Privy Council Appeal No. 156 *of* 1927.

Gurudas Kundu Chowdhury and others - - - - *Appellants*

v.

Kumar Hemendra Kumar Roy and others - - - - *Respondents*

Gurudas Kundu Chowdhury and others - - - - *Appellants*

v.

Jatindra Nath Mukherjee and others - - - - *Respondents*

(*Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1929.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD CARSON.
SIR CHARLES SARGANT.

[*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, have been named the Kundu set, the Mukherjee set and the Roy set. They were three families of zemindars who were in joint possession of certain *mouzahs* called Durlabhpur in Jirat and Hatikanda. They were in joint possession in law. It was quite true that they had a separate *towzi* 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 Roy set and the Kundu set, made applications, but the Roy set did not persevere, and there is a copy of the order sheet in the Court of the Collector in which, dealing with the Roy 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 Mouri have succeeded in establishing that Government 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 *putni* 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 *putni* 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 defendants 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 first readmitted to possession, but the *terminus ad quem* might either be the raising of the suit or the time when the plaintiffs got decreed to 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 possession 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 possession 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 possession 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 *putnidars* 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 nett profit which he received after deducting working expenses."

Now, the question which was directly raised by the appellants here is this: He says: "I am only liable for what I really got, namely, what I 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 me to put out Srish and begin to cultivate myself, and therefore I, in the terms of the Code, am only liable for what I 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 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.

In the Privy Council.

GURUDAS KUNDU CHOWDHURY AND OTHERS

v.

KUMAR HEMENDRA KUMAR ROY AND OTHERS.

GURUDAS KUNDU CHOWDHURY AND OTHERS

v.

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(*Consolidated Appeals.*)

DELIVERED BY VISCOUNT DUNEDIN.

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