* Appeal from Order No. 49 of 1907, against the order passed by Rajendra Nath Dutt, Subordinate Judge of Chapra, dated the 10th September 1907.

(1) (1907) 12 C. W. N. 285.
(2) (1903) I. L. R. 30 Calc. 536.
(3) (1865) B. L. R. F. B. 202; 3 W. R. (Act X) 29.

basis of rent for the first two years and on the basis of produce for the subsequent years with interest at 12 per cent. per annum amounted to Rs. 12,805. The defendant contended that mesne profits should be assessed on the basis of rent for the entire period; the amount with interest on the rental basis was found to be Rs. 3,192; the Subordinate Judge ordered the latter sum to be paid to the plaintiff with costs and subsequent interest at 6 per cent. per annum. The plaintiff appealed and the main contentions before the High Court were based on the rival principles of calculation namely, whether the mesne profits should be calculated on the rental or produce basis.

Dr. Rash Behari Ghosh and *Babu Lachmi Narain Singh* for the appellant.

Moulavi Syed Shamsul Huda and *Moulavi Syed Mahomed Tahir* for the respondent.

MITRA AND CASPERSZ JJ. The plaintiff appellant obtained on the 29th July 1902, a decree against the defendant respondent for recovery of possession of 69 bighas and 15 cottas of land in Mehal Tier as *malik's zerait* or proprietor's private land, with mesne profits. The claim for mesne profits covered the periods from the 18th February 1898 to the date of the institution of the suit, *i.e.*, the 30th January 1901 and from the date of the institution of the suit to the date of delivery of possession. namely, the 31st May, 1904. The decree directed that mesne profits should be ascertained in the execution proceedings. The land was not only *Malik's Zerait*, but it was alleged to have been in the *khas* or direct possession of the defendant himself, and the decree directed delivery of *khas* possession by dispossessing the defendant. The defendant appealed to this Court from the decree of the lower Court. On the 10th March 1905, this Court affirmed the decree of the lower Court. Possession, however, had, in the meantime, been taken, as we have said, on the 31st May 1904.

There is no dispute as to the amount of mesne profits for the years 1305 to 1307 F. S. The plaintiff's claim for these years was based on rental, which was realisable from *raiyats*, to whom

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he had let out the land, but he alleged that the leases to the *raiyats* expired with the year 1307F.S., and he was entitled to *khas* possession from 1308F.S., and that, therefore, he was entitled to damages from 1308 to Baisakh 1311F.S., the measure of which should be the actual price of the produce less the necessary costs of cultivation. On the application of the plaintiff, the lower Court appointed a Commissioner to ascertain the amount of mesne profits by means of an investigation at the spot, and the Commissioner found, after an elaborate investigation, that the total amount of mesne profits calculated on the basis of rent for the earlier period and on the basis of produce for the later period, with interest at 12 per cent. per annum, would be Rs. 12,805-6-6. The defendant, however, contended that mesne profits should be assessed on the basis of rental for the entire period. On a rental-basis, the amount with interest was found to be Rs. 3,192-12-6 and that is the amount which the lower Court has allowed with costs and subsequent interest at 6 per cent. per annum.

The appeal of the plaintiff and the cross-appeal of the defendant have reopened the entire case before us, but it is not necessary to dwell upon the slender argument in support of the cross-appeal. The main contentions raised before us are based on the rival principles of calculation for the years 1308 to 1311F.S., namely, whether the mesne profits should be calculated on the rental or produce basis?

The dispute as to the facts bearing on the question of principle of assessment relates to the mode of enjoyment by the defendant during the later period. The plaintiff attempted to make out by evidence that the defendant was, throughout the period in *khas* possession, cultivating the land and reaping ordinary country crops; while the defendant asserted that, during the years 1308 and 1309F.S., he cultivated the lands with indigo for his Trikalpore Factory and that he was a loser by such cultivation as the price of indigo went down owing to a well known cause, and that, during the last two years, he let out the land to raiyats on money rent. The lower Court has held that the defendant and his witnesses have given the facts correctly. It has found that the defendant did cultivate the lands with indigo in 1308 and

