Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Hem Chunder Chowdhry v. *Kali Prosunno Bhaduri and others, and of Hem Chunder Chowdhry* v. *Kali Prosunno Bhaduri and others, from the High Court of Judicature at Fort William in Bengal; delivered the* 24*th June* 1903.

Present at the Hearing:
LORD MACNAGHTEN.
LORD LINDLEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

The Appellant, Hem Chunder Chowdhry, is the owner of a four annas share in the Pergunnah Pukhuria Jainsahi, which originally formed one entire Zemindari estate. In this Pergunnah there has long existed a subordinate Talookdari tenure known as Madarjani, which is owned and possessed by the Respondents and one Guna Misser, who is not a party to the present Appeals. The questions for determination are—(1) whether the Appellant has made out his claim to the enhancement of rent allowed by the Subordinate Judge, and (2) from what date that enhanced rent is claimable.

For many years the right of the Zemindar to enhance the rent of this Talook has been a subject of contest in the Indian Courts, but it was ultimately established by a decree of the High Court at Calcutta, which decided, on the 30th November 1888, that the tenure held by the Respondents

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was of a nature liable in law to an enhancement of rent. From this decree no appeal was preferred, and their Lordships must hold that it is now too late to re-open the question. It remains to be considered, however, whether in the suits to which the present Appeals relate, the Appellant has made out his claim, in fact, to the enhancement which he seeks. The Subordinate Judge found in favour of the Appellant on this point, but his decree was reversed by the High Court.

Under Section 7 of the Bengal Tenancy Act (No. viii. of 1885), where the rent of a tenure-holder is liable to enhancement (as is the case here), it may, "subject to any contract between "the parties, be enhanced up to the limit "of the customary rate payable by persons "holding similar tenures in the vicinity"; or, "where no such customary rate exists, it "may, subject as aforesaid, be enhanced up "to such limit as the Court thinks fair and "equitable." The Subordinate Judge found that the Plaintiff had failed to prove the existence of any customary rate, and accordingly proceeded to ascertain, by an examination of the evidence before him, the limit to which the rent might be fairly and equitably enhanced, there being no contract to fix that limit.

The evidence, as is not infrequent in cases of this kind, was of a most unsatisfactory character. "Numerous witnesses," says the Subordinate Judge, "have been examined by both parties to "depose to the rates alleged by them, but none "of them appears to be reliable." Much of the documentary evidence he considered equally worthless. And the High Court concurred in this appreciation.

Some road-cess returns were, however, put in by the Appellant, which the Subordinate Judge regarded as sufficiently trustworthy to afford a

basis upon which to ascertain the assets of the Talook, and thus to fix a fair and equitable limit of enhancement. These returns are rendered under Bengal Act IX. of 1880, Section 95 of which makes them admissible in evidence against the person by or on behalf of whom they were filed. It is also contended that, on other grounds, some of them are relevant evidence under the Indian Evidence Act.

It is admitted that two of these returns relate to the particular portion of the Zemindari held by the Appellant. They were filed on behalf of Raja Jotindra Narain Roy, who is now dead, and whose widow the Respondent Rani Hemanta Kumari Debi, is one of the Talookdari tenants, as well as the owner of a 10 annas share in the whole Zemindari. They show that, in 1884, Raja Jotindra's fractional share in the Talookdari tenure was let out on lease for terms of three or four years to certain persons, at an aggregate rent of Rs. 108. 4. 8, to which must be added Rs. 4. 9. 0 for the value of the Talookdar's nij share of khamar land, making the total value of the Raja's share Rs. 112. 13 8 per annum. Adopting this figure as a fair statement of what the Talookdars generally received from their lessees as rent on account of their holdings in the Talook, the Subordinate Judge worked out a rule-of-three sum which brought the rent received by the Talookdars in respect of the Appellant's 4 annas share in the Zemindari to Rs. 3,140. 6. 0; and, after making usual deductions for expenses and collection charges, he fixed the enhanced rent payable to the Appellant at Rs. 2,386. 11. 0 in respect of the portion of the two estates in question in the suit.

The learned Judges of the High Court dissented from this method of dealing with the case. The road-cess returns did not, in their

opinion, "furnish any reliable data for ascer-
"taining the assets of the tenure"; and they held that the mathematical calculation made by the Subordinate Judge rested on two assumptions, for neither of which they saw any ground. It is quite true that the returns are not conclusive evidence; but, so far as they go, they undoubtedly show that the Talookdars were receiving from their sub-tenants a considerably higher rent relatively than that which they were paying to their superior landlord, and that the claim for enhancement could *primâ facie* be supported on the ground that the existing rate was consequently not "fair and equitable" within the meaning of the Bengal Tenancy Act. In the opinion of their Lordships, this evidence was sufficient to shift the onus to the Respondents, in whose power it was, by producing their collection papers, to rebut any presumption raised against them by the road-cess returns. But for reasons best known to themselves, they did not produce any documentary evidence on which reliance could be placed. On the contrary, they put in certain counterfoils of receipts alleged to have been granted to their ryots; and these the Subordinate Judge found to have been fabricated for the purposes of the suit. Under Section 114 (g) of the Indian Evidence Act (No. I. of 1872), the Court may presume that "evidence which could
"be, and is not, produced would, if produced, be
"unfavourable to the person who withholds it"; and their Lordships consider that, in the circumstances of the case, the Subordinate Judge was fully justified in coming to the conclusion which he formed upon the only evidence before him which he regarded as reliable.

The Decree of the Subordinate Judge was made on the 31st July 1895, and awarded the enhanced rate prospectively from the end of the

Fasli year 1298. On the 20th November 1895 the Appellant filed a suit against the Respondents to recover the arrears of rent due for 1298. The Subordinate Judge held that the claim was barred by Section 12 of the Civil Procedure Code, but not by the law of limitation. The High Court, on appeal, came to the precisely opposite view. In the opinion of their Lordships the proceedings in the earlier suit stayed the operation of the law of limitation; and as the Appellant claimed the arrears of 1298 in that suit, but his claim was then disallowed as premature, he is now entitled to the benefit of the decree for enhancement and to recover the arrears at the enhanced rate. The decree of the Subordinate Judge, in which he ascertained the amount due for arrears at that rate, but postponed execution until the final decision of the enhancement suit, can therefore be sustained.

Their Lordships will humbly advise His Majesty that the Decrees of the High Court in both suits should be set aside with costs, and those of the Subordinate Judge affirmed. The Respondents will pay the Appellant's costs of the Appeals, except that the parties will pay their own costs of the petition lodged by the Appellant for leave to refer at the hearing to certain documents.