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respondent was there, and that she then wrote to her informant to ascertain his address and received a reply saying that he had left Bombay; that since leaving for Vizianagram the respondent had not returned to Calcutta, and that she had enquired of friends of the respondents and of persons with whom he had business dealings in Calcutta if they could give her his address, but without success, and that she had been unable to get any information regarding his whereabouts, and that consequently she had been unable to have a copy of the decree served upon him or give him notice of this application.

Mr. *T. A. Apcar* on behalf of the petitioner applied to have the decree made absolute, and submitted that under the circumstance he was entitled to the order asked for, notwithstanding that no copy of the decree had been served or notice of the motion given. He referred to the cases cited in Belchambers's Practice, pages 419 and 420, to the decision of Trevelyan, J., in *Hoskins* v. *Hoskins* (1), and to Brown on Divorce, Appendix II, page 534, Rule 80.

WILSON, J.—On the authorities I think you have shown sufficient cause for making the decree absolute, and it will be made absolute accordingly. Costs of this application will be cost in the cause.

H. T. H. *Order made.*

Attorney for petitioner, Baboo *O. C. Gangooly.*

PRIVY COUNCIL.

*P. C.** 1891. *January* 28, *Feby.* 21.

MAHABIR PERSHAD AND OTHERS (OBJECTORS, APPELLANTS) AND RADHA PERSHAD SINGH (PETITIONER, RESPONDENT) AND A CROSS-APPEAL.

[On appeal from the High Court at Calcutta.]

Mesne profits—Evidence—Presumption of fact.

In determining the mesne profits upon alluvial land gained by accretion and decreed to the respondent, the amount of such profits depending upon

* *Present* :—LORDS WATSON, HOBHOUSE, and MORRIS, and SIR R. COUCH.

(1) Unreported.

the quantity of land that had been under cultivation during a definite period, the Courts below found that, at the end of that time, an area of a certain number of bighas was cultivated land. There was no evidence, however, to show what had been the increase year by year of the area cultivated; and, on this question, the appellants, objecting to the amount of the mesne profits assessed by the Court, could have produced evidence consisting of the papers usually kept in a zemindar's serishta, showing how gradual the increase had been. But these documents they withheld. *Held*, that, on the above facts, the Courts had properly presumed against them, that the entire area of all the bighas above mentioned had come under cultivation from the beginning of the period.

APPEAL and cross-appeal from a decree (3rd February 1885) of the High Court, varying an order (12th November 1881) of the Subordinate Judge of Shahabad.

The appellants were judgment-debtors under decrees adjudging to the respondent's father, and predecessor in estate, possession of 1,653 bighas of land gained from the Ganges in the Shahabad district, and also mesne profits. These were confirmed by the order of Her Majesty in Council of 29th June 1871, which remitted the decrees to the High Court for ascertainment of the amount of mesne profits. The appeals terminating in that order are reported as *Pahalwan Singh* v. *Maharaja Muhessur Bukhsh* and *Muhessur Bukhsh* v. *Meghburn Singh* (1). The present respondent, and decree-holder, possession of the land having been obtained in 1871, filed his petition on the 19th February 1880, claiming the determination of the mesne profits. The proceedings thereupon taken, as well as the previous litigation that had resulted in the Order in Council of 29th June 1871, are stated in their Lordships' judgment.

The High Court (ROMESH CHUNDER MITTER and FIELD, JJ.), after the appellants had taken objections which were disposed of both in the Subordinate and in the Appellate Courts, finally determined the amount of the mesne profits due at Rs. 1,06,013, in amendment of the amount of Rs. 1,83,058 awarded by the Subordinate Judge. After the appellants had filed their appeal from the order of the High Court, the respondent, by leave, filed his cross-appeal, alleging that the Subordinate Judge had rightly held him entitled to mesne profits on 1,079 bighas of land cultivated

(1) 9 B. L. R., 150.

