Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Girish Chunder Lahiri v. *Shoshi Shikhareswar Roy, from the High Court of Judicature at Fort William in Bengal; delivered* 24*th March* 1900.

Present at the Hearing :

LORD HOBHOUSE.
LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Defendants in this case are grandsons of one Bireswar Roy who died many years ago. The Respondent is the senior of them and the only one who had attained majority when this suit was instituted. It is he who has conducted the defence throughout. The Plaintiff, now Appellant, is also a grandson of Bireswar in this sense, that Baroda, Bireswar's daughter, adopted him Bireswar made several grants of property to Baroda which the Plaintiff claimed after her death either as heir or as devisee. Possession of them was taken by or on behalf of the Defendants, and in the year 1882 the Plaintiff sued to recover them. The question to be decided in this Appeal arose in the execution of the decree then obtained by the Plaintiff.

The decree is dated 17th January 1884. It declares the Plaintiff's right to the villages or estates of which he has been dispossessed, and it

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proceeds thus: "and that he do get from the "Defendants khas possession of the same and "mesne profits for the period of dispossession, "and the Rs. 2,400 claimed for maintenance "allowance; that the mesne profits be ascer- "tained on inquiry at the time of the execution "of decree; and that the Plaintiff do get from "the Defendants a total of Rs. 1,255 7 annas "9 pies on account of the costs in this suit, with "interest from this day till the day of realization "at the rate of Rs. 6 per cent. per annum."

In the year 1885 the Plaintiff obtained possession of all the estates except one called Nyadiar, of which he did not obtain possession till May 1891. The present proceedings for account and recovery of mesne profits were commenced by petition filed in January 1890. The Plaintiff asked for mesne profits for three years prior to the institution of the suit up to the date of recovery of possession.

On the 14th February 1890 the Subordinate Judge appointed an Amin to conduct the inquiry and gave him written instructions how to proceed. Another Amin was afterwards substituted for the first but he proceeded on the same instructions.

On 1st September 1891 the second Amin made his report which finds a sum of Rs. 14,774 due for mesne profits. The Respondent filed a petition of objection on 19th September 1891 afterwards summarized and slightly varied on 28th November 1891. (Rec. pp. 288, 292.) The case was heard by the Subordinate Judge on 31st March 1892. He passed a judgment which in most respects maintains the Amin's report. The Respondent appealed to the High Court who, differing from the Subordinate Judge on several points both of principle and detail, set aside his order and remanded the case for the purpose of ascertaining the mesne profits

which the Plaintiff is entitled to in accordance with their foregoing observations. That is the order from which the Plaintiff now appeals. The case runs very much into detail but there are some matters of principle to which their Lordships will first address themselves.

As regards the form of the order which in effect throws the whole account open again, Mr. Mayne was asked whether under the provisions of the Code which relate to remands it was not necessary to state more specifically the issues which the Subordinate Judge is required to decide on remand; and he did not dispute that the remand made was incorrect. That miscarriage in procedure however, though important, does not affect the legal merits of the questions in dispute between the parties. If on those questions their Lordships agreed in substance with the High Court the decree could be brought into conformity with the directions of Sections 562—566 of the Procedure Code. But with few and unimportant exceptions their Lordships after hearing full argument have to express agreement with the views of the Subordinate Judge.

The most important point on which the High Court hold the Subordinate Judge to be in error, is the mode in which the amount of mesne profits is ascertained. The Subordinate Judge directed the Amin to ascertain as to certain nij lands, the value of the crop which could have been grown upon them; as to some waste lands, their rates of rent; as to some gardens held khas, the value of their produce; as to land settled with tenants their mesne profits, and whether any land was settled at a low rate by the judgment debtors during the period of dispossession.

He continues—

"In order to ascertain these facts, it is "necessary to make measurement of the lands,

" and to ascertain the proper rates and rents, and
" to show separately and in detail the mesne
" profits of the different items as ascertained,
" after receiving oral and documentary evidence
" and making a khutian of the dakhilas of
" tenants."

