

Privy Council Appeal No. 92 of 1933.

Bengal Appeal No. 13 of 1932.

The Secretary of State for India in Council - - - - *Appellant*

v.

Saroj Kumar Acharjya Choudhury and others - - - *Respondents*

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 18TH DECEMBER, 1934.

Present at the Hearing :

LORD BLANESBURGH.

LORD WRIGHT.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

The appeal in this case, which now comes before the Board for the third time, is solely concerned with questions of the ascertainment of mesne profits under the decrees of the Subordinate Judge of Faridpore, of the 22nd July, 1907, which were restored, with a variation which is not material, by the judgment of this Board of the 2nd July, 1917, after it had been set aside by the High Court. Four separate suits for possession and mesne profits had been instituted against the present appellant, Secretary of State for India in Council, by four sets of co-sharers, each claiming a one-fourth share in the suit lands, but three of these suits had been compromised while the decrees were under appeal to the High Court, and the present respondents are the plaintiffs in suit No. 17 of 1902, who were not parties to the compromise. The suit lands form part of an island chur which began to emerge out of the bed of the river Padma, a part of the Ganges, in 1888, and was taken possession of on behalf of Government on the

30th May, 1890, by the Subdivisional Officer of Manikganj under the provisions of Section 3 of Bengal Act IV of 1868.

“ Whenever it shall appear to the local Revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under Clause 3 Section IV of Regulation XI of 1825 of the Bengal Code, the local Revenue authorities shall take immediate possession of the same for Government, and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Board of Revenue, whose order thereupon, in regard to the assessment, shall be final. Provided, however, that any party aggrieved by the act of the Revenue authorities in taking possession of any island as aforesaid, shall be at liberty to contest the same by a regular suit in the Civil Court.”

The third clause of section 4, Bengal Regulation XI of 1825, “ for declaring the rules to be observed in determining claims to lands gained by alluvian or by dereliction of a river of the sea,” is in these terms :—

“ When a *chur* or island may be thrown up in a large and navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land tenure or tenures of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section, with respect to increment of land by gradual accession.”

This clause had been interpreted in some decisions as meaning that islands, etc., thrown up were the property of Government, but they were over-ruled by this Board in *Lopez v. Maddun Mohun Thakoor*, 13 M.I.A. 467.

Appeals from the order of the Subdivisional Officer were preferred to the Commissioner and to the Board of Revenue, and after further investigations a large part of the *chur* was surrendered as reformation *in situ* to the former owners ; but, as regards the suit lands, the Board of Revenue dismissed the appeal on the ground that they were not shown to be reformations *in situ* of lands belonging to the plaintiffs, but were reformations *in situ* of lands which had been in the khas possession of Government. The Courts in India differed on this question, which was apparently one of considerable difficulty ; but as already stated, this Board agreeing with the Subordinate Judge, gave the plaintiffs a decree for possession and mesne profits, and the only questions in these appeals are whether mesne profits have been correctly determined by the High Court in the judgment under appeal : (1) as to the defendant's liability for the omission of the revenue authorities to collect any salami or premium from tenants admitted to the suit lands ; (2) as to the defendant's right to a deduction of 10 per cent. for expenses of collection ; and (3) as to the rate at which the interest provided for in the definition of

mesne profits in section 2 (12) of the Code of Civil Procedure should be charged.

Mesne profits are there defined as "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefor, together with interest thereon." As regards the finding of the High Court that the defendant is accountable for additional profits which the revenue authorities could have realised with reasonable diligence, by way of salami or premiums, the contention has been raised for the first time before the Board that in taking possession of, assessing, and settling the lands according to the rules in that behalf, those authorities only did what they were required to do by the statute, and that the defendant cannot be held liable for their failure to do more. Their Lordships are unable to accept that contention, because in their opinion the proviso that the party aggrieved by the action of the revenue authorities in taking possession should be at liberty to contest the same by a regular suit necessarily imports that, where possession has been taken on behalf of Government of property which is the subject of private ownership, the defendant in such regular suit cannot justify under the section but must be held answerable to the party aggrieved in the same way as a trespasser, as has been done in this case. To hold otherwise might seriously affect the remedy given by the proviso. Even so, on the terms of the definition of mesne profits what the plaintiffs have to show is that, with reasonable diligence, more might have been realised than was actually realised by the revenue authorities in the way of profits, which term includes both rents and premiums, if any. As to what amounts to due diligence, in their Lordships' opinion, the person in wrongful possession is not liable for failure to realise the highest possible rates of rent and premium from the tenants. It is enough if taking account of both rent and premium, if any, a fair return has been realised from the land, and their Lordships will deal with the case on that basis in considering whether the plaintiffs have shown that there has been a want of reasonable diligence on the part of the defendant.