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1309F. S., and was a loser by that cultivation, and that, in the following years, he let out the lands on money-rent. The Commissioner, however, had come to a different conclusion. The oral evidence adduced before the Commissioner was highly conflicting, because the witnesses of each party supported its own case. The Commissioner himself hesitated as to the weight to be attached to such conflicting testimony, but the scale, in his estimate, turned in favour of the plaintiff on account of a statement, or detailed account of produce filed by the defendant himself with his petition of objection. That statement, however, was not a part of the petition and it does not contain any direct or unequivocal admission that the lands were sown with ordinary crops during 1308 and 1309. We, therefore, are not disposed to place much reliance on this statement. On the other hand, the land had been used for a long series of years for indigo cultivation. It was so used from 1291 to 1297 and again from 1298 to 1304, periods during which the Trikalpore Factory held it on lease with the rest of the lands of Mehal Tier. The factory did not stop work during 1308 and 1309. The defendant sold indigo in those years through the Calcutta indigo brokers, Messrs. Thomas & Co. The discovery of synthetic indigo dye in Europe could not, in the years previous to 1308, lead to any necessary inference of a permanent decline in the price of Bengal indigo and it is more probable that the defendant used the land for indigo cultivation for supplying his factory with materials for manufacturing indigo. The evidence to show that the indigo despatched by the defendant to the market of Messrs. Thomas & Co. was partly indigo from the land in suit is no doubt not very complete, but the probabilities are in favour of the view that the defendant did not allow the land to go out of indigo cultivation as long as he had occupation of it and as long as he continued work at the factory at Trikalpore. The land was, in fact, indigo land for nearly twenty years. The plaintiff is now in possession of the village and it is easy for him to produce a number of raiyats as witnesses to support his case. The defendant labours under the disadvantage, which dispossession always brings with it. Weighing, therefore, the entire evidence, we come to the same conclusion as the lower Court with respect to the years 1308

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and 1309. The defendant was undoubtedly a loser by indigo cultivation in these years.

The finding of the lower Court as to the next period, *i.e.*, 1310 and 1311, is not equally sound. The evidence is as conflicting as that adduced with regard to the previous period. The defendant admittedly had ceased to cultivate and manufacture indigo and a decree for possession had already been passed against him in favour of the plaintiff. There was, however, no reason why, unlike other indigo-planters, he would give up *khas* possession. The probabilities are against his case of letting out the land on money-rent. The lower Court has not analysed the evidence on this point and we are disposed to agree with the Commissioner in his estimate of the oral evidence. No leases or *kabuliats* have been produced to support the defendant's case of occupation by tenants. The tenants examined do not even produce their rent-receipts. In our opinion, therefore, the defendant was in *khas* possession during the years 1310 and 1311 and himself used the land for the cultivation of ordinary country-crops.

But in the view of the law that we are disposed to take, it makes no difference whether the defendant cultivated the land with indigo in 1308 and 1309 and raised other crops during the last two years, when the land was in *khas* cultivation, or whether money rent was obtained therefrom during the second period. The land is *zerait* or proprietor's private land. It must have been used as such before 1291 F.S., when the Trikalpore Factory took a lease of it. We must assume that it was cultivated by the proprietor himself for raising ordinary country crops. From 1291 to 1304 F S. it was cultivated by the lease-holders themselves and was not treated as *raiyati* land. The cultivation with indigo in 1305 to 1309 F.S. is not inconsistent with the same inference. Moreover, the plaintiff has been in direct occupation, since he took possession in execution of his decree, and he too has been cultivating the land with ordinary crops. The character of the land and its use for a long series of years, including the use since 1311 F.S., can lead to one conclusion only, viz., that the plaintiff, if he had been in possession, would have used the land for cultivating it himself with ordinary food crops. He is not an indigo-planter and would not have cultivated