From an interim report made by the first Amin to the Subordinate Judge on 20th September 1890 it appears that the Plaintiff was making slow progress. He said there were four or five hundred tenants on the land; that they would not appear voluntarily, being under the influence of the debtors; that there was difficulty in finding them, and in serving summonses during the rainy season. The Amin adds that he is instructed to inspect the dakhilas of tenants which will take a long time because of their number, and by the time that is done the land will be dry enough for measurement. In the meantime he is putting pressure on the Plaintiff who, as he intimates, has not shown sufficient activity. (Rec. p. 234.) Upon this report being made the Plaintiff presented a petition alleging that the delay was due to the Amin who would not or could not come to the place before the rains. Shortly afterwards the change of Amin took place. (Appendix p. VII.)

The report of the second Amin, who did all the work that was done, again shows the difficulties that beset the plaintiff in the inquiry.

" It was difficult for the decree holder to adduce
" more evidence than that found on the spot,
" because the judgment debtors are powerful
" zemindars of the place and all the tenants are
" under their control and obedient to them. The
" decree holder is a man in ordinary circumstances.
" He was not a man of influence or power in the
" mofussil, so that he could duly muster the
" tenants and prove his cause or make them file
" their dakhilas, and satisfactorily establish his
" case. . . . . Notwithstanding that the

" judgment debtor No. 1 (the present Respon-
" dent) was repeatedly called upon to produce
" the collection papers, the papers showing the
" lands and their jummas, no papers were pro-
" duced on his behalf; and the evidence that was
" taken of the few witnesses on his behalf was
" not sufficient. A sheet of paper containing the
" rates of rent of Sabrul village, which was pro-
" duced on his behalf, was an incomplete copy,
" and it can hardly be relied on."

Under these circumstances the Amin had recourse to other evidence. As regards Harifala one of the largest properties, he made a map according to the boundaries given in the decree. These boundaries were verified by witnesses on both sides. Then he found the quantity by actual measurement, and ascertained by the collection papers and such other evidence as he could get the rates at which the land could be let. Apparently he pursued the same course as regards Binodhpore, the only other large property.

11. The Defendant's objection is that the Amin did not proceed on the basis of the tenants' dakhilas or receipts for rent. The Subordinate Judge holds that the Amin did rightly. The High Court think otherwise. They say that the Subordinate Judge has charged the Defendant on the basis of wilful default, and that there is no case for such a charge. What he ought to have done was to ascertain the actual assets of the estate. They comment on the absence of rent receipts, and consider that in their absence the evidence is insufficient to show the value of the lands.

There are then two questions raised on this part of the case: 1st, whether the Subordinate Judge was bound to ascertain the actual assets; by which, as their Lordships understand, the learned Judges mean the actual amount of money or value which reached the hands of the

Defendants; and 2ndly, whatever was to be ascertained, whether it was essential to resort to the evidence of rent receipts.

It seems to their Lordships that the first question is settled by the Code of Civil Procedure. The original Code of 1859 did not contain any definition of mesne profits. The Code of 1877, Section 211, added an explanation: "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." In the existing Code of 1882 that explanation is repeated with an addition which gives rise to another dispute in this case, viz. "together with interest on such pro- "fits." The Amin as directed by the Subordinate Judge has tried to ascertain the very thing which the Code directs. He called for evidence of actual receipts. Whether if that had been produced it would have satisfied the enquiry cannot be known. It might still have been necessary to enquire into the possibility of larger receipts by ordinary diligence. But the Plaintiff could not, and the Defendant who was the actual recipient would not produce the evidence. So the Amin turned to the other alternative, viz., to ascertain what might have been received with ordinary diligence. The Subordinate Judge's order does not charge the Defendants with wilful default. Indeed if it did it would adopt a principle more favourable to the Defendants than that of the Code; for there may be values recoverable by ordinary diligence which yet it would not be wilful default not to recover. Wilful default is charged against persons in rightful possession though accountable for their dealings with the property. These Defendants were wrongfully in possession. And *primâ facie* it is fair to infer that a person in possession of land may by ordinary diligence get rent for it

according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount.

This view is quite consistent with holding that the proper evidence was not procured. The High Court attach great importance to the dakhilas and quite rightly. They are not indeed so important as they would be if the inquiry was confined to the actual receipts, because from various motives lands may be let at rates lower than the ordinary ones. Still in deciding a dispute on the question what is the ordinary rate, actual payments made by tenants must always be of value. But it is clear from the reports of both Amins that the Plaintiff had great difficuty in procuring this evidence. The Subordinate Judge says speaking of Harifala.