The accounting period, beginning three years before the date of the suit, was from the 29th May, 1899, to the 15th April, 1921, the date of delivery of possession under the judgment of the Board of the 2nd July, 1917. The Special Commissioner appointed to take the necessary accounts covering a period of twenty-two years, after taking evidence, reported on the 9th January, 1927, that the revenue authorities could have realised an additional sum of Rs. 25,200 by way of rents and a sum of Rs. 30,300 12 9 by way of salami or premium on the admission of tenants, during the accounting period. The Subordinate Judge affirmed the finding of the Commissioner as to rents, but disallowed the claim for salami on the erroneous view that it would not come within the definition of mesne profits.

There were cross appeals to the High Court, and the two Indian Judges who heard the appeal subjected the evidence adduced for the plaintiffs both as to rates of rent and salami to a very careful examination, and came to the conclusion that it was most unsatisfactory and wholly unreliable. They accordingly reversed the finding of the Subordinate Judge which held the defendant liable for want of reasonable diligence in collecting rent and from this part of their judgment the plaintiffs have not preferred an appeal.

As regards salami, the learned Judges most carefully examined the evidence adduced for the decree holders as to the rates of salami collected by them and other landowners in the neighbourhood, and commented, among other things, on the fact that the nathis, or orders, for the admission of tenants on payment of an adequate salami and the sumars, or special collection books in respect of salami, were only opened after the institution of the suit, and that the entries in these sumars were not corroborated as they should have been by the entries in the ordinary accounts. These are matters about which the learned Judges were in a much better position to judge than this Board, and their Lordships see no reason to differ from their conclusion that the documentary evidence for the decree holders as to salami was extremely unsatisfactory and unconvincing, and that in the circumstances it was not possible to calculate a rate of salami with any degree of accuracy.

In these circumstances, the learned Judges had recourse to the terms of the compromise between the defendant and the decree holders in the other three suits, and finding that the defendant had agreed to pay a salami of Rs. 5 per begha under that compromise, applied the same rate not only to cases of admission after the beginning of the accounting period in 1899, but to all admissions from the taking of possession, with the result that they awarded Rs. 19,710 9 5 under this head as salami, as compared with Rs. 30,300 12 9 awarded by the Commissioner. As to this award, their Lordships' agree with the appellant's contention that the fact that the defendant had agreed to pay a salami of Rs. 5 per begha in a compromise in which both sides agreed to give up a great deal does not afford a proper basis for settling a rate of salami in this case, and cannot be accepted. They agree, also, with the appellant's further contention that the defendant could not be held liable for not collecting salami during the accounting period from tenants who were already in possession at the beginning of that period, that is to say, in 1899, as the respondents have failed to show that during the accounting period salami could have been collected from tenants in possession before the beginning of that period. The plaintiffs' claim for salami must therefore be limited to salami in respect of admissions during the accounting period.

As regards the claim for failure to collect salami on the admission of tenants during the accounting period, as already

observed, the profits of the land consist of rents and salami if any; and in considering whether the revenue authorities failed to exercise reasonable diligence, it is necessary to see what was done by them in this matter. As required by the section under which possession was taken, they proceeded to assess and settle the lands according to the rules in that behalf, that is to say, under the provisions of clause 6 of section 2 and the following thirty-three sections of Regulation VII of 1822 which by section 2 of Regulation IX of 1825 were made applicable to all lands in Bengal which had not been permanently settled, and to all lands in the khas possession of Government.

