Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mudun Mohun Doss v. *Gokul Doss, from the late Sudder Dewanny Adawlut, Agra, North-Western Provinces of Bengal: delivered the* 17*th day of March*, 1866.

Present:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THIS is an Appeal against a Decree of the Sudder Court of Agra, which confirmed a Decree of the Civil Court of Mirzapore, dismissing the Appellant's Suit with costs.

The Suit was brought to recover the damages alleged to have been sustained by the nominal Plaintiff's employer, Dwarka Doss, in consequence of an attachment made at the instance of the Respondent as the holder of a Decree.

Dwarka Doss and the Respondent had conflicting claims upon an indigo factory lying between the villages of Putteetah and Sirswabur, and called in the Record sometimes by the one, and sometimes by the other name. This factory, with three others, belonged to two persons named Chunder Churun and Esserchund Neoghy.

At the beginning of the year 1856 the Neoghys were indebted to Mussumat Ooman Soondree, the wife of Tara Pershun Bagjee, in the sum of rupees 17,761, partly for moneys advanced by her, and partly for moneys advanced by Dwarka Doss on her husband's guarantee, for the purpose of carrying on the factories; and those advances were secured by certain instruments of mortgage dated the 20th of January, 1852, the 18th of April, 1853, and the

1st of January, 1856. These securities embraced the block of all the factories, and their crops at least for the year 1856–57.

On the 1st of January, 1856, Mussumat Ooman Soondree, by an instrument called a Deed of Remortgage, assigned all her interest in the factories under the before mentioned securities to Dwarka Doss, in order to secure the sum of rupees 9,761, being the balance then due in respect of his former advances, together with the future advances to be made by him for carrying on the factories. And it was thereby provided that he should take the factories under his control and management during the year 1263 Fuslee, or 1856–1857; thereby giving him the first charge or lien on the crop.

It does not very clearly appear whether under this stipulation he took possession of the factories; or, if he did so, how long he continued in possession. But on the 7th of July, 1859, he obtained a Decree in the Civil Court of Benares against Mussumat Ooman Soondree and the Neoghys, for the sum of rupees 23,672 as then due to him upon his mortgage; and on the 15th of the same month he and the Neoghys filed in Court a petition embodying the terms of a compromise into which they had entered. The effect of this was that Dwarka Doss was to suspend the execution which he had taken out under the Decree for rupees 23,672; was to advance further sums for manufacturing indigo from the stumps then on the ground; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one Balgobind Doss Seith, whom the Neoghys had nominated as their agent for that purpose. The rights of Dwarka Doss under the execution for any balance that might remain to him after the sale of indigo, were expressly reserved to him both against the factories and against all the Defendants to his suit. This arrangement was carried out by placing a servant or agent of Dwarka Doss in charge of the factories.

On the day on which this instrument of compromise was filed in the Benares Court (the 15th of July, 1859), the Respondent obtained a Decree in the Court of the Principal Sudder Ameen of Mirzapoor against the Neoghys for the sum of rupees 764, alleged to be due to him upon a mortgage of

the Putteetah factory, dated in Phagoon Budee 1st. Sumbut 1911 (being some time in A.D. 1855). Dwarka Doss intervened in this Suit as an objector, insisting that the factory had been attached for money due to him, and that the claim was fraudulent. But the Principal Sudder Ameen held that the objection could not be tried in that suit, and was no bar to the making of the usual Decree in a suit based upon a simple mortgage-bond. He accordingly passed the ordinary Decree against the Defendants (the Neoghys) and the mortgaged property for the sum found due.

The Respondent took out execution on this Decree for rupees 878 : 10. He first obtained an order for the attachment of both the Putteetah factory and another factory known as the Soorma factory, with the appurtenances of each, and of fifty maunds of indigo alleged to be at the former, and of thirty maunds of indigo or thereabouts alleged to be at the latter factory.

But on the 17th of September he made a further application to the Court, wherein he expressed his desire to abandon the execution against the Soorma factory, and submitted a more detailed list of the property at the Putteetah factory. He limited also the quantity of indigo to be attached at his suit to eight maunds. The order of the Court was that the attachment should be limited to the property comprised in this last list.