"As regards this item, the judgment-debtor contends that "the Amin is wrong in not ascertaining the amount of wasilat "by referring to the dakhilas of the tenants, but by finding the "quantities of the several kinds of lands contained within the "mehal and the rate at which each bigha of lands could be let "out. I cannot say that the Amin is wrong therein. All the "tenants and all the dakhilas of each tenant could not be "found. They are mostly ryots of the Defendant, judgment "debtor. The Defendant should have produced all of them "and made them produce all their dakhilas; and when he "did not produce them and make them produce all their "dakhilas, I cannot say that the Amin was wrong in not "ascertaining the amount by reference to the dakhilas. "Again, the principle of ascertaining the amount by reference "to the dakhilas is wrong. It may be, as urged by the decree "holder, that the judgment-debtor let out the lands at a rate "lower than the ordinary one in order to make the tenants "come over to his side. I am] therefore of opinion that the "Amin was right in ascertaining the amount by finding out "the quantities of the lands contained within the mehal and "the rate at which each of them could be let out."

Moreover the Defendant was the beneficial owner of the rents for which these dakhilas were given, and though he may have been a minor for part of the time the evidences of receipt by his guardians must be in his power. It has been shown above what the second Amin says of his silence. It is clear that he could if he pleased have

put in evidence which would show whether the inferences of value drawn by the Amin would or would not stand the test of actual transactions between lessor and lessee; but he did not call the tenants with their receipts or produce his own accounts. Their Lordships asked Mr. Mayne whether the Defendant had given any counter-evidence at all to rebut the Plaintiff's case, and he answered that none could be found, the Plaintiff's case being left precisely as he put it before the Amin and the Subordinate Judge.

On this part of the case it appears to their Lordships 1st that the Subordinate Judge rightly apprehended what is the proper object of an inquiry into mesne profits; and 2ndly, admitting the tenants' receipts to be evidence of value and possibly of great value, they were not necessary evidence; their importance has been overrated owing to a misapprehension of the object of the inquiry; and the Defendant's failure to put them in has been visited by the Court on the head of the Plaintiff.

Another question important in principle, though it cannot be ascertained of what practical importance it was to the result of the case, is whether the Subordinate Judge ought to have received further evidence after the Amin's report. It seems that after lodging objections the Defendant summoned witnesses and on their non-appearance applied for warrants of arrest. The following is the Subordinate Judge's note of what passed in Court.

"An objection has been preferred on the part of the decree "holder that the judgment debtor has no right to put in new "evidence. It does not appear what matters the judgment-"debtor seeks to prove by producing witnesses. An Amin is "appointed to ascertain the wasilat after taking evidence from "the parties, and this was the case in this instance. It "appears that both parties have adduced evidence before the "Amin. The evidence which each party needed to adduce "ought to have been produced before the Amin. It has not "been objected that the Amin did not give the judgment "debtor an opportunity to adduce evidence or that he declined "to receive any evidence which had been already presented. No

" reason appears why the judgment debtor should now be " allowed to adduce evidence, which he might have and ought " to have produced before the Amin, but which he of his own " accord withheld. If such a thing is allowed, then the main " purpose connected with ascertainment of wasilat by the " Amin, and of the laws and circulars relating thereto, will " stand defeated. Consequently, additional evidence in this " matter cannot now be taken."

The High Court think this decision was wrong and they found their opinion on a judgment delivered by Sir Richard Couch and reported in 17 W.R. 270. That report is one of the large number contained in *The Weekly Reporter* which are useless or misleading because the facts of the case are not stated. The only point of law or of practice laid down in the judgment is that the Court will treat the Amin's report as part of the evidence in the suit and will take other evidence if necessary. If that judgment is taken as laying down that it is necessary to take further evidence whenever one of the parties chooses, it has been misconstrued. The High Court in that case considered the further evidence necessary and the reason given for rejecting it insufficient. Why we do not know, because no facts are stated except the tender of the evidence and its rejection.