The Regulation of 1822 imposes upon the settlement officers the duty of seeing that the raiyats are not made to pay excessive rates of rent to their landlords, and the Bengal Tenancy Act of 1885, which is applicable to these lands, contains provisions for securing that raiyats should pay rents at fair and equitable rates. In this case the Revenue authorities would appear to have done their best to settle rates of rent which would be fair to both parties. The Board of Revenue refused to confirm the rates imposed at the first settlement in 1894, and directed a fresh settlement, with the result that the rates were increased to such an extent that the settlement officer recommended that the settlement should be for fifteen years, instead of five, as otherwise the increase would cause hardship to the tenants.

The learned Judges of the High Court most carefully considered what was done by the revenue authorities in this matter, and arrived at the conclusion that there was no want on their part of such diligence as a prudent and fair-minded proprietor could be expected to show in dealing with his own property in the matter of the realisation of rent. This is in effect a finding that the rents realised were fair and equitable, and therefore such as contemplated by the Legislature. In those circumstances it would, in their Lordships' opinion, be difficult to hold that the defendant, assumedly a person in wrongful possession, had been wanting in reasonable diligence in not realising more. Moreover, in the present case, having regard to the very unsatisfactory nature of the decree-holders' evidence as to what was obtainable from the suit lands by way of rent and salami and to the fact that the learned Judges refused to act on it, their Lordships are of opinion that plaintiffs have failed to show that there was any want of reasonable diligence in realising mesne profits from the suit lands. Consequently, the plaintiffs' claim for additional profits by way of salami fails and the decree of the High Court must be varied accordingly.

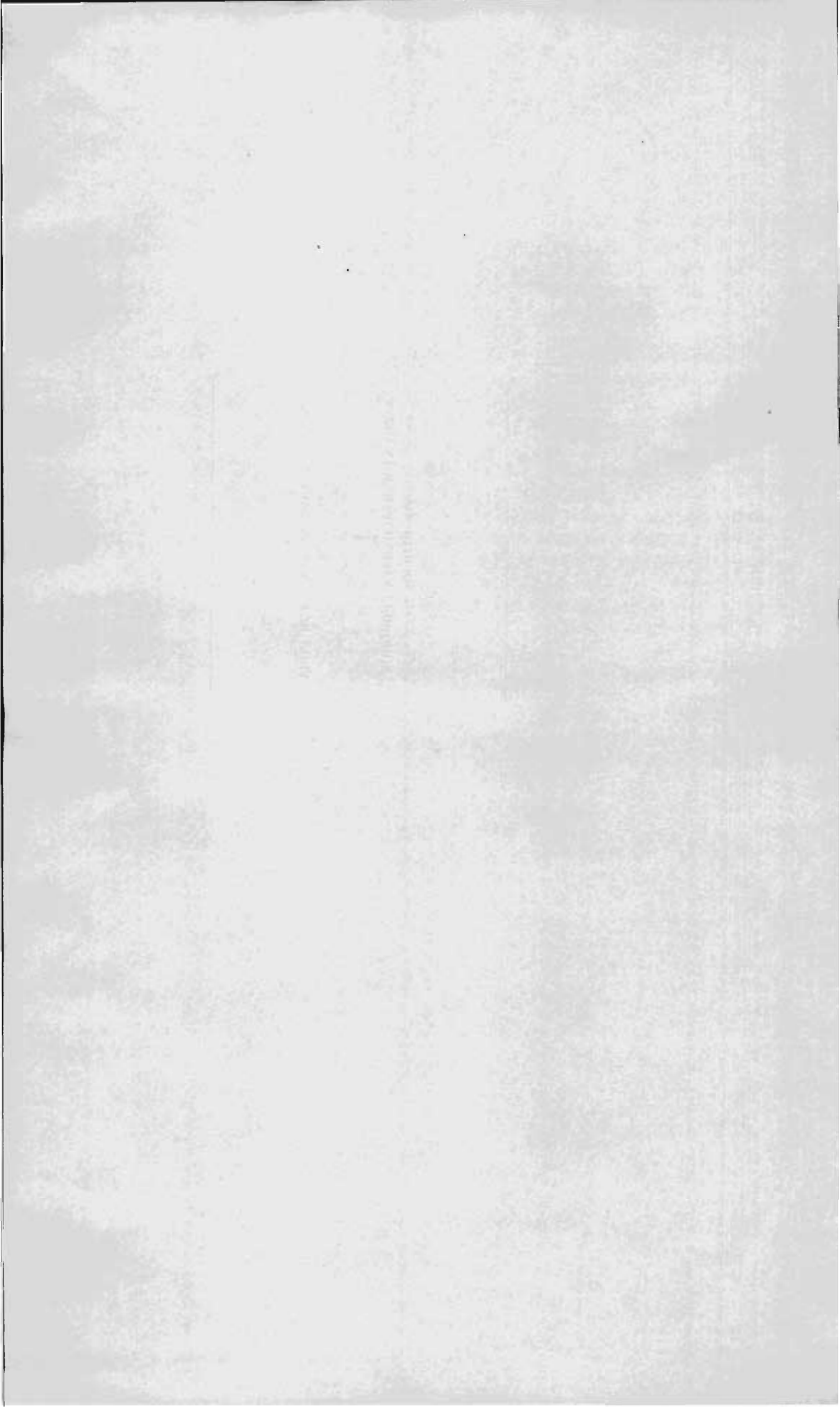
The next objection is that both the lower Courts refused to make any allowance for the expenses of collection on the ground that the defendant failed to adduce any evidence as to the amount of such expenses. Profit always means the difference between the amount realised and the expenses incurred in realising it; and

