

than this would encourage perjury and forgery. Our view is supported by the observations of Sir B. Peacock in *Narinee Dasse v. Nurrohury Mohonto*, Marshall, Calc. R. 70, quoted in pp. 78, 79 of Broughton's Civil Procedure Code, 4th edition, and other cases there mentioned, and *Govind Rámchandra v. Shekh Ahmed (e)*.

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LA'KSHMI-
BAI
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RA'VJI.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 414 of 1871.

Feb. 15.

CHAKU MODAN ISA'NA'..... *Appellant.*DULLABII DWA'RKA'..... *Respondent.**Mesne Profits—Interest on Mesne Profits.*

In a suit for mesne profits (not being a suit for land and its mesne profits) interest on mesne profits cannot be recovered.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge of Ahmadabad, amending the decree of the Subordinate Judge of Dhandúka.

The facts appear from the judgment of the Court.

The appeal was heard by WESTROPP, C.J., and LLOYD, J., on the 12th of February 1872.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Nagindás Tulsidás for the respondent.

Cur. adv. vult.

WESTROPP, C.J.:—The defendant Chaku's grandfather, who was originally the owner of a field, mortgaged it in A.D. 1812 to Karsan Ranchhod and another. The plaintiff's father, Dwáráká, purchased the mortgagees' interest and became transferee of the mortgage on the 22nd August 1853, but permitted the original mortgagees to remain in possession of the field. About the 4th of June 1859, the defendant, Chaku, who had succeeded to the mortgagor's interest in the field, although aware of the transfer of the mortgage to Dwáráká, paid off the money due upon the mortgage to

(e) 5 Bom. H. C. Rep. A. C. J. 133.

1872. CHAKU M. ISA'NA' v. DULLABH DWAR'KA'. the representatives of the original mortgagees, and then obtained possession from them of the field. Dullabh having succeeded to the interest of his father, Dwárká, as transferee of the mortgage, filed a plaint against the defendant, Chaku, on the 18th July 1862, to recover possession of the field, and for mesne profits for three years previous to the filing of the plaint, but not for interest upon those mesne profits. He obtained a decree in that suit for possession and for the three years' mesne profits. He was put into possession of the field upon the 31st March 1866. Upon the 2nd March 1869, he filed his plaint in the present suit for further mesne profits, viz., for such profits from the 18th July 1862 (the date of the filing of the plaint in the former suit) to the 31st March 1866 (the date of delivery of possession of the field to the plaintiff) and for interest thereon at the rate of 9 per cent. per annum. The Subordinate Judge awarded to the respondent (plaintiff) Rs. 412-8 as mesne profits and interest thereon at 6 per cent. per annum. The Assistant Judge affirmed that decree as regarded the amount of mesne profits, but varied it as to the rate of interest, which he raised to 9 per cent. Both the appellant and the respondent in the present special appeal to this Court have objected to the mesne profits allowed—the appellant saying that it exceeds the actual produce of the field, and the respondent saying that it is below that produce. What that produce was we deem to be a question of fact, as to which we are bound by the finding of the Assistant Judge, who in that respect concurred with the Subordinate Judge. We therefore proceed to consider the only question of law in the case, viz., whether the respondent was entitled to any, and if any, to what interest upon the mesne profits.

Section 196 of Act VIII. of 1859 enacts that "when the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decreeholder, with interest thereupon at such rate as the Court may think proper."

The present suit is not a "suit for land or other property paying rent," but is one for mesne profits and interest only; therefore this case does not fall within the section quoted, although the mesne profits sought here are in respect of the period between the commencement of the suit and the delivery of possession.

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Nor does Section 197 apply here, inasmuch as it provides only for the recovery of mesne profits in a suit for land and mesne profits which have accrued prior to the date of the suit. Moreover, that section is silent as to interest.

Section 11 of Act XXIII. of 1861, though conversant of mesne profits, yet is so with respect to the execution of decrees only, and is therefore inapplicable in this case (a).

Hence it appears that neither the Civil Procedure Code nor Act XXIII. of 1861 provides for an award of interest in an action for mesne profits as distinguished from an action to recover land or other property paying rent, in which interest may be given on mesne profits from the date of the suit to the date of the recovery of possession. The specification of that case would seem to be the tacit exclusion of interest on mesne profits in other cases.

If we look to the law in England and Ireland for light upon this subject, we do not find any ground for supposing that interest can in those countries be recovered upon mesne profits. A plaintiff is entitled to recover compensation for the use and occupation of the premises recovered during the time they were actually or constructively occupied by the defendant (b). It is true that in estimating damages in an action for mesne profits, the jury are not there restrained to the mere rent or produce of the premises, but may award by their verdict such sum, exceeding the value of the mesne profits, as the circumstances established in evidence shall

(a) See 2 Cal. W. R. Misc. App. p. 5; 3 Bom. H. C. Rep. A. C. J. 31, over-ruled 4 Bom. H. C. Rep. A. C. J. 181; 5 *Ibid.* A. C. J. 74; 6 Cal. W. R. Misc. R. 33, 109.

(b) *Doe v. Harlow*, 12 A. & E. 40 (head-rent paid by occupier should be deducted: 4 Tyr. 29. 2 Cr. & M. 145).—See 9 Cal. W. R. Civ. R. 457, 458, as to Wasilat; 5 *Ibid.* Mis. 35; 3 *Ibid.* Mis. 25, 30; 7 *Ibid.* Civ. R. 78, 230; 8 *Ibid.* Civ. R. 101, 103, 447; Cal. W. R. 1864 F. B. 40.

