to the question of the weight. I would, therefore, set aside the verdict against Ramsawarath Singh on the ground that it is erroneous by reason of a non-direction amounting to a misdirection. In my opinion Ramsawarath's is also not a case for a retrial having regard to the evidence available.

The result is that I would allow the appeal of Tribeni and Ramsawarath, set aside their convictions and sentences, and acquit them. I would confirm the convictions of the five appellants in the other two appeals. The sentences passed upon them do not call for interference.

MACPHERSON, J.—I agree.

PRIVY COUNCIL.

GRAY

v.

BHAGU MIAN.*

1929.

Dec, 6.

On Appeal from the High Court at Patna.

Mesne Profits—Basis of Assessment—Agricultural Land—Rental Value—Code of Civil Procedure (Act V of 1908), section 2(12).

Under the definition of " mesne profits " in section 2(12) of the Code of Civil Procedure, 1908, the sum to be awarded is not what the plaintiff has lost by his exclusion from the land but what the defendant has, or might with reasonable diligence have, made by his wrongful possession. In the case of agricultural land that depends upon what an ordinary prudent agriculturist would have grown, and if the defendant for his own purposes has grown a less profitable crop the mesne profits are not thereby limited. If the defendant has let the land the rent received is ordinarily the measure of the profits in the absence of evidence that a higher rent could have been obtained by reasonable diligence; but if he has cultivated the land himself the cultivation profits are the primary consideration.

**Present:* Viscount Dunedin, Lord Darling, Lord Tomlin, Sir George Lowndes and Sir Binod Mitter.

1929.

GRAY v. BHAGU MIAN.

The above principles applied in the case of mesne profits under a decree for joint possession with the defendant.

Gurudas Kundu Chowdhury v. *Hemendra Kumar Roy*(1), referred to.

Judgment of the High Court affirmed.

Appeal (no. 3 of 1928) by special leave from a decree of the High Court (January 25, 1926) affirming a decree of the Subordinate Judge of Muzaffarpur.

In circumstances which appear from the judgment of the Judicial Committee the respondents obtained against the appellants a decree for joint possession with them of about 23 bighas of land together with mesne profits.

The report of a commissioner appointed by the Subordinate Judge assessed the mesne profits at Rs. 19,869, on the basis of what the land would have produced if tobacco, sugarcane and similar productive crops had been grown.

The Subordinate Judge adopted the report holding that the basis upon which the mesne profits had been assessed was correct; he made a decree accordingly;

The High Court (Das and Ross, JJ.) affirmed the decree.

1929. *October 18, 21.—Dunne K. C.* and *E. B. Raikes K. C.* for the appellants:

The appellants being joint owners of the land the respondents were only entitled as mesne profits to a proportion of the fair commercial rent obtainable for the land: *Watson & Company* v. *Ramchund Dutt*(2). If, however, the mesne profits should be based upon the produce of the land, it is the produce from growing indigo. Under the definition of mesne profits in section 2(*12*) of the Code of Civil Procedure "ordinary diligence" did not require the appellants

(1) (1930) I. L. R. 57 Cal. 1; L. R. 56 I. A. 290.
(2) (1890) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110.

to embark upon growing other crops. The High Court in considering the profit which would have been made by the plaintiffs, applied the wrong principle. Under the definition the test is not the profit which the plaintiffs would have made, but what the defendants made or could have made acting reasonably.

Dube, for respondent no. 14. Under the definition in the Code the test was not the rental value but the profit which the appellants with ordinary diligence might have made, and that is a question of fact upon which the findings are conclusive. The authorities as to mesne profits have always drawn a distinction between the cases where the defendant has let the land and where he has cultivated it himself: *Soudaminee Dabee* v. *Anund Chunder Haldar*(1), *Laljee Sahay Singh* v. *Walker*(2), *Pundit Lachmi Narayan* v. *Mazhar Hassan*(3), *Rookumee Kooer* v. *Ram Tuhul Roy*(4). *Watson & Company* v. *Ramchund Dutt*(5) was not a case of mesne profits against a person in wrongful possession. The profit which could have been made by the plaintiffs, who grew on their neighbouring land the more profitable crops, was evidence of the profit the defendants might have made. Reference was made also to *Gurudas Kundu Choudhry* v. *Hemendra Kumar Roy*(6).

E.B. Raikes K. C. replied.

December 6. The judgment of their Lordships was delivered by—

SIR GEORGE LOWNDES.—The only question raised for determination in this appeal is as to the basis upon which mesne profits should be ascertained in respect of the wrongful possession of agricultural land.