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from 1267 Fasli to 1280 (1865 to 1873) at Rs. 7 a bigha by the year.

Mr. *C. W. Arrathoon*, for the appellants, among other reasons for the over-estimation of the mesne profits, which he contended had occurred, submitted that the High Court should not have allowed, in reference to either of the decrees, a presumption in favour of the decree-holder to the effect that an area of 1,079 bighas had come under cultivation as far back as the Fasli year 1272 (1880). On this they had acted, but not with the support of the survey map.

Mr. R. *V. Doyne* and Mr. *J. D. Mayne*, for the respondent and cross-appellant, were not called upon.

Their Lordships' judgment was afterwards, on February 21st, delivered by

SIR R. COUCH.—The proceedings which are the subject of this appeal and cross-appeal were taken for the determination of the mesne profits of two tracts of land situated in mouzahs Kharha Tand, Pharhada Mahrowli, and Pranpore, pergunnah Bhojepore, for 12 years from 1269 to 1280 F.S. inclusive, under a decree of 1863, and for 14 years from 1267 to 1280 inclusive, under a decree of 1865. The two decrees were made by the High Court—one on the 21st July 1863 and the other on the 31st July 1865—in favour of the father of the respondent in the principal appeal, for possession of lands gained from the bed of the Ganges in the above mouzahs, and for mesne profits. The former of these decrees was, on an application for review, confirmed by the High Court on the 29th April 1864, and the latter was, on a like application, set aside on the 17th April 1866. On appeal to Her Majesty in Council in both cases judgment was given by the Board, which was confirmed by an Order in Council of the 29th June 1871, that the respondent's father, the plaintiff, was entitled to possession with mesne profits of so much alluvial land as lay to the north and west of the red line in the map annexed to Her Majesty's Order in Council, while the defendants, the present appellants, were entitled to the land situated on the south-east of the said line. Afterwards the respondent's father was, by an order of the Court of Shahabad, in execution of the decree of Her Majesty in Council,

put in possession of the lands decreed to him. Objections to the proceedings were from time to time taken by the defendants, and the final order was made on the 27th August 1877, and confirmed by the High Court on the 27th March 1878.

On the 17th February 1880 the respondent, who had succeeded as heir to his father, made an application for fixing the amount of the mesne profits, and the Court Amin having, by order of the Court, made a report on the subject, the appellants filed objections. They were eleven in number, but the fourth is the material one. It is that the quantities of cultivated and uncultivated lands as estimated by the amin are incorrect. The Subordinate Judge framed the following amongst other issues:—"Of the lands whereof mesne profits are claimed, how much is under cultivation and how much out of cultivation?" On that issue the Subordinate Judge held that 1,083 bighas 5 cottahs 15 dhoors of land were under cultivation from 1267 down to the year when possession was delivered to the decree-holder. As the periods for which mesne profits were awarded by the two decrees differed, it was necessary to determine what quantity of this land was covered by each decree. The Subordinate Judge compared the total amount of land, under cultivation and out of cultivation, of which the respondent had been put in possession under the two decrees, with the 1,083 bighas 5 biswas 15 dhoors which were proved to be under cultivation, and found that the land under cultivation covered by the decree of 1865 was 261 bighas 6 biswas. This being deducted from the amount covered by both decrees left 821 bighas 19 biswas 15 dhoors for the decree of 1865. And he awarded mesne profits of 261 bighas 6 biswas for twelve years from 1269 to 1280 at Rs. 7 per bigha, and of 821 bighas 19 biswas 12 dhoors at Rs. 14 per bigha.