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warrant. In *Goodtitle v. Tombs* (c), Gould, J., said: "It must be taken for granted in this case that there was an actual *ouster*, and that the defendant kept him (the plaintiff) out from the time of the demise till the judgment in ejectionment; the plaintiff in this case is not confined to the very mesne profits only, but he may recover for his trouble, &c. I have known four times the value of the mesne profits given by a jury in this sort of action of trespass (for mesne profits); if it were not to be so sometimes, complete justice could not be done to the party injured." And Wilmot, C.J., said: "Damages are not confined to the mere rent of the premises; but the jury may give more, if they please, as my brother Gould hath truly observed." Other authorities show what would come under damages for "trouble, &c.," of which Gould, J., speaks as properly awardable by a jury in actions of trespass for mesne profits: for instance, costs incurred in recovering possession, not only where the action of ejectionment for that purpose was undefended (d), but where a verdict has been obtained against the defendant (e) or another person (f), and also the costs between attorney and client, incurred in a Court of Error in reversing a judgment in ejectionment given erroneously in the defendant's favour, although the Court of Error could not have awarded costs to the plaintiff (g). And it would seem that the plaintiff may recover, in an action of trespass for mesne profits, compensation for waste or injury done to the premises, by carrying away fixtures which were not removeable by a tenant, or by committing other spoil or waste on the premises, *provided such matters are specially alleged in the declaration* (h). But nowhere do we find it stated that interest on mesne profits is recoverable.

Next as to the Indian authorities. In an unreported case decided on the 11th December 1871, Regular Appeal No. 18

(c) 3 Wils. R. 118, 121.

(d) *Doe v. Davis*, 1 Esp. 358; *Doe v. Huddart*, 2 Cr. M. & R. 316; *Pearse v. Coaker*, L. R. 4, Exch. 92.

(e) *Symonds v. Page*, I. Cr. & Jer. 29.

(f) *Love v. Reilly*, 2 Huds. & Br. 185 n; *Pry v. Donovan*, *Ibid.* 184.

(g) *Novell v. Roake*, 7 B. & Cr. 404; S. C. 1 Man. & Ry. 170.

(h) *Dunn v. Large*, 3 Douglas 335.

of that year, *Sitārām Bāvā v. Atmārām Bāvā*, by Melvill and Kemball, JJ., interest at 6 per cent. was given on mesne profits from the date of the institution of the suit *until payment*. But that was a suit for a share of land, and therefore, so far as the interest given was interest from the date of the suit until delivery of possession, fell within Section 196 of Act VIII. of 1859, and is accordingly so far inapplicable here. The only questionable part of the interest there awarded would be such part, if any, as might accrue between delivery of possession and payment. We may mention that the case of *Gundo Anandrāv v. Krishnarāv Govind*, to which we shall presently refer, does not appear to have been cited in that case. In the unreported Special Appeal No. 287 of 1871, *Jasvánt Sing v. Russabhái Meghabhái*, heard on the 17th November 1871 by the same Judges, the Subordinate Judge gave interest on mesne profits, but no question as to interest was raised or argued in the High Court. In *Rajah Leclanant Singh v. The Government of Bengal (i)*, the liability to pay interest on mesne profits was allowed by Government to pass *sub silentio*, the only question there made and decided being one of jurisdiction. That case, therefore, is not an authority as to interest being properly chargeable on mesne profits.

The suit for mesne profits is not a suit for a debt but for unliquidated damages, and, as a general rule, interest is not allowable on a claim for unliquidated damages (j). A statute (3 and 4 Wm. IV., c. 42, s. 29) was deemed necessary in England to enable the jury in actions of trover or trespass *de bonis asportatis* (in which actions damages are unliquidated) to give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure thereof. That enactment has been introduced into India for the Queen's Courts by Acts IX. of 1840 and XXVI. of 1841.

In *Gundo Anandrāv v. Krishnarāv Govind (k)*, which was a suit to recover a share in the profits of a wátán payable

(i) 1 Calc. W. Rep. P. C. 21. (j) 7 Bom. H. C. Rep. A. C. J. 89, 98.

(k) 4 Bom. H. C. Rep. A. C. J. 55.

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1872. out of three villages, seven years' arrears, due previously to
 CHAKU M. the filing of the plaint, were awarded with interest by the
 ISA'NA' Lower Courts. The High Court varied that decree so far as
 DULLABI it granted interest, which it refused to allow, Couch, C.J.;
 DWA'RKA' saying that "there is no law which enabled the Lower Courts
 to award interest" in such a case.

Damages for mesne profits are not a debt or sum payable at a certain time, nor has any demand, in writing, of payment of mesne profits been proved to have been made: this case, therefore, does not come within Act XXXII. of 1839 (l).

We have arrived without doubt at the conclusion that interest was improperly awarded in the Courts below—by the Subordinate Judge at 6 per cent., and by the Assistant Judge at 9 per cent. We hold that interest at any rate whatever cannot be allowed in such an action as the present, brought, as it is, to recover mesne profits and interest only.

[APPELLATE CIVIL JURISDICTION.]

Feb. 19.

Miscellaneous Special Appeal No. 30 of 1871.

YENKOBA' BA'LSHET KA'SA'R..... *Appellant.*
 RAMBHA'JI valad ARJUN *Respondent.*

Jurisdiction—Decree for sale of mortgaged property out of jurisdiction
—Civ. Proc. Code, Sec. 5.

A suit for the recovery of a mortgage debt by the sale of the mortgaged property is not a suit for land within the meaning of Sec. 5 of the Code of Civil Procedure.

A Court may decree the sale of mortgaged immoveable property though situate beyond its jurisdiction.

THIS was a miscellaneous special appeal from an order of A. C. Watt, Acting Judge of Khandesh, confirming an order of the Subordinate Judge of Amalnair, refusing to execute a decree.

(l) See *Harper v. Williams*, 4 Q. B. 219; 12 L. J. Q. B. 227.