PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

SAROJEKUMAR ACHARJYA CHAUDHURI.

P. C.*
1934.

Nov. 8, 12, 13, 15, 16; *Dec.* 18.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Mesne Profits—Decree against Government—Char *lands*—Selâmi—*Collection expenses—Rate of interest—Code of Civil Procedure (Act V of 1908), s.* 2(12).

In 1890, the Government obtained possession under Bengal Act IV of of 1868, section 3, of an island *char*, which had emerged from the river Padma, and settled and assessed the land according to the rules in force. In 1902, the respondents brought a suit claiming a fourth share of part of the *char* lands, with mesne profits, on the ground that the land in suit was a reformation *in situ* of land, of which they were co-proprietors. They ultimately obtained possession under a judgment of the Privy Council delivered in 1917. The present appeal related solely to the mesne profits to which the respondents were entitled :—

Held : (*i*) that the Government was liable in the same way as a trespasser for mesne profits as defined by section 2 (*12*) of the Code of Civil Procedure, 1908;

(*ii*) (*a*) that for *selâmi*, which had not been obtained, the Government was not liable, because the rents imposed were fair and equitable, and there was no satisfactory evidence of want of ordinary diligence in not obtaining *selâmi* ; the fact that the Government, in compromising suits brought by the other co-sharers, had agreed to pay them a percentage for *selâmi* did not affect the question. (*b*) That, although the Government adduced no evidence as to the expenses of collection, an allowance of 10 per cent. should be made therefor, that being the customary allowance. (*c*) That the rate of interest upon the mesne profits should be 6 per cent. per annum (not 12 per cent. as held by the High Court), that being the fair rate of interest in the absence of special circumstances.

Decree of the High Court varied.

Appeal (No. 92 of 1933) from a decree and supplementary decree (January 14 and February 25, 1932) of the High Court varying a decree of the Subordinate Judge, first court, Faridpur (July 13, 1927).

In 1902, the respondents, or their predecessors, instituted a suit against the appellants claiming a

* *Present* : Lord Blanesburgh, Lord Wright and Sir John Wallis.

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declaration of their title to a share in certain *char* lands, possession of which had been taken on behalf of the Government in 1890, and for mesne profits. The respondents obtained a decree under a judgment of the Privy Council, delivered in 1917, which reversed the decree of the High Court and restored the decree of the trial judge.

The accounting period, for which mesne profits had to be calculated, was from May 29, 1899, to April 15, 1921. The appellant disputed the sum decreed by the High Court (Mukerji and Mitter JJ.) in three respects, namely, (i) large sums allowed in respect of *selâmi*, (ii) the disallowance of collection expenses, (iii) the allowance of 12 per cent. interest.

The facts appear from the judgment of the Judicial Committee.

Dunne K. C. (with him *Pringle*) for the appellant. Hypothetical collections for *selâmi* should not have been included. Full and equitable rents were imposed in accordance with the Regulations, which aim at there being a reliable class of cultivating tenants rather than the imposition of rack rents and charges. The Government, having performed its statutory duty in fixing the rents, are not liable for sums beyond that. The question is whether the profits realized were the reasonable profits for Government to have made, not whether a private person might have exacted more. But, in any case, the evidence did not show that *selâmi* could have been obtained; there was no evidence that the rents were unreasonably low unless *selâmi* was exacted. The terms of the compromise with the co-sharers were not admissible. The appellant was entitled to a deduction of 10 per cent. in respect of collection charges, that being recognized as the fair allowance in India: *McArthur & Co.* v. *Cornwall* (1), *Hurro Durga Chowdhrani* v. *Surut Sundari Debi* (2), *Dhanarajagerji* v. *Parthasaradhy* (3). In *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (4), the

(1) [1892] A. C. 75, 89.
(2) (1881) I. L. R. 8 Calc. 332; L. R. 9 I. A. 1.
(3) (1932) I. L. R. 57 Mad. 49, 60.
(4) (1900) I. L. R. 27 Calc. 951 (970); L. R. 27 I. A. 110 (127).

Board allowed 10 per cent. for expenses although there was no evidence as to the actual expenses. The rate of interest allowed should have been the statutory rate of 6 per cent; there were no circumstances to justify a higher rate: *Sashikanta Acharyya* v. *Sarat Chandra Rai Chaudhuri* (1), *Dhanarajagerji* v. *Parthasaradhy* (2), *Girish Chander Lahiri* v. *Sasi Sekhareswar Roy* (3). As to the nature of mesne profits, reference was made to *Gurudas Kundu Chaudhuri* v. *Hemendra Kumar Ray* (4) and *Gray* v. *Bhagu Mian* (5).

