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PRIVY COUNCIL.

GURUDAS KUNDU CHAUDHURI

v.

HEMENDRA KUMAR RAY.*

1929

Feb. 12, 14.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Mesne profits—Decree and plaint silent as to future profits—Mesne profits recoverable up to what date—Suit between zemindars *jointly entitled—Land in* khas *possession of* patnidar*—Basis on which* mesne *profits recoverable—Code of Civil Procedure (Act XIV of 1882), ss. 211, 212.*

Land to which three families of *zemindars* were entitled in certain shares became diluviated. On reformation, the Government took possession and let it on a *patni* lease. One of the three families recovered the land from the Government and continued the *patnidar* in possession. Subsequently members of the other two families sued the family, who had recovered the land, and the *patnidar*, claiming possession of their shares and mesne profits, which they valued down to the date of the plaint. In 1906, they were decreed possession and mesne profits, to be ascertained in execution. The decree was finally affirmed by the Privy Council in 1917. Owing to the appeals, the plaintiffs did not obtain possession until 1919.

Held : (*1*) that the plaintiffs were entitled to mesne profits down to the date when they obtained possession ; (2) that the liability of the *zemindar* defendants under the decree was not joint and several with the *patnidar*, and, under the explanation to section 211 of the Code of Civil Procedure, 1882, the mesne profits recoverable from them should be based upon the rent they received from the *patnidar*, and not upon the produce value of the land.

Decree of the High Court, I. L. R. 53 Calc. 992, reversed on the second point.

CONSOLIDATED APPEAL (No. 156 of 1927) by the defendants, judgment-debtors, from two decrees of the High Court (June 9, 1926), varying decrees of the Subordinate Judge of Nadia.

The appeal arose in two execution proceedings in circumstances which appear from the judgment of the Judicial Committee.

*Present: Viscount Dunedin, Lord Carson and Sir Charles Sargant.

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The questions for determination were: (*1*) whether, under a decree for possession and mesne profits obtained by the respondents in 1906, the mesne profits were recoverable only down to the date of the suit, or down to the time when they obtained possession, that time being about 13 years later owing to appeals; and (*2*) whether the *zemindar* defendants (the appellants) were liable jointly and severally with a *patnidar* defendant, who was in actual possession, to pay mesne profits based on the produce value of the land, or were liable merely in respect of the rent they had received from the *patnidar*?

The Subordinate Judge held: (*1*) that, on the terms of the decree, the plaintiffs were not entitled to mesne profits for a period subsequent to the institution of the suit; (*2*) that the present appellants were liable on the basis only of the rent which they had received.

The High Court, by judgments reported at I. L. R. 53 Calc. 992, held to the contrary on both points. The learned judges (Cuming and Page JJ.) were of opinion, on the second question, that the present appellants were liable jointly and severally with those in actual possession and were joint tort-feasors with them; as some of the land had been let at a produce rent, the Court held that it could assume that it was all so let.

The Code of Civil Procedure, 1882, which was in force at the date of the decree, makes provision for mesne profits by sections 211 and 212.

Sir George Lowndes, K.C. (with him *E. B. Raikes*), for the appellants. Upon the construction of the decree, in conjunction with the plaint, the plaintiffs were entitled to mesne profits only down to the date of the suit. Section 212, not section 211, of the Code of 1882 applied. The High Court relied upon *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal* (1). That case, however, was under the Code of 1859, the relevant provisions of which differed from sections 211 and 212 of the Code of 1882.

(1) (1881) I. L. R. 8 Calc. 178; L. R. 8 I. A. 197.

Secondly, if section 211 applies, then, under the explanation, the appellants were liable only in respect of the rent paid to them. That was the only profit which they received; they acted reasonably in continuing the *patni* and not cultivating the lands themselves. The appellants were co-tenants with the plaintiffs,—they were, therefore, not trespassers. Having regard to the explanation to section 211, they plaintiffs.—they were, therefore, not trespassers. The Board held, in *Pugh* v. *Ashutosh Sen* (1), that *Doe* v. *Harlow* (2), relied on in the High Court as showing that the appellants were joint tortfeasors, lays down no principle at all.

Upjohn, K.C. (with him *Dube*), for respondents Nos. 1a to 3. The judgment of the trial judge in 1906 shows that he treated the claim as including future mesne profits. The decree upon its true construction entitles the plaintiff to them: *Dhurm Narain Singh* v. *Bundhoo Ram* (3); *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal* (4). The order for possession itself carries the right to mesne profits to date when possession is given: *Lelanund Singh* v. *Luckmissur Singh* (5). The mesne profits recoverable from the appellants were rightly based upon the produce value of the land. That clearly was the right basis as against the *patnidar*. The appellants were in law joint tortfeasors with him, and their liability under the decree was joint and several with him. That view was accepted by them in the High Court and is not affected by section 211.

Sir George Lowndes, K.C., replied.

The judgment of their Lordships was delivered by Viscount Dunedin.

