Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mahabir Pershad Singh and others v. *Raja Radha Pershad Singh, and Cross Appeal, from the High Court of Judicature at Fort William in Bengal; delivered 21st February* 1891.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard 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 twelve years from 1269 to 1280 F.S. inclusive, under a decree of 1863, and for fourteen 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

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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, 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 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.