De Gruyther K.C. (with him *Parikh*) for the respondents. Bengal Act IV of 1868 applied only to Government land which emerged as an island, and therefore did not apply to the present case. The land in suit was a reformation *in situ* of part of the respondents' *zemindâri* and was their property upon emergence: *Lopez* v. *Maddan Thakoor* (6). Even if the Act applied, the Government was liable in respect of mesne profits upon the same basis as an ordinary trespasser, namely, the whole profit which might have been made with diligence: *Sourendra Nath Mitter* v. *Secretary of State for India in Council* (7). That ordinarily includes *selâmi*: *Birendra Kishor Manikya* v. *Secretary of State for India* (8), *Dhanarajagerji* v. *Parthasaradhy* (2). Apart from the compromises, the evidence showed that a further 5 per cent. at least might have been obtained as *selâmi*. The rate of interest on the mesne profits was a matter within the discretion of the court, and, having regard to the unreasonable conduct of the Government in retaining possession even after the decision of the trial judge, the rate allowed was not excessive: *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (9), *Sashikanta Acharyya* v. *Sarat Chandra Rai Chaudhuri* (1). There was no evidence as to the collection expenses, and the court was justified in not allowing them.

(1) (1921) 34 C. L. J. 415, 420.
(2) (1932) I. L. R. 57 Mad. 49, 60.
(3) (1905) I. L. R. 33 Calc. 329.
(4) (1929) I. L. R. 57 Calc. 1; L. R. 56 I. A. 290.
(5) (1929) I. L. R. 9 Pat. 621; L. R. 57 I. A. 105.
(6) (1870) 5 B. L. R. 521; 13 M. I. A. 467.
(7) (1920) 35 C. L. J. 196.
(8) (1920) I. L. R. 48 Calc. 766.
(9) (1919) I. L. R. 42 Mad. 661.

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Dunne K.C., in reply. The Government properly took possession under Bengal Act IV of 1868; both courts found that the land was an island *char* in 1888. The Government having accounted for all the profits which they received, the onus was upon the plaintiffs to prove that more might have been recovered.

The Judgment of their Lordships was delivered by

SIR JOHN WALLIS. The appeal in this case, which now comes before the Board for the third time, is solely concerned with questions of the ascertainment of mesne profits under the decrees of the Subordinate Judge of Faridpur, of the 22nd July, 1907, which were restored, with a variation which is not material, by the judgment of this Board of the 2nd July, 1917, after it had been set aside by the High Court. Four separate suits for possession and mesne profits had been instituted against the present appellant, Secretary of State for India in Council, by four sets of co-sharers, each claiming a one-fourth share in the suit lands, but three of these suits had been compromised while the decrees were under appeal to the High Court and the present respondents are the plaintiffs in suit No. 17 of 1902, who were not parties to the compromise. The suit lands form part of an island *char* which began to emerge out of the bed of the river Padma, a part of the Ganges, in 1888, and was taken possession of on behalf of Government on the 30th May, 1890, by the Subdivisional Officer of Manikganj under the provisions of section 3 of Bengal Act IV of 1868.

> Whenever it shall appear to the local revenue-authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under clause 3, section 4 of Regulation XI of 1825 of the Bengal Code, the local revenue-authorities shall take immediate possession of the same for Government, and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Board of Revenue, whose order thereupon, in regard to the assessment, shall be final.
>
> Provided, however, that any party, aggrieved by the act of the revenue-authorities in taking possession of any island as aforesaid, shall be at liberty to contest the same by a regular suit in the civil court.

The third clause of section 4, Bengal Regulation XI of 1825, "for declaring the rules to be observed in

"determining claims to lands gained by alluvion or by "dereliction of a river of the sea," is in these terms:—

When a *char* or island may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river or sea between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government.

But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land tenure or tenures of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section with respect to increment of land by gradual accession.

This clause had been interpreted in some decisions as meaning that islands, *etc.*, thrown up were the property of Government, but they were overruled by this Board in *Lopez* v. *Maddan Thakoor* (1).

Appeals from the order of the Subdivisional Officer were preferred to the Commissioner and to the Board of Revenue, and after further investigations a large part of the *char* was surrendered as reformation *in situ* to the former owners; but, as regards the suit lands, the Board of Revenue dismissed the appeal on the ground that they were not shown to be reformations *in situ* of lands belonging to the plaintiffs, but were reformations *in situ* of lands which had been in the *khâs* possession of Government. The courts in India differed on this question, which was apparently one of considerable difficulty; but, as already stated, this Board, agreeing with the Subordinate Judge, gave the plaintiffs a decree for possession and mesne profits, and the only questions in these appeals are whether mesne profits have been correctly determined by the High Court in the judgment under appeal: (i) as to the defendant's liability for the omission of the revenue-authorities to collect any *selâmi* or premium from tenants admitted to the suit lands; (ii) as to the defendant's right to a deduction of 10 per cent. for expenses of collection; and (iii) as to the rate at which the interest provided for in the definition of mesne profits in section 2 (*12*) of the Code of Civil Procedure should be charged.