Both parties appealed to the High Court, which thought there should be a further inquiry as to what was the quantity of the cultivated land within the area decreed in the second suit, and remitted the case to the lower Court for that purpose. On the 24th March 1884 the Subordinate Judge—the successor of the Judge who made the former order—decided that 1,079 bighas were the area of the cultivated land in the first suit, and only 23 bighas 14 cottahs 8 dhoors the cultivated area in the second suit,

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and awarded mesne profits for the whole at Rs. 7 per bigha annually. The result was that there was an increase of about 20 bighas at Rs. 7 per bigha, and a reduction in the defendants' favour of Rs. 7 per bigha on 821 bighas. With this finding the case was returned to the High Court for disposal. Both parties filed objections to the finding. With regard to the quantity of cultivated land up to 1271 inclusive, the High Court differed from it, and upon the strength of the survey map held that in the first suit there were 544 bighas 12 cottahs, from the year 1267 to 1271. This is as regards the land in the first suit in the defendants' favour. Then as regards the period 1272 to 1280, the High Court found that in 1281 the entire area of 1,079 bighas was under cultivation, and as it was in the power of the defendants by production of jumma-wasil-baki papers and other papers usually kept in the zemindar's serishta to show the gradual increase in the cultivated area from 1272 to 1280, and they had not given any evidence on this point, they could not complain if it was presumed against them that the entire 1,079 bighas came under cultivation from the beginning of 1272. The High Court therefore accepted the finding of the Subordinate Judge as regards the quantity of cultivated land in the first suit from 1272 to 1280. Their Lordships think this presumption is a proper one, and, moreover, the findings of the two Courts being concurrent on a matter of fact, they ought not to be questioned.

The non-production of papers by the defendants applied also to the land in the second suit. The High Court on the evidence before them with regard to that held that from 1272 the quantity of cultivated land in this suit was 293 bighas 6 cottahs. Their Lordships have seen no reason to think that this is not a proper finding. Certainly no ground has been shown for saying that it is wrong. The defendants appear to have endeavoured throughout the proceedings to defeat the execution of the decree for mesne profits by not producing evidence which they had power to produce. The decree of the High Court ought to have put an end to the protracted litigation.

Their Lordships regard the present appeal as an abuse of the right to appeal to Her Majesty in Council, and they will humbly advise Her Majesty to dismiss it, and to affirm the decree of the

High Court, which was made in accordance with the findings that have been stated. It became unnecessary for the respondent to proceed with his cross-appeal, and their Lordships will humbly advise Her Majesty that it should also be dismissed. It will be dismissed without costs, and the appellants in the principal appeal will pay the costs of that appeal, which are to be taxed and allowed as if there had been no cross-appeal.

Appeal and cross-appeal dismissed.

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

Solicitors for the respondent and cross-appellant: Messrs. *Burton, Yeates, Hart,* and *Burton.*

C. B.

WAJID KHAN (PLAINTIFF) *v.* EWAZ ALI KHAN (DEFENDANT).

*P. C.** 1891 *May 5.*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Equity as to gifts to persons in a fiduciary relation—Burden of proving absence of undue influence—Gift attempted by widow.

An instrument executed by a widow, after setting apart the rental of villages, belonging to her as her patrimony, to defray the expenses of her and her deceased husband's tombs, gave to her managing agent, who was her sole adviser, the management of the endowment in perpetuity, with the residue, after the above expenditure should have been met, for himself; so that a large surplus would have remained each year in his hands, and he would have been the person substantially interested. *Held,* that this transaction was within the well-recognised principle that every onus is thrown upon a person filling a fiduciary character towards another of showing conclusively that he has acted honestly, and *bonâ fide,* without influencing the donor, who has acted independently of him.

In a suit brought by the agent's representative to have the gift enforced against the widow's successor in the estate, this burden had not, in the opinion of the Courts below, with which their Lordships concurred, been sustained; and it was *held* that the gift had been rightly set aside.

APPEAL from a decree (29th August 1887) of the Judicial Commissioner, affirming a decree (2nd October 1886) of the District Judge of Rai Bareli.

* *Present:*—LORDS WATSON and MORRIS, SIR R. COUCH, and MR. SHAND (LORD SHAND).