On the 23rd of September the Ameen, accompanied by two servants of the Respondent, who went to point out the property, proceeded to attach the factory and other property detailed in the application of the 17th of September. He made an actual entry upon the lands, and took an inventory of the property attached. He could not, however, complete the attachment of the eight maunds of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse, which was under lock and key; and the servants of Dwarka Doss refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two peons in charge of the property attached.

The Appellant, having heard of the applications for the attachment, had on the 22nd of September

applied to stay it. But as the Dusserah holidays, during which the Courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation; and the same cause prevented any further application touching the actual attachment.

In October, the Ameen, armed with a magistrate's order, and accompanied by a blacksmith, went to the storehouse for the purpose of breaking Dwarka Doss's lock, but appears to have desisted on the threat of the people in charge of the factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there.

On the 5th of November, these circumstances having been brought to the notice of the Principal Sudder Ameen, he passed an Order to the effect that if the Defendants to the Respondent's Suit, or their agents, should fail to appear in Court within a week and substantiate their objection to the opening of their lock, it should be broken, and the eight maunds of indigo be forcibly attached.

On the same day he required the Respondent, as the decree-holder, to answer the Appellant's objection of the 22nd of September within four days.

On the 25th of November, the Ameen having in the meantime received no order to suspend the attachment of the indigo, proceeded, under the Order of the 5th November, to remove the lock; attached eight maunds of indigo pointed out to him by a servant of the Respondent; and made two inventories, one of the eight maunds of indigo attached, the other of the other property found in the storehouse, which was not attached. Owing, however, to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under the lock of the Ameen, or in charge of his peons, until the 8th of December, when the eight maunds were finally weighed and removed to a separate place, and the other contents of the storehouse were left at the disposal of Dwarka Doss's people.

On the 12th of December the Ameen submitted to the Court a further report of his proceedings, and stated that he had, according to the Respondent's request, attached no property belonging to the factory except the eight maunds of indigo. The objection filed by the Appellant on

the 22nd of September appears to have been thenceforward confined to these; and it was finally disposed of by an Order of the 3rd of January, 1860, which, on the ground of the preferential claim of Dwarka Doss, directed the release of the eight maunds of indigo from attachment.

Some difficulty in carrying out this order was occasioned by the refusal of Dwarka Doss's agents to receive back this indigo except on terms with which the Ameen would not comply; but ultimately the eight maunds, and whatever else had been under attachment, were, by order of the Court, left at the disposal of those who were in possession and charge of the factory; and the peons were withdrawn from the premises on the 28th of February, 1860.

Upon this statement of admitted facts it appears clear to their Lordships that Dwarka Doss had, by reason of the attachment of the 23rd of September and subsequent proceedings, sustained an injury, for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the Respondent, under his Decree, was to sell the factory pledged to him, subject to the rights of Dwarka Doss under his prior mortgage. He had no right to invade or disturb the possession of the prior mortgagee by placing peons upon the property, in order to attach the factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done. The attachment must have been constructive. But under the new Code of Procedure, which had come into force on the 1st of July, 1859, the proper course was to issue and publish a written notice under the 235th and 239th sections of Act VIII. of 1859. For the actual seizure of the eight maunds of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the Respondent's mortgage. And that it was not part of the general property in the possession of the Neoghys, that Dwarka Doss had or claimed a lien upon it, the Respondent had had ample notice in his own suit, wherein Dwarka Doss had intervened as objector, and by the proceedings of the 12th of May, 1859, touching a distress for rent which has been put in evidence in the cause.

And the manner in which this wrongful attachment was carried out, the placing by the Ameen of his lock upon the door, subjected Dwarka Doss to the additional wrong of having the contents of the godown, to which *ultra* the eight maunds of indigo the Respondent made no claim, taken out of his control and dominion from the 23rd of September until the 8th of December. It is idle to say that his people ought in the first instance to have given the Ameen access to the godown, and delivered the eight maunds of indigo, or that they ought to have acted according to the directions of the Ameen concerning the use of the two locks, supposing those directions to have been given to the peons. The case cited by Mr. Leith from Bingham's Reports, shows that in this country a Plaintiff, in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it be said that in this case there is no evidence of the malicious character which the Plaint imputes to the trespass.

