

*Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Ganga Bahu Debi, since deceased, (now represented by Shama Bibi and another) v. Apurba Krishna Roy and others; and of Apurba Krishna Roy and others v. Ganga Bahu Debi, since deceased (now represented by Shama Bibi and another), from the High Court of Judicature at Fort William in Bengal; delivered the 13th June 1912.*

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PRESENT AT THE HEARING :

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

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These are Consolidated Appeals from a decree of the High Court of Judicature at Fort William in Bengal, dated the 27th March 1907, which affirmed a decree of the Additional Subordinate Judge of the 24 Pergunnahs, dated the 29th July 1902, in a suit for redemption.

The lands which were mortgaged are situate in the Sunderbuns, and were originally leased by the Government in 1845 to one Manu Khan. They consisted of 18,600 bighas, and were waste lands covered with jungle. Manu Khan's interest in the lease, vested in one Kalidas Ganguly, who in 1854 assigned his interest in the lease to Ganga Bahu Debya. On the 28th May 1855 the Government granted a new lease of the lands to

Ganga Bahu Debya. It was made a condition of the grant that one-eighth of the land should be cleared and fit for cultivation at the end of five years, one-fourth at the end of ten, one-half at the end of twenty, and three-quarters at the end of thirty years, each of these periods being reckoned from the 1st day of May 1844. On the failure of any of these conditions, the whole interest of the grantee was to be forfeited, and the lands were to be resumed by the Government.

In 1862 the extent of land already cleared and cultivable appears to have been in excess of what was required by the terms of the lease. In order to provide money for the expenses of reclamation Ganga Bahu Debya on the 16th May 1862 mortgaged by conditional sale the lands for Rs. 25,000 to Kishori Mohan Roy, who was a member of a joint Hindu family. The mortgage provided that if Ganga Bahu Debya or her representatives should on the 16th May 1865 repay to Kishori Mohan Roy the said Rs. 25,000, with interest thereon at the rate of 12 per cent. per annum, and should in the meantime pay and satisfy, as they should become due, all the revenues, rates, taxes, assessments, and impositions payable, or thereafter to become payable, in respect of the said lands and hereditaments, or any part thereof, and all costs and charges as between attorney and client in respect of the deed of mortgage, and of a bond and warrant of attorney to confess judgment thereon, and also of a warrant of attorney to confess judgment in ejectment, the said Kishori Mohan Roy, his heirs, representatives, executors, administrators, or assigns should reconvey the said lands and hereditaments to Ganga Bahu Debya, her heirs, representatives, and assigns. The interest was payable half yearly. On the 16th May 1862 Ganga Bahu Debya and her husband gave to Kishori Mohan Roy their joint and several penal

bond for the payment to Kishori Mohan Roy on the 16th May 1865 of the Rs. 25,000, interest, revenues, rates, taxes, assessments, impositions, and costs in the mortgage mentioned. Also on the 16th May 1862 Ganga Bahu Debya gave her warrant of attorney to certain solicitors at Calcutta authorising them to receive on her behalf a plaint in an action of ejectment at the suit of John Doe on the demise of Kishori Mohan Roy for the recovery of the property comprised in the mortgage, and to confess the same action and to suffer judgment of ejectment to pass and be entered up against her on the mortgage, and on the money bond.

On the 6th February 1863 Ganga Bahu Debya obtained an additional loan of Rs. 17,000 from Kishori Mohan Roy, which was not to bear interest, in order to enable her to proceed with the clearances and reclamation required by her lease and to protect the land from forfeiture by the Government. The arrangement was carried into effect by two separate deeds and an ekrar-nama, all of that date. By one of those deeds she, in consideration of the loan of the Rs. 17,000, without interest, conveyed to Kishori Mohan Roy and his representatives, one moiety of the lands which remained uncleared at that date. The lands so conveyed were about one-fourth of the 18,600 bighas. By the other deed it was agreed and declared that three-fourths of the land which had been mortgaged on the 16th May 1862 should stand charged with and remain as security for the repayment to Kishori Mohan Roy of the said Rs. 17,000, and also of the said Rs. 25,000 and the interest thereon, and that the said lands should not be redeemed or redeemable until full payment should be made to Kishori Mohan Roy, his heirs executors, administrators, or assigns, of the said sum of Rs. 25,000 and the interest thereon, and of the said Rs. 17,000. The

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ekrarnama provided for the appointment of a superintendent and of a mohurir, and the application of the profits which might accrue from Ganga Bahu Debya's three-fourths share of the lands.

By virtue of the warrant of attorney of the 16th May 1862 Kishori Mohan Roy in March 1863 obtained from the High Court at Calcutta judgment in ejectment against Ganga Bahu Debya, and also in July 1863 judgment on the penal bond for Rs. 50,000. On the 27th January 1864 a writ of possession was issued, and on the 11th February 1864 Kishori Mohan Roy obtained possession under the writ. On the 12th November 1864 his name was recorded in the register as the owner. On the 19th of April 1864 Kishori Mohan Roy instituted, under Regulation XVII. of 1806, foreclosure proceedings, which were held by this Board on Appeal to have been ineffectual. Kishori Mohan Roy, or his representatives, have continued in possession of the mortgaged lands since the 11th February 1864.

On the 30th May 1888 the suit for redemption in which these appeals have arisen was brought by Ganga Bahu Debya in the Court of the First Subordinate Judge of the 24 Pergunnahs against Kishori Mohan Roy, and others, who claimed title through or under him. Kali Prasad Johuri, who was an assignee of a portion of the interest of Ganga Bahu Debya, was subsequently added as a co-Plaintiff. On the 28th July 1888 the Defendants, or those whom they represent, filed a written statement in which they denied the right of the Plaintiff to redeem, pleaded limitation, and claimed an absolute proprietary interest in themselves in the mortgaged property in consequence of the foreclosure proceedings of 1864. On the 29th June 1889 the Subordinate Judge of the 24 Pergunnahs gave judgment in favour of Ganga Bahu Debya and Kali Prasad

Johuri, and made a decree for redemption of the three-fourths share in the mortgaged lands and for accounts. From that decree the Defendants appealed to the High Court at Calcutta, and the Plaintiffs filed certain cross-objections to the decree. In their Appeal the Defendants persisted in their denial of the right of the Plaintiffs to redeem and in the claim of absolute proprietary title in themselves by reason of limitation and the foreclosure proceedings. On the 10th September 1890 the High Court by its decree dismissed the Defendants' Appeal with costs, and in part allowed the cross objections of the Plaintiffs. The decree of the High Court, so far as it was material, was as follows :—

“ It is ordered and decreed that the decree of the Lower  
 “ Court in so far as it declares that the Plaintiffs are  
 “ entitled to redeem the twelve annas or three-fourths share  
 “ of the properties mentioned in the schedule to the plaint  
 “ and in the event of a reconveyance thereof by the  
 “ Defendants to the Plaintiffs to have a partