Privy Council Appeal No. 3 of 1928.
Patna Appeal No. 1 of 1927.

Harry Kempson Gray and another - - - - - *Appellants*

v.

Bhagu Mian and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER, 1929.

Present at the Hearing:
VISCOUNT DUNEDIN.
LORD DARLING.
LORD TOMLIN.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*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.

The appellants, who were the owners of an indigo factory, had for a number of years leased certain lands from the predecessors 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 sugar cane, 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 respondents in this 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. *Kumar Hemendra Kumar Roy* 56 I.A. 290.

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

In the Privy Council.

HARRY KEMPSON GRAY AND ANOTHER

v.

BHAGU MIAN AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1929.