Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jotindra Mohun Lahiri v. *Guru Prosunno Lahiri and Others, from the High Court of Judicature at Fort William in Bengal; delivered the 23rd March* 1904.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal against two decrees of the High Court of Bengal dated the 17th July 1900, overruling a decree of the Subordinate Judge of Rungpore of the 25th May 1898. The suit was for contribution in respect of a decree under which all parties to the present suit and all parties to the present Appeal (or those whose interests they represent) were liable as judgment debtors; the Plaintiff's case being that he had paid a larger amount towards the satisfaction of that decree than properly fell to his share as between him and his co-debtors.

The proceedings now before their Lordships are a stage, and it is to be feared not the final stage, in a tedious and complicated course of litigation between the various persons from time to time interested in the estate of Karaibari, and between the several branches of a family which owes its origin to one Ramanath Lahiri, who was at one time the principal sharer in that estate. The present suit is so far connected

with the earlier transactions that, although the decree in respect of which contribution is claimed was in its final form only settled in 1882, it is necessary, in order to understand the points raised upon this Appeal, to go back to a much older story. But for the present purpose the merest outline of that story will be sufficient.

In 1826 Ramanath Lahiri was the owner and in possession of a 12-annas share of the estate of Karaibari, the remaining four-annas share being the property of one Kali Chunder Lahiri. Ramanath had five sons and a wife (their mother), and he then executed a document of the nature of a family settlement, by which he reserved to himself and his wife a three-annas share of his estate, and gave 3 annas to the eldest son, and 2 annas 10 gundas to each of the four other sons. Ramanath died in 1831, and after his death, instead of his five sons succeeding to the estate in equal shares under the ordinary law of inheritance, the widow remained in the enjoyment of 3 annas, while the sons continued to hold the unequal shares assigned to them by the settlement of 1826; and so things continued till the death of the widow in 1849. At that time the four elder sons were dead, of whom the first, second, and third were represented by female heirs, and the fourth by his son Nilkamal; the fifth son, Shibnath, was living. The three-annas share hitherto enjoyed by the widow was than divided equally between Nilkamal and Shibnath. This, of course, effected a change in the proportionate interests of the several members of the family; and so far as the matter can be traced with certainty, it cannot be said that there was any further alteration of the shares then fixed until after the year 1854, a year which forms an important date in this case.

In the same year, 1826, in which the family settlement was executed, Ramanath, whose real title was, as has already been said, to 12 annas of Karaibari, came into possession of the remaining four annas, which properly belonged to Kali Chunder. How this happened does not appear, but Ramanath's possession of the four annas, which was continued after his death by his successors in interest, was subsequently proved to have been wrongful. This was established by a suit in which the representatives of Kali Chunder obtained a decree against the representatives of Ramanath for possession of the four annas share. Possession in accordance with this decree was actually obtained in 1854.

The representatives of Kali Chunder followed up their success by instituting another suit, on the 27th January 1862, in the Court of the Deputy Commissioner of Goalpara to recover mesne profits in respect of the period of wrongful exclusion from possession, extending from 1826 to 1854; and they joined as Defendants all those who then were or might be entitled to share in the estate that had been Ramanath's, including the representatives of the lines of all the five sons of Ramanath, and described them as "co-sharers, zemindars of a "12 annas share of pergunnah Karaibari."

The decree of the Deputy Commissioner in that suit, dated the 6th September 1875, awarded to the Plaintiff a sum of over two lacs of rupees, including costs, and that decree was against the persons who were co-partners at its date, one of the original Defendants, Chandmoni, having died while the suit was pending, and the line of her husband, the third son of Ramanath, having, with her, become extinct.

From that decree there was an appeal to the High Court, which reduced the amount awarded

by the Deputy Commissioner to Rs. 85,795. Other proceedings followed, as the result of which the terms of the decree were finally settled on the 3rd April 1882. That decree is not before their Lordships, but its effect is stated in documents which are in evidence and are on the record, its terms must be perfectly well known to all the parties, and throughout the proceedings in the Courts below and on this Appeal it has always been assumed and frequently stated, and the statements have been accepted, that the final decree was one merely reducing the amount awarded by the First Court. Their Lordships accept it as a decree doing this and nothing more.