indigo. It is undoubtedly more profitable to cultivate one's own land than allow *raiyats* to be in occupation on payment of customary rent. The fact that the plaintiff gave leases to tenants for three years, from 1305 to 1307 F.S., during the time of dispossession by the defendant, cannot weaken the inference that the plaintiff, if he had been in possession, would have used the land as *sir* or *zerait* by cultivating it himself. The intention of the plaintiff must be presumed. He is the potential cultivator according to the principle expounded in the case of *Ijâtulla* v. *Chandra Mohan Banerjee* (1). If the defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo, or if he adopted the more comfortable use of land by letting it to tenants and was satisfied with a comparatively small income, the plaintiff ought not to be a loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser. *Surja Pershad Narain Singh* v. *Reid* (2) and *Laljee Shahay Singh* v. *Walker* (3) relied on by the Lower Court do not lay down a different rule. The character of the possession before trespass by the defendant should be ascertained to arrive at the true measure of damages, because such possession is a fair index of intention as to the mode of occupation, if there were no trespass. *Gopal Chandra Mandal* v. *Bhooban Mohan Chatterjee* (4) lays down the same principle of ascertaining the intention of the true owner and the potential position he occupies. In *Ijatulla Bhuyan* v. *Chandra Mohan Banerjee*(1) we held that as regards *zerait* land, mesne profits should be assessed on the basis of produce and not on the basis of rent. The present is a parallel case and we see no reason to lay down a different rule. We are, therefore, of opinion that the principle of assessment of damages adopted by the Lower Court is erroneous. It should not have assessed damages on a rental basis.

The next question is one of fact; what is the amount payable by the defendant to the plaintiff for the years 1308 to 1311 F.S.,

(1) (1907) 12 C. W. N. 285.
(2) (1902) I. L. R. 29 Calc. 622.
(3) (1902) 6 C. W. N. 732.
(4) (1903) I. L. R. 30 Calc. 536.

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damages being calculated on the basis of produce? The judgment of the Lower Court has not discussed this question, and we do not get any assistance from it. The parties adduced no evidence in Court, and we have to fall back on the report of the Commissioner and the evidence given before him. We may note that the parties have not expressed any desire to adduce further evidence.

The difficulty of ascertaining mesne profits on the basis of produce is always great. The elements of uncertainty, the unknown quantities, are many. The gross produce must first be ascertained and then its market value. The exact quantity of grain, which a piece of land has produced in any particular year is a matter of primary importance, but evidence of a precise and reliable character is generally wanting. To discover the average of a number of years is a still more complex problem, especially in India, when cultivation is greatly dependent on meteorological phenomena and not so much on science as in other countries. The price of the produce is also a varying factor, the oscillations in this respect being attributable to the law of demand and supply, to the distance from markets or trade centres and to other possible causes, though, as regards any particular locality, the variations may be ascertainable without much difficulty, until new means of transit come into existence.

But it is not sufficient to ascertain merely the gross produce or its money value. The nett produce is the true measure of damages. From the gross produce all the expenses of cultivation must be deducted to find the nett produce. A certain sum must also be deducted on account of the application of capital and labour, and the cost of superintendence must have a certain pecuniary value. The true measure of damages must be the nett produce obtained by deducting the cost of raising the produce from the market value of the production. We should also take into consideration the risks of the agriculturist and his bare means of subsistence. If all these items are to be matters for calculation in ascertaining mesne profits on produce basis, the resultant profit differs very little from competition or rack rent. Assuming complete freedom of competition, the rent paid by a tenant-at-will would practically coincide with the whole nett produce of any given piece of land.

If rent were customary, and not competitive, it would not be a practical test for ascertaining the nett produce. In India, custom generally controls rent, and competitive rent, as defined by writers on political economy, is the exception. In *Thakooranee Dassee* v. *Bisheshur Mookerjee* (1) the majority of the Judges accepted the theory of a customary rent, as prevailing in India. They held that the customary or pergana rate should be the true basis of ascertainment of rent in India. The theory adopted in India is "All that is not comprehended in the wages of labour and profit on the ryot's stock is not the land-holder's rent."

Nevertheless the question arises whether the rent actully paid by a tenant at will for occupation of *zerait* land under a recent settlement may not be the best and easiest means of discovering the nett produce. In *Thakooranee Dassee* v. *Bisheshur Mookerjee*, (1) the Court had to consider the case of occupancy raiyats, who in the majority of cases, had acquired the status of *khudkasht* raiyats and were entitled to hold land at customary rates. The causes of aberration from true competition rents are many and undefinable, but in modern times, competition must, even in India, influence rent, when there are no statutory or customary rights in operation. A raiyat holding at fixed rates or an occupancy-raiyat or even a non-occupancy raiyat created by the Bengal Tenancy Act may in a certain sense become a co-proprietor of the soil, but a tenant-at-will or a tenant, whose occupation may be terminated at the end of any agricultural year, can hardly be said to possess an interest in land. There is nothing to bar a proprietor from letting out his private land at the highest available competition rent, and we may assume that, when he does allow a tenant to occupy it, he stipulates for the payment of competition rent (and not customary rent), although that may not strictly be the nett produce of land. A margin, however, of profit to the tenant for his subsistence must be conceded in the fixing of his rent, as it is undeniable that the customary rents paid by most of the raiyats in a village must keep down the rents of *zerait* lands also.

(1) (1865) B. L. R. F. B. 202; 3 W. R. (Act X) 29.

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In the present case, the plaintiff himself let out the land at Rs. 5 a bigha, and this is some evidence as to what the ordinary rate is and it might be taken to be competition rate of rents practically equivalent to the nett produce of land. The plaintiff, however, was then out of possession. If a proprietor, who has been in direct possession of his private land, and knows what average nett produce it yields, leases it to a tenant, reserving the right, as he has a right by law, to re-enter at the end of any agricultural year, we may fairly assume that the rent is a rack rent and equivalent, as nearly as may be, to nett produce. If the proprietor was not in direct possession before such a lease, and had no special knowledge of the nett produce, an allowance may be made in his favour. An allowance may, also, be made for the reactionary effect, which the prevalence of customary rent has on rent, which would otherwise be the full competition rent. That is to say, the pecuniary loss arising from the effect of the prevailing rate paid by *khudkasht* raiyats may be added so as to arrive at true competition rent on nett produce. In the present case, we have the fact of letting at Rs. 5 a bigha and the further fact that the plaintiff valued the land at Rs. 80 a bigha in the plaint, thus assessing the profit per bigha at Rs. 4, the ordinary market price being 20 years' purchase.

Although, theoretically, there should be an exact coincidence between competition rent and the value of nett produce, the divergence in the present case will be very great, if the conclusions arrived at in the Commissioner's report be correct. There ought not to be such a divergence, if, as we have held, the rent paid was not customary. The figures given by the Commissioner as to quantities of produce and the cost of production appear to us to be inaccurate. They are, respectively, over-estimated and under-estimated. It is in evidence and is an undeniable fact that the *serait* lands in Tier were assessed in the leases to the Trikalpore Factory at Rs. 4 per bigha as rent and the plaintiff consequently valued each bigha at Rs. 80. We have no doubt, therefore, that the figures showing the nett produce as given in the Commissioner's report are highly exaggerated and we cannot accept them.

How then are we to assess the mesne profits? We do not think it desirable to send the case back. The parties have already ncurred heavy costs in the investigation and the case itself has been long pending. We do not also expect that any further evidence of a reliable character would be available, if we were to remand the case for another enquiry by the lower Court. Materials for determining the nett produce, or what would be the true competition rent, must inevitably be meagre or unsatisfactory. We do not therefore think any useful purpose would be served by remand. We think it desirable to come to our own conclusions on the materials on the record.

Thirty-three and a third per cent. appears to us to be a fair margin for the risk and profit reserved to the tenants, who took leases from the plaintiff from 1305 to 1307 at Rs. 5 per bigha. We do not think the plaintiff settled the *serait* land by giving up more than 33⅓ per centum out of the nett produce. He might have conceded less, but the defendant is a wrong-doer and every presumption should be made against him. As it is, the result we arrive at is less than one half of that calculated with so much wealth of detail by the Commissioner, the ratio being $\frac{2}{5}$ths.

We are, therefore, of opinion that the basis of the award made by the Court below should be increased by one-third, and the decree modified accordingly. The rate of interest at 12 per cent. per annum will stand.

As regards costs, the defendant should pay the entire cost of the investigation by the Commissioner and of the trial by the lower Court. We make no order as to costs of this Court.

S. C. B.