This is a case which has arisen out of one of those curious effects of nature which have often been before the Board, namely, the behaviour of the Ganges. There were three families who, for brevity's sake,

(1) (1928) I. L. R. 8 Pat. 516; L. R. 56 I. A. 93.
(2) (1838) 12 Ad. & E. 40; 113 E. R. 724.
(3) (1869) 12 W. R. 74 C. R.
(4) (1881) I. L. R. 8 Calc. 178; L. R. 8 I. A. 197.
(5) (1870) 13 Moo. I. A. 490

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have been named the Kundu set, the Mukherji set and the Ray set. They were three families of *zemindars*, who were in joint possession of certain *mouzas* called Durlabhpur in Jirat and Hatikanda. They were in joint possession in law. It was quite true that they had a separate *touzi* number, but that makes no difference to the legal character of the possession. These properties disappeared under the Ganges. After a considerable period of years they reappeared and when they reappeared they were in juxtaposition to some property held by the Government. The Government assumed that the land which had come out of the Ganges was an accretion to their property, and proceeded to put tenants upon it, but, after a certain time, the *zemindars* woke up to the fact that it might be their property that had reappeared from under the Ganges, and, accordingly, they took the ordinary steps, namely, an application to the court of the Collector. Originally the two sets, the Ray set and the Kundu set, made applications, but the Ray set did not persevere, and there is a copy of the order sheet in the court of the Collector, in which, dealing with the Ray application, it says: "The "notice-givers took no steps to establish their right "to the lands claimed by them as a reformation *in* "*situ*. On the other hand, the Kundu Babus of "Mourhi have succeeded in establishing that Govern-"ment has no right to the *mouzas* of Jirat and "Durlabhpur." Accordingly, there is on the other order sheet a certified copy of order of release in which the Collector says: "I accordingly order that "the lands included within the Revenue Survey "boundaries of *Char* Jirat and Durlabhpur as shown "in exhibits A and A (2) be released." That put the Kundu people in lawful possession of the whole of the lands. It is quite true that they, although in lawful possession of the whole of the lands, were not really in one sense in lawful possession because they had, as regards the other two families, only a right to a 6 annas share; the other 10 annas share being in the right of the other two families.

When the Government had been there they had thought that the best way to deal with the land was to let it in *patni* to a person of the name of Srish. Srish seems to have worked the land well and settled cultivators upon it, and he paid his *patni* rent to the Government. When the Kundu family got possession of the land under the lease they thought that the best plan that they could adopt was to continue Srish and continue Srish they did.

After a little while, the other two families woke up to the fact that as the lands had been recovered, and as they had a right to a 10 annas share of it, they had better make effectual their right, and, accordingly, they raised action for that purpose. That action was defended by the Kundus. The first Judge gave judgment in favour of the plaintiffs; then there was an appeal, in which that judgment was reversed, and then there was an appeal to the Privy Council, which restored the judgment of the first Judge.

That suit was for the recovery of the land and mesne profits. The suit was brought against everybody who was found there: it was brought against the Kundus; it was brought against the Government and a certain gentleman connected with the Government who had had partial possession of land before the period at which the Kundus were readmitted, and it was also brought against Srish, who was found to be the person in actual possession. The decree in that suit was as follows: "It is ordered that the claim of this suit "be decreed with costs and mesne profits and interest "against the principal defendants and the defend- "ants subsequently added..............The amount of "mesne profits to be ascertained in execution."

The questions that are now before their Lordships arose when the amount of mesne profits had to be ascertained in execution. Two questions arose in connection with that. The first is as to the period for which the mesne profits should be allowed. The *terminus a quo*, so far as these particular defendants are concerned (because it is only the Kundu defendants that are here), was, of course, when they were

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first readmitted to possession, but the *terminus ad quem* might either be the raising of the suit or the time when the plaintiffs got an order giving them the right to be on the lands. Upon that the High Court have held that mesne profits must go to the further period and this appeal is first against that.

Their Lordships think that this matter is really decided by authority. " That the claim of this suit " be decreed with costs and mesne profits " has been decided to mean profits up to the time of the plaintiffs' readmission to the land. The argument on the other side was that when you looked at what was actually claimed in the plaint, the plaint had said: " Suit " for declaration of title to and for recovery of posses- " sion of immovable property and mesne profits, " valued at Rs. 7,545," and then when you come to the statements, in paragraph 9, the value of the land is put at Rs. 6,156, and then it goes on to say: " The " mesne profits amount to Rs. 1,389-5-8 as per " accounts given below." Now, that Rs. 1,389-5-8 is only a calculation up to the time of the institution of the suit. Although that is so, inasmuch as the decree is " with costs and mesne profits," it has been held in many cases and cannot be gone back upon that, section 211 of the Civil Procedure Code having said that: " When the suit is for the recovery of posses- " sion of immovable property yielding rent or other " profit, the court may provide in the decree for the " payment of rent or mesne profits in respect of such " property from the institution of the suit until the " delivery of possession to the party in whose favour " the decree is made or until the expiration of three " years from the date of the decree (whichever event " first happens)," a decree in this form is an exercise by the court of that power under section 211. Their Lordships are, therefore, clearly of opinion that on this first point the appeal fails.