(1) (1870) 5 B. L. R. 521; 13 M. I. A. 467.

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Mesne profits are there defined as—

> Those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefor, together with interest thereon.

As regards the finding of the High Court that the defendant is accountable for additional profits which the revenue-authorities could have realised with reasonable diligence, by way of *selâmi* or premiums, the contention has been raised for the first time before the Board that, in taking possession of, assessing, and settling the lands according to the rules in that behalf, those authorities only did what they were required to do by the statute, and that the defendant cannot be held liable for their failure to do more. Their Lordships are unable to accept that contention, because in their opinion the proviso that the party aggrieved by the action of the revenue-authorities in taking possession should be at liberty to contest the same by a regular suit necessarily imports that, where possession has been taken on behalf of Government of property which is the subject of private ownership, the defendant in such regular suit cannot justify under the section but must be held answerable to the party aggrieved in the same way as a trespasser, as has been done in this case. To hold otherwise might seriously affect the remedy given by the proviso. Even so, on the terms of the definition of mesne profits what the plaintiffs have to show is that, with reasonable diligence, more might have been realised than was actually realised by the revenue-authorities in the way of profits, which term includes both rents and premiums, if any. As to what amounts to due diligence, in their Lordships' opinion, the person in wrongful possession is not liable for failure to realise the highest possible rates of rent and premium from the tenants. It is enough if taking account of both rent and premium, if any, a fair return has been realised from the land, and their Lordships will deal with the case on that basis in considering whether the plaintiffs have shown that there has been a want of reasonable diligence on the part of the defendant.

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The accounting period, beginning three years before the date of the suit, was from the 29th May, 1899, to the 15th April, 1921, the date of delivery of possession under the judgment of the Board of the 2nd July, 1917. The Special Commissioner appointed to take the necessary accounts covering a period of twenty-two years, after taking evidence, reported on the 9th January, 1927, that the revenue authorities could have realised an additional sum of Rs. 25,200 by way of rents and a sum of Rs. 30,300-12-9 by way of *selâmi* or premium on the admission of tenants, during the accounting period. The Subordinate Judge affirmed the finding of the Commissioner as to rents, but disallowed the claim for *selâmi* on the erroneous view that it would not come within the definition of mesne profits.

There were cross appeals to the High Court, and the two Indian Judges who heard the appeal subjected the evidence adduced for the plaintiffs both as to rates of rent and *selâmi* to a very careful examination, and came to the conclusion that it was most unsatisfactory and wholly unreliable. They accordingly reversed the finding of the Subordinate Judge which held the defendant liable for want of reasonable diligence in collecting rent and from this part of their judgment the plaintiffs have not preferred an appeal.

As regards *selâmi* the learned Judges most carefully examined the evidence adduced for the decree-holders as to the rates of *selâmi* collected by them and other landowners in the neighbourhood, and commented, among other things, on the fact that the *nathis*, or orders, for the admission of tenants on payment of an adequate *selâmi* and the *sumârs*, or special collection books in respect of *selâmi*, were only opened after the institution of the suit, and that the entries in these *sumârs* were not corroborated as they should have been by the entries in the ordinary accounts. These are matters about which the learned Judges were in a much better position to judge than this Board, and their Lordships see no reason to differ from their conclusion that the documentary

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evidence for the decree-holders as to *selâmi* was extremely unsatisfactory and unconvincing, and that in the circumstances it was not possible to calculate a rate of *selâmi* with any degree of accuracy.

In these circumstances, the learned Judges had recourse to the terms of the compromise between the defendant and the decree-holders in the other three suits, and finding that the defendant had agreed to pay a *selâmi* of Rs. 5 per *bighâ* under that compromise, applied the same rate not only to cases of admission after the beginning of the accounting period in 1899, but to all admissions from the taking of possession, with the result that they awarded Rs. 19,710-9-5 under this head as *selâmi*, as compared with Rs. 30,300-12-9 awarded by the Commissioner. As to this award, their Lordships agree with the appellant's contention that the fact that the defendant had agreed to pay a *selâmi* of Rs. 5 per *bighâ* in a compromise in which both sides agreed to give up a great deal does not afford a proper basis for settling a rate of *selâmi* in this case, and cannot be accepted. They agree, also, with the appellant's further contention that the defendant could not be held liable for not collecting *selâmi* during the accounting period from tenants who were already in possession at the beginning of that period, that is to say, in 1899, as the respondents have failed to show that during the accounting period *selâmi* could have been collected from tenants in possession before the beginning of that period. The plaintiffs' claim for *selâmi* must therefore be limited to *selâmi* in respect of admissions during the accounting period.