this rule has been expressly applied by this Board as regards mesne profits in *Hurro Doorga Chowdhurani v. Maharani Surut Soondari Debi*, 9 I.A. 1. In India 10 per cent. is the customary allowance for mesne profits, and it was therefore unnecessary for the defendant to adduce any evidence on this subject. In *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy*, 27 I.A. 110, 10 per cent. was substituted by this Board under the head for 5 per cent., although the rate had not been made the subject of evidence. The decree must, therefore, be varied by allowing the defendant a reduction of 10 per cent. on the collections.

The third objection is that the rate of interest on mesne profits awarded to the plaintiffs as forming part of the mesne profits under the definition has been fixed at 12 per cent., whereas the proper rate is 6 per cent. The Subordinate Judge allowed interest at 12 per cent. on the ground that the Government were not *bona fide* trespassers, and the High Court, rightly reversing this finding, none the less maintained the rate of 12 per cent., which they regarded as a fair compensation for the decree holders who had been kept out of their property. That was also the rate adopted in some earlier decisions of that Court. In *Girish Chunder Lahiri v. Shoshi Shikhareswar* (*supra*), where the High Court had varied the decree of the Subordinate Judge by disallowing interest on mesne profits at 6 per cent., this Board, when restoring the decree of the Subordinate Court, awarded interest at 6 per cent., and this was apparently done without objection being taken.

In *Raja Sashikanta Acharyya v. Raja Sarat Chandra Rai Chaudhuri* (1921), 34 C.L.J. 415, the question of the proper rate of interest to be granted on mesne profits was fully considered, and it was decided that under existing conditions 6 per cent. was the proper rate. Their Lordships are of opinion that, in the absence of special circumstances, 6 per cent. is a fair rate of interest, a sufficient compensation to the decree holder for having been deprived of the rents and profits of the suit lands. The rate of interest should be reduced to 6 per cent.

In the result, their Lordships are of opinion that the decree of the High Court should be varied by disallowing salami, by allowing the defendant a deduction of 10 per cent. for the expenses of collection, and by reducing the rate of interest from 12 to 6 per cent., and they will humbly advise His Majesty accordingly. The respondents will pay the appellant's costs.



In the Privy Council.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL.

2.

SAROJ KUMAR ACHARJYA CHOUDHURY
AND OTHERS.

DELIVERED BY SIR JOHN WALLIS.

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