Now, the second point is: On what basis the mesne profits are to be computed. The same section 211 gives an explanation of what " mesne " profits " are. " 'Mesne profits' of property mean

"those profits which the person in wrongful posses- "sion of such property actually received, or might, "with ordinary diligence, have received therefrom, "together with interest on such profits." Undoubtedly, in the lower court, the principal argument seems to have turned upon a contention which does not commend itself to their Lordships. It was argued seemingly that the true criterion was not what the person in possession got but what the person who was out of possession might have got if he had been there, and it was said that inasmuch as you were a *zemindar* you would not have cultivated yourself; you would have taken a rent; here is the rent which is given by Srish, and, therefore, that ought to be the proper criterion. That argument was quite rightly put aside. But then there is another argument. Mr. Upjohn wished their Lordships to think that this other argument which will be stated presently was never started until the parties got before this Board. Their Lordships do not think that can be said, because in the judgment of the High Court this was said :—

"The second question now arises for consideration, namely, upon what basis are such mesne profits to be ascertained? In this connection the respondents have relied upon two main contentions : (*1*) That the plaintiffs are entitled to recover from the defendants only such profits as the plaintiffs using reasonable diligence could have made if they had been in possession of the lands, and inasmuch as the plaintiffs are either *zemindars* or *patnidars* and would not themselves have worked as cultivators of the land, they are only entitled to recover mesne profits upon a rental basis."

That is the argument which has already been mentioned as not being worthy of very much attention. But then the learned Judge goes on :—

"(2) That each of the judgment debtors is liable only for the portion of the mesne profits that he actually received or with reasonable diligence might have received during the period in which he was in wrongful possession ; that is to say, the person in actual possession is liable only for the net profit which he received after deducting working expenses."

Now, the question which was directly raised by the appellants here is this : They say : "We are only "liable for what we really got, namely, what we got "from Srish; allowing Srish to go on as he had done "with the Government was perfectly reasonable, you "cannot think that it was necessary for us to put out

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"Srish and begin to cultivate ourselves, and, there-"fore, we, in the terms of the Code, are only liable "for what we really got."

Mr. Upjohn has argued the case with his usual ability and more than his usual ingenuity, and it comes to this: He begins with the decree and he says that was a decree for joint and several liability. Then he says: "Oh, these people really did not "take this point sufficiently." Well, they may not have taken it sufficiently in the first court because their Lordships think they rather wandered into the question which they have already dealt with, but their Lordships think it is perfectly clear from what has been read of the judgment that they took it in their second point referred to by the High Court. Then the argument proceeds thus:—

The judgment was against them, and it was against them upon this theory that these people were all trespassers; not only were the Kundu defendants trespassers but Srish was a trespasser. He was put in by the Kundus; the Kundus had no real right, and, therefore, he had not a right. Accordingly, as the decree was for joint and several liability, you may take the mesne profits upon the calculation of what Srish got out of the land, and get decree against all the others for that amount.

Their Lordships have great difficulty in looking upon Srish as a trespasser, or, for that matter, in one sense, even the Kundus as trespassers, because they were in possession of the land and on the only legal title to it which existed, namely, the lease from the Government. It is quite true, in one sense that they were in wrongful possession because they were taking the whole profits, whereas they were only entitled to 6 annas of the profits and not to 16 annas of the profits. Be that, however, as it may, their Lordships cannot accept this argument. They do not view the decree as a proper joint and several decree. They think it is to be construed *applicando singula singulis*. Let this test be taken: Suppose any one of the numerous defendants had refused

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to quit possession, could all the other defendants have been put in prison because that one defendant was in contumacy to the decree? What authority is there for saying that under such a decree as against any one particular defendant you are entitled to say: I will hold you liable not for the mesne profits which you got according to the terms of the Act, but for the mesne profits which somebody else got and with whom, under the decree, you are liable? Their Lordships think it would be the height of injustice to hold that and they do not see that they are bound to hold it.

Therefore, their Lordships think that the basis of the judgment of the High Court here fails and that dealing with these Kundu defendants, and with them alone, their liability is just exactly what it is said to be by section 211 of the Civil Procedure Code, viz., that which they themselves received, no case having been made that they by ordinary diligence could have got any more.

The result is that upon this second point their Lordships are of opinion that the appeal succeeds.

Their Lordships will, therefore, humbly advise His Majesty to declare that the mesne profits to be allowed up to the date of the readmission of the plaintiffs to the land, but are to be calculated only on what the defendants actually themselves received as rent from the land let. There will be no costs either before this Board or in any of the courts below as this has been a divided success, and any costs paid must be repaid.

Appeal allowed in part.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Watkins & Hunter; Vallance & Vallance.*

A. M. T.