As regards the claim for failure to collect *selâmi* on the admission of tenants during the accounting period, as already observed, the profits of the land consist of rents and *selâmi*, if any; and in considering whether the revenue authorities failed to exercise reasonable diligence, it is necessary to see what was done by them in this matter. As required by the section under which possession was taken, they proceeded to assess and settle the lands according to

the rules in that behalf, that is to say, under the provisions of clause 6 of section 2 and the following thirty-three sections of Regulation VII of 1822 which by section 2 of Regulation IX of 1825 were made applicable to all lands in Bengal which had not been permanently settled, and to all lands in the *khâs* possession of Government.

The Regulation of 1822 imposes upon the settlement officers the duty of seeing that the *râiyats* are not made to pay excessive rates of rent to their landlords, and the Bengal Tenancy Act of 1885, which is applicable to these lands, contains provisions for securing that *râiyats* should pay rents at fair and equitable rates. In this case the revenue-authorities would appear to have done their best to settle rates of rent which would be fair to both parties. The Board of Revenue refused to confirm the rates imposed at the first settlement in 1894, and directed a fresh settlement, with the result that the rates were increased to such an extent that the settlement officer recommended that the settlement should be for fifteen years, instead of five, as otherwise the increase would cause hardship to the tenants.

The learned Judges of the High Court most carefully considered what was done by the revenue-authorities in this matter, and arrived at the conclusion that there was no want on their part of such diligence as a prudent and fair-minded proprietor could be expected to show in dealing with his own property in the matter of the realisation of rent. This is in effect a finding that the rents realised were fair and equitable, and therefore such as contemplated by the legislature. In those circumstances it would, in their Lordships' opinion, be difficult to hold that the defendant, assumedly a person in wrongful possession, had been wanting in reasonable diligence in not realising more. Moreover, in the present case, having regard to the very unsatisfactory nature of the decree-holders' evidence as to what was obtainable from the suit lands by way of rent and *selâmi* and to the fact that the learned Judges refused to act on it,

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their Lordships are of opinion that plaintiffs have failed to show that there was any want of reasonable diligence in realising mesne profits from the suit lands. Consequently, the plaintiffs' claim for additional profits by way of *selâmi* fails and the decree of the High Court must be varied accordingly.

The next objection is that both the lower courts refused to make any allowance for the expenses of collection on the ground that the defendant failed to adduce any evidence as to the amount of such expenses. Profit always means the difference between the amount realised and the expenses incurred in realising it; and this rule has been expressly applied by this Board as regards mesne profits in *Hurro Durga Chowdhrani* v. *Surut Sundari Debi* (1). In India 10 per cent. is the customary allowance for mesne profits, and it was therefore unnecessary for the defendant to adduce any evidence on this subject. In *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (2), 10 per cent. was substituted by this Board under the head for 5 per cent., although the rate had not been made the subject of evidence. The decree must, therefore, be varied by allowing the defendant a reduction of 10 per cent. on the collections.

The third objection is that the rate of interest on mesne profits awarded to the plaintiffs as forming part of the mesne profits under the definition has been fixed at 12 per cent., whereas the proper rate is 6 per cent. The Subordinate Judge allowed interest at 12 per cent. on the ground that the Government were not *bona fide* trespassers, and the High Court, rightly reversing this finding, none the less maintained the rate of 12 per cent., which they regarded as a fair compensation for the decree-holders who had been kept out of their property. That was also the rate adopted in some earlier decisions of that Court. In *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (2), where the High Court had varied the decree of the Subordinate Judge by disallowing interest on

(1) (1881) I. L. R. 8 Calc. 332; L. R. 9 I A 1.

(2) (1900) I. L. R. 27 Calc. 951; L. R. 27 I A. 110.

mesne profits at 6 per cent., this Board, when restoring the decree of the Subordinate Court, awarded interest at 6 per cent., and this was apparently done without objection being taken.

In *Sashikanta Acharyya* v. *Sarat Chandra Rai Chaudhuri* (1), the question of the proper rate of interest to be granted on mesne profits was fully considered, and it was decided that under existing conditions 6 per cent. was the proper rate. Their Lordships are of opinion that, in the absence of special circumstances, 6 per cent. is a fair rate of interest, a sufficient compensation to the decree-holder for having been deprived of the rents and profits of the suit lands. The rate of interest should be reduced to 6 per cent.

In the result, their Lordships are of opinion that the decree of the High Court should be varied by disallowing *selâmi*, by allowing the defendant a deduction of 10 per cent. for the expenses of collection, and by reducing the rate of interest from 12 to 6 per cent., and they will humbly advise His Majesty accordingly. The respondents will pay the appellant's costs.

Solicitor for appellant: *Solicitor, India Office.*

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

A.M.T.

(1) (1921) 34 C. L. J. 415.