In order to appreciate the meaning and operation of these decrees, it must be noticed that between 1854, when the dispossession of Kali Chunder's family came to an end, and 1882, when the final decree for mesne profits in respect of that dispossession was passed, a number of changes had taken place in the distribution of interests between the branches of Ramanath's family. Voluntary transfers had been made from one branch to another. Long and complicated litigation had resulted in the compulsory acquisition of certain shares by one from others of them. And, as has been already stated, one branch, that of the second son, had become extinct by the death of his widow during the pendency of the suit, and thereby her share had devolved upon Nilkamal, the son of the fourth son. It is not necessary to examine these transactions in detail. It is enough here to say that, in the result, at the date of the decree, Kanaktara, the widow of Ramanath's first son, held a share, and the representatives of the second, fourth, and fifth sons other shares, while the line of the third son was extinct. Subsequently to the final decree

for mesne profits, and before the institution of the present suit, Kanaktara died, and so the line of the first son of Ramanath became extinct, and the share which she had enjoyed passed to those who represented the fourth and fifth sons in equal shares. The stems of descent from Ramanath were thus reduced to three, and amongst these the Plaintiff in this suit (Appellant before their Lordships) represents the line of the fifth son; Nilkamal, the first Defendant (for whom the first group of Respondents, his heirs, are now substituted) that of the fourth son; and Hari Saran Moitra, the second Defendant (for whom the second group of Respondents, his heirs, are now substituted) that of the second son.

After the final decree for mesne profits, the decree-holders issued execution in 1882 and again in 1888 to recover the amount due to them by attachment and sale of the estate.

Under each of these executions and to prevent the sacrifice of the properties against which they were issued, payments were made from time to time by and on behalf of the several persons liable under the decree. These payments began at least as early as April 1883, and the decree was finally satisfied, and the matter concluded on the 17th September 1889, during which period interest was running on so much of the amount of the decree as for the time being remained unsatisfied.

The Plaintiff filed the present suit on the 10th September 1894. In his plaint he stated the decree for mesne profits, and proceeded to say that:—

"The property left by the late Rama Nath Lahiri was liable "for the amount due on account of mesne profits, and the "property left by him, a 7 annas 13 gundah share consisting "of the entire share of Chandmoni Debi and a moiety of "Kanaktara Debi's share, is owned and held by the Defendant "No. 1, a 3 annas 4 gundahs share by the Defendant No. 2,

"and with Kanaktara's moiety share, 5 annas 3 gundahs "share is owned and held by the Plaintiff, and the Plaintiff "and the Defendants are liable to pay the amount of the said "decree in proportion to those shares. The Plaintiff and the "Defendant No. 1 having after Kanaktara Debi's death got "the property left by her in equal shares, were bound to pay "equally the amount of that decree payable on account of her "share, and as the Defendant No. 1 after Chandmoni Debi's "death got the share belonging to Ram Mohun Lahiri, the "Defendant No. 1 is bound to pay her share of the amount "due."

The Plaintiff then set out an account intended to show that, taking the foregoing specification of shares as the basis of liability, he had, as against each of the Defendants, paid more than his proper share under the decree, and he asked for a decree accordingly against each of them.

The Defendants in their written statements raised certain defences, which it is not now necessary to notice. They further alleged that the satisfaction of the decree had been delayed by wilful default and obstruction on the part of the Plaintiff's adoptive mother, and that but for this the sums paid by the Defendants respectively would have been sufficient to cover their shares of liability; and issues were raised with reference to this defence. The Subordinate Judge who tried the case, in deciding these issues, held that in fact the Defendants had not been prevented from paying their shares by what had occurred; and from this finding the learned Judges of the High Court have not expressed any dissent. The point has been again raised in argument on this Appeal; but after hearing all that was to be said their Lordships see no reason to differ from the finding of the Subordinate Judge. The matter therefore need not be mentioned further. It is not improbable, however, that any injustice which might seem to be done to the Defendants by this conclusion may be remedied by the directions which their Lordships propose to give in another connection.