The Sections of the Code (392, 393) which relate to local investigations do not contemplate the tender of further evidence after an Amin's report except the examination of the Amin himself, but they do not forbid it. They are consistent with either course, and the point must be decided on general principles according to the facts of each case.

In every trial there must come a time when it is proper that the evidence should be closed. After that time new evidence should not be given as a matter of course or without the assent of the Court. As regards local enquiries it may in many cases be clearly proper and convenient to take evidence in Court after taking it in the locality. In others it may be equally

clear that the locality is the proper place and the time of enquiry the proper time for bringing the proposed evidence. In this case the most obvious time for closing evidence on the inquiry was the presentation of the Amin's report, which is itself made evidence by Section 393. What reason did the Defendant give for adducing further evidence? None whatever, either in his written objections to the report or in his grounds of appeal from the Subordinate Judge. He did not even state what was the nature of the evidence he desired to submit, nor does the High Court state it, nor can the Counsel at the bar now state it. It may for all that appears be purely frivolous. The learned Judges below do not in terms affirm the absolute right of every party to a local investigation to adduce evidence before the Court after a Commissioner's Report. But their decision cannot be supported unless that right exists; however much the party may have neglected to produce his evidence at the proper time and in the proper place; even though, as in this case, he has disregarded repeated demands of the Amin for his evidence; and even though, as in this case, he either cannot or will not state what is the nature of his fresh evidence, nor why he brings it so late which may be because a discussion in the locality does not suit him so well as a discussion at a distance. Their Lordships agree with the Subordinate Judge that such a practice would, at least to a great extent, defeat the very object of local investigation. The whole case might be tried over again not in the locality but at the distant seat of the Civil Court. It seems to them that the Subordinate Judge has applied sound principles of adjudication to the facts of the case.

Another point on which the High Court reverse the decision of the Subordinate Judge is the allowance of interest on the profits as

ascertained year by year. Mr. Branson has shown that there is error in supposing that the interest has been calculated with quarterly rests, but that is not the ground of the judgment. The learned Judges below think that the decree did not award any interest at all. That depends on the construction of Section 211 of the Code which imports into the expression "mesne profits" the addition of "interest on those profits."

The learned Judges say that the Court has still jurisdiction to give or refuse interest as it chooses. Their Lordships agree, because mesne profits are in the nature of damages which the Court may mould according to the justice of the case. But the question is what is the effect of a decree which grants mesne profits and says nothing about interest, which, as their Lordships think is the proper construction of the decree in this suit. The learned Judges treat that silence as equivalent to a decision that there shall be no interest. But then it is difficult to see what effect is given to the alteration made in Section 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so. The learned Judges give reasons for thinking that interest ought not to be given in this case. But in execution proceedings we are only construing the decree and not considering its merits. The case which is cited from 11 Indian Appeals 88 (*Kishna Nand* v. *Kunwar Partab Narain Singh*) has no bearing on the present one. The Defendant there was the manager of an encumbered estate under a special statute and not in wrongful possession at all. The decree for account expressly disallowed interest. On appeal this Board

refused to interfere with the discretion of the Courts below. Speaking in 1884, their Lordships declined to say "whether in the present state of "the law, having regard to the provision in the "Procedure Act in which there is an explanation "of mesne profits, interest was allowable."

Another question arises out of a tunkha or annuity of Rs. 400 per annum granted in perpetuity by Bireswar to Baroda. It was specially secured to her by providing that she might deduct the amount out of the rent reserved and payable by her upon grants made to her of the Binodhpore and Harifala estates by Bireswar. Of these properties the Plaintiff was dispossessed. The amount of tunkha up to date was recovered by decree. In estimating mesne profits after decree the Defendant claimed to be allowed the reserved rent, which was not disputed. But then the Plaintiff claimed to set off the tunkha against it, and the Subordinate Judge allowed it. The High Court have disallowed it. Their Lordships confess themselves unable to understand the reasons of this disallowance as printed in the report; nor could Mr. Mayne explain them. It is not alleged that in any way the Plaintiff has got the benefit of the tunkha twice over. He is certainly entitled to it once It must be held that the Subordinate Judge was right.