The Plaint in this case was filed on the 25th of February, 1860. The damages claimed were all in the nature of special damages, and consisted of three items, viz. Rs. 14,000, "on account of loss of 70 maunds of indigo at 200 rupees per maund"; Rs. 5,545 on account of indigo which it was alleged Dwarka Doss was prevented from manufacturing from indigo plants; and Rs. 2,250 on account of indigo which it was alleged he was prevented from manufacturing from indigo stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the Plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of September; and whether, if any had then remained to be used in the manufacture of indigo, the attachment would have prevented them from being so used. The two last items of damage may, therefore, be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo was disposed of by the Courts below in a different way. The Principal Sudder Ameen held that, though the Plaintiff did probably, as stated by the European indigo factors, sustain some trifling loss owing to the storehouse having remained locked up, this was due "to the refusal of his agent to unlock the door on the Ameen's application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the Plaintiff." And the Sudder Court considered that no good proof had been furnished that the Plaintiff's agents were ever prevented from having free access to the godown for the purpose of turning and drying the indigo cakes; but that, on the other hand, the Plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his agents, contumaciously obstruct the Ameen employed to distrain. The learned Judges seem to rest the first of their conclusions partly on the ground that the Plaintiff ought not to have kept his lock on the godown; partly on the evidence given by the Ameen of his instructions to the peons to open his lock, whenever the Plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the Plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the Court during the Dusserah vacation, he could neither follow up that objection, nor make any further objection to the acts of the Ameen until the holidays were over. Again, the case of *Bayliss* v. *Fisher*, 7 Bing., already referred to, shows that even if the instructions said to have been given by the Ameen to the peons were really given (as to which there is a conflict of evidence), the Plain-

tiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would have lost his right of action. It appears, therefore, to their Lordships that the Plaintiff's suit has been improperly dismissed with costs; and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in India to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the Respondent that the Suit was properly dismissed, inasmuch as the Appellant was by the form of his Plaint limited to the three heads of special damage therein laid; and, having failed to prove any such special damage, was precluded from recovering general damages for the trespass.

Their Lordships, however, are of opinion that there was evidence in the cause on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that if this had not been the case the Plaintiff could have recovered nothing. The Plaint might have been more accurately drawn, but substantially it seeks damages generally, as consequent on the wrongful attachment of the factory. The principle ordinarily applied to actions of *tort* is that the Plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the *gist* of the action. Thus in an action of slander for words actionable *per se*, when the Plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable *per se*. In the present case the *gist* of the action is not the special damage, but the unlawful attachment; and the Plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

Taking this view of the case, their Lordships feel that it is not desirable to remit the cause

for the assessment of damages in India, since no case has been made for taking fresh evidence, and the Judge below would have only those materials for a Judgment which are now before their Lordships.

They have, therefore, determined to take the course which was taken by this Committee in the case of *Le Breton* v. *Ennis*, 4 Moore's P. C. Reports, p. 323, and to assess the damages themselves. It must be confessed that the Appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged, and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at Rupees 500.

Their Lordships have felt some difficulty about the costs in the Courts below, and those of this Appeal. The costs of an action in India, particularly the stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a Plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case, there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the Appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of Rupees 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the Appellant could not have appealed to Her Majesty.

In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that they ought not to give to either party the costs of this Appeal. In making the apportionment, the Appellant will, of course, receive credit for any costs which he may have paid under the Decrees reversed.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make is, that

the Decrees both of the Sudder Court and of the Civil Court of Mirzapore be reversed; that the Appellant be declared entitled to recover damages to the amount of Rupees 500; that the cause be sent back to the Sudder Court, with directions to enter Judgment for the Plaintiff for that sum, and to deal with the costs in both the Courts below according to the practice of those Courts in like cases; and that each party do bear his own costs of this Appeal.