The written statements did not traverse the allegations of the plaint as to the shares in the family estate enjoyed by the parties to the suit, nor was any issue ever raised, or ever asked for, upon that matter; though the issues raised were probably sufficiently wide to cover the point ultimately raised in the High Court as to the proper basis of liability. The Subordinate Judge therefore adopted the specification of shares put forward in the plaint as correct. And there can be no doubt, indeed it has never been seriously questioned, that the shares at the date of this suit were those stated. Nor is there any doubt that the shares then existing, as between the branches of the family, were the same as they had been at the date of the decree for mesne profits, except for the death of Kanaktara and the devolution of her share; and as her share of course devolved, subject, as between the co-partners, to its burdens, that change gives rise to no complication.

The Subordinate Judge further accepted the specification of shares so ascertained as the basis for determining the respective liabilities of the parties to the suit. This is the first point on which difference of opinion has arisen.

The second Defendant, by his written statement, raised another point, relating to certain moneys formerly lying in the Garo Hills Government treasury. The facts as they appeared at the trial were these, and they are not disputed. A portion of the Karaibari estate seems to have lain in the Garo Hills district, and for some reason or other moneys derived from that portion were held in the Treasury to the credit of the various co-partners. In 1883 the aggregate of those moneys was paid to the decree-holders towards satisfaction of the decree for mesne profits. At that date these moneys were not held on joint account to the credit of

the estate or of the co-partners collectively, but on separate accounts to the credit of the individual co-partners, and the sum so credited to the second Defendant was equivalent to a two-annas share of the whole; he had, however, before that time by legal proceedings established his right to a 3 annas 4 gunda share of the whole estate. The Plaintiff, in the account filed by him in this suit, credited the second Defendant as a payment by him, with the amount which had stood to his credit in the Treasury; the latter contended that he should be credited with a larger sum corresponding with the share of the whole estate to which he had established his title. The Subordinate Judge held that effect could not be given in this suit to the contention of the second Defendant, and pointed out that his remedy (if any) lay in another direction.

The Subordinate Judge took an account in accordance with his findings; and as it showed each of the Defendants to be indebted to the Plaintiff, he gave a decree in which he made each liable for the amount shown against him.

Against this decree each of the Defendants or their representatives appealed to the High Court. The learned Judges in that Court differed from the Subordinate Judge as to the principle on which the liability to contribute should be ascertained. Their view was thus expressed:—
"We have to deal with the respective shares of
"the parties of which they were in possession
"from September 1826 to 25th July 1854."
And they found that "for the years 1826 to 1854
"the Plaintiff's share must be taken as 5 annas,
"the share of Defendant No. 2 as 2 annas 10
"gundas, and the share of Defendant No. 1 as
"6 annas odd gundas."

As to the money drawn from the Garo Hills Treasury also the learned Judges differed from

the Subordinate Judge, and they stated their reasons for doing so as follows :—

"There has been considerable discussion as to the share to "which Defendant No. 2 is entitled to credit; for, out of the "sum drawn from Garo Hills Treasury and paid to the decree-"holders in satisfaction of their decree, the Plaintiff has "given him credit for Rs. 2,613. 9. 4. 10, in respect of a "2 annas share, and the Subordinate Judge has accepted that "estimate on the ground that the Plaintiff was out of "possession of the 1 anna 4 gundahs share at that time. It is "not clear what time the Subordinate Judge refers to. The "suit was brought by Uma Soondari, claiming a 3 annas "4 gundahs share, in 1870, and it was decreed in the High "Court in 1874, and in the Privy Council in 1880. The "money was drawn out of the Garo Hills Treasury in 1883. "Certainly, at the time the money was drawn, Defendant "No. 2 was entitled to a 3 annas 4 gundahs share of it. We "cannot, therefore, agree with the finding of the Subordinate "Judge on this point, but hold that Defendant No. 2 is "entitled to a credit out of the sum drawn from the Garo "Hills Treasury proportionate to a 3 annas 4 gundahs, or "one-fifth share, that is to say, to Rs. 4,181. 11. 9."

In accordance with these findings the learned Judges retook the account between the parties, and finding nothing due to Plaintiff, dismissed the suit with costs.