On two small items 3 and 4 in the Amin's index relating to a property called Sabrul (Rec. p. 246) an unusual kind of controversy has arisen. The Subordinate Judge states (Rec. 296) that no party raised any objection to these items. At the hearing of the Appeal before the High Court the Defendant's Counsel denied this statement and produced an affidavit from one of the Defendant's Amla to the effect that objection was taken. The learned Judges, observing that no contrary affidavit had been produced, thought that the two

items should be the subject of adjudication. In point of fact there was a contrary affidavit by the Plaintiff himself, who was in Court during the whole hearing before the Subordinate Judge, instructing his pleaders; but this must somehow have been overlooked. It has been shown by the Amin's report that the Defendant produced to him a paper relating to the rates of rent in Sabrul, but in such an imperfect state as to be useless. In the Defendant's detailed objections to the Amin's report (Rec. p. 288) Sabrul is not mentioned. In the summary (p. 292) Sabrul is placed among a list of five properties of which it is alleged in general terms that the rates of rent and the classification of lands are wrong. It strikes their Lordships as highly inexpedient that such a controversy should be raised by affidavit before the High Court without any application to the Subordinate Judge himself. If these items stood alone they would not on the materials before them feel justified in sending the case back to the Subordinate Judge; but as this must be done on other points it may be more satisfactory to have this dispute cleared up.

Other items which constitute points of difference, all comparatively small, may be briefly disposed of. On the question of collection charges, whether they should be 5 or 10 per cent., which is not made the subject of evidence, their Lordships think it right to follow the High Court. As to the village of Nyadiar their Lordships agree with the High Court. The Subordinate Judge gives the Plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree and to the extent of the excess is unauthorised by Section 211 of the Code. As regards Chakran Pakuria and Ghosepara, in which cases the learned Judges think that the Subordinate Judge has made mistakes of a

clerical kind, the mistakes have not been shown to their Lordships, and the amounts must be very small such as of themselves would hardly justify further enquiry. But as the account has to be rectified in some particulars it may be reviewed on these points also.

There are several subjects on which the High Court state that the evidence is unsatisfactory to them; such as charges for fruit trees, for fruit-bearing land, and for cesses; and the existence and extent of Khamar land in Binodhpore. Their Lordships make the general observation that the appreciation of evidence by the High Court is and necessarily must be subordinated to their view of the proper issue to be tried, as to which their Lordships have expressed agreement with the Subordinate Judge. None of these subjects has been laid before their Lordships in any detail, and they see no reason why the conclusions arrived at, first by the Amin and afterwards by the Subordinate Judge, should be disturbed under a general re-opening of the whole account.

Their Lordships will state the heads of the decree which they think the High Court should have made on the appeal to them. Declare that the collection charges should be at the rate of 10 instead of 5 per cent. and refer it to the Subordinate Judge to remodel the account accordingly. Declare that mesne profits for Nyadiar should not be allowed for any later time than three years from the date of the decree, and refer it to the Subordinate Judge to remodel the account accordingly. Refer it to the Subordinate Judge to ascertain whether he has erroneously allowed mesne profits for Ghosepara twice over, and whether he has in his final estimate allowed mesne profits for Chakran Pakuria which in his detailed judgment he disallowed. Refer it to the Subordinate Judge to make a formal

adjudication on items 3 and 4 in the Amin's index. Let the Subordinate Judge finally readjust the amount recoverable by the Plaintiff in accordance with his findings on the foregoing references. *Quoad ultra* dismiss the Appeal with costs in proportion to the amounts in respect of which the parties may after the inquiry has been completed, be found to have succeeded and failed respectively. That is the decree which their Lordships will humbly advise Her Majesty to make in lieu of the decree now appealed from which will be discharged.

As regards the costs of this Appeal, in which the rule of proportion observed in India does not prevail, their Lordships consider the success of the Defendant to be so minute in proportion to the whole controversy that it ought not to weigh on the question of costs. The mesne profits of Nyadiar constitute the only point of principle on which the Respondent has succeeded. Nyadiar is valued at Rs. 68 and a fraction and the time of excessive mesne profits is less than $4\frac{1}{2}$ years; so there is little over Rs. 300 in question. On all the important points the Respondent is held to be wrong. He must pay the costs.