(1) (1870) 13 W. R. 37.
(2) (1902) 6 C. W. N. 732.
(3) (1908) 12 C. W. N. 650.
(4) (1872) 17 W. R. 156.
(5) (1890) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110.
(6) (1930) I. L. R. 57 Cal. 1; L. R. 56 I. A. 290.

1929.

GRAY v. BHAGU MIAN.

The appellants, who were the owners of an indigo factory, had for a number of years leased certain lands from the predessors in title of the principal respondents, and had utilised the lands in growing indigo for the purposes of their factory. The lease having expired in or about November, 1919, the respondents became entitled to possession of the major portion of the lands. The appellants subsequently obtained a new lease of a small portion, which did not belong to the respondents, and refused to give up possession of the respondents' portion, alleging themselves to be occupancy tenants. The respondents sued to establish their title and were successful, a decree being passed in their favour for joint possession with the appellants and for mesne profits of an area of some 23 *bighas*. After proceedings in appeal to the High Court the matter came again before the Subordinate Judge for the ascertainment of the mesne profits awarded by the High Court's decree. A local enquiry was held by a Commissioner, and the Subordinate Judge eventually found a sum of Rs. 19,869-11-11 to be due to the respondents, for which he passed a final decree in the respondents' favour on the 15th August, 1922. The appellants again appealed to the High Court, alleging this amount to be excessive, but their appeal was dismissed, and they have now by special leave appealed to His Majesty-in-Council.

The calculation by the Courts in India was made upon the basis of the crops which the land was capable of producing. It was, in fact, planted with indigo, but the Courts found, and it is not disputed before this Board, that it was capable of producing more profitable crops, such as sugarcane, wheat, tobacco, etc., crops which were in fact grown by the appellants on other neighbouring lands.

The question in their appeal is whether this was the correct basis of calculation. Their Lordships have no doubt that it was, though they are not

altogether in agreement with the reasoning by which the learned Judges in India have reached this conclusion.

"Mesne profits" are defined by section 2(*12*) of the Code of Civil Procedure, 1908, as

> "those profits which the person in wrongful possession [of the property in question] actually received, or might with ordinary diligence have, received therefrom."

The appellants' first contention was that the rental value of the land, which they put at Rs. 5 per *bigha*, was the proper criterion. This would no doubt ordinarily be so where the person charged had merely let the land out to others. In such a case the rent that he received, if there was no evidence that a higher rent could "with ordinary diligence" have been obtained, would be the measure of the profits for which he would be liable. But when (as in the present case) the wrong-doers cultivated the land themselves, the definition above cited clearly makes the cultivation profits the primary consideration.

Alternatively, the appellants contended that the actual cultivation having been in indigo, the indigo profits only should have been allowed. But it is, in their Lordships' opinion, clear that in this case the growing of indigo was for the special purposes of the appellants, who were the owners of the adjacent factory. Apart from this there seems to be no reasonable doubt that the ordinary farmer would have grown the other more profitable crops, for which the land was admittedly adapted, and upon which the calculation of the Courts in India was founded. Their Lordships think that in all such cases the true test must be what the ordinary prudent agriculturist would have grown.

The learned Judges of the High Court came to the same conclusion, but by a different process. They say in their judgment that the rental test is inappropriate because *the plaintiffs* (the respondent in this

1929.

GRAY v. BHAGU MIAN.

appeal) are themselves cultivators, and if they had been let into possession would undoubtedly have cultivated the land and would not have let it out on rent. Again, as to the crops, they say that the true test is what *the plaintiffs* would have grown if they had had possession. Their Lordships are unable to accept this line of reasoning, though it has been pointed out to them that it has the sanction of previous decisions in India, which have been cited in the argument. The test set by the statutory definition of mesne profits is clearly not what the plaintiff has lost by his exclusion, but what the defendant has, or might reasonably have, made by his wrongful possession. What the plaintiff in such a case might or would have made can only be relevant as evidence of what the defendant might with reasonable diligence have received. Their Lordships are in effect only repeating what was said by Lord Dunedin in delivering the judgment of their Board in a recent case, in which the same argument was used: See *Gurudas Kundu Choudhury* v. *Hemendra Kumar Roy*(1).

For the reasons above stated their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors for appellants: *Sanderson, Lee and Co.*

Solicitors for respondent no. 14: *W. W. Box and Co.*

(1) (1930) I. L. R. 57 Cal. 1; L. R. 56 I. A. 290.