Against that decree the present Appeal has been brought; and for the Appellant it has been contended that the learned Judges were wrong upon both the points in which they differed from the First Court, and that their decree should be set aside, and that of the Subordinate Judge restored.

On behalf of the Respondents it was argued that the learned Judges were right on both the points just referred to. Reliance was again placed on the attempted defence to the suit on the ground of obstruction, as to which their Lordships' opinion has been already expressed, and another contention was urged, based upon delay, which will be dealt with immediately.

With regard to the basis upon which contribution should be estimated, even assuming the principle adopted by the High Court to be

correct, namely, that it should follow the shares enjoyed from 1826 to 1854, not those at the date of the decree for mesne profits, still the conclusion drawn does not seem to follow. The shares stated by the learned Judges do not seem to correspond in fact with those held at any time during the years in question. And the shares were not uniform during those years, the shares between 1826 and 1849 were different from those between 1849 and 1854; so that to apply the principle correctly an account would have to be taken of some complexity, and of a kind different from that taken in either of the Courts below. Their Lordships are of opinion, however, that the principle so laid down is not correct. The cause of action in the suit for mesne profits was the wrongful enjoyment by the 12 annas shareholders collectively, as a part of their family estate, of property which did not belong to them. The suit was brought against those who were co-partners at the time of its institution, and both in form and in substance it sought to charge them as such. The decree which followed was against those who were co-partners when it was passed; it was in effect a decree against the estate. The execution proceedings were directed against the estate. If those proceedings had gone on to their legal conclusion the estate would have been sold, and the loss would have fallen on the co-partners according to their shares. That is the danger which hung over them if the decree were not satisfied otherwise, and which was averted by the payments made. It follows, in their Lordships' opinion, that the same shares form the proper basis for assessing contribution, and that is the basis on which the Subordinate Judge proceeded.

As to the second point upon which the learned Judges of the High Court have differed from the

Subordinate Judge, that is to say, the claim of the second Defendant (represented by the second group of Respondents) to be credited with a larger sum than had been allowed him out of the money received from the Garo Hills Treasury, their Lordships are again unable to agree with the learned Judges. If the money in the Treasury had been held on a joint account to the credit of the estate or of the family, it might well be said that the parties should be credited with payment in accordance with their their legal shares in the estate generally. But in fact the money was held on separate accounts to the credit of the several co-partners; and it cannot be said for the present purpose that the second Defendant paid more than was his to pay, that is, the amount standing to his credit. The circumstances referred to by the learned Judges show at best that, if he had enjoyed his full legal rights, he would have been in a position to pay more. Whether he has a remedy on this account in any other from is a question which their Lordships have not to consider.

It remains to consider one objection urged on behalf of the Respondents to the account as adjusted by the Subordinate Judge, which appears to their Lordships to be well founded. The payments by which the decree for mesne profits was satisfied were made at various times, between 1883 and 1889, by the several persons liable, and in different proportions, while all the time interest was running on the balance unpaid under the decree. The Defendants would seem to have contributed relatively more largely to the earlier payments and the Plaintiff to the later, and thereby an injustice was done under the decree of the Subordinate Judge, which made no allowance for this distinction. Each payment on account, so far as it went, stopped the running of interest on the decretal amount; and the

benefit of that cessation of interest ought to have gone in relief of those who made the payments, not of those who continued in default.

Their Lordships will humbly advise His Majesty that the Decrees of the High Court and that of the Subordinate Judge should be discharged, and that the case should be remitted to the High Court, with a direction to retake the account between the parties on the principle of computing interest on the total principal of the judgment debt to the date of the final extinguishment without regard to the sums from time to time paid on account, and then crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid, from the date of payment until the final satisfaction of the decree in 1889. If upon taking the account on this footing it appears that anything was due to the Plaintiff by either Defendant, and is due by his representatives, a decree should be made against the latter for the amount so found due with costs in all the Courts in India. If in the case of either Defendant it be found that nothing was due from him and is due from his representatives, the suit will be dismissed as against the latter with costs in all the Courts in India.

Neither party has wholly succeeded before their Lordships, and all parties will bear their own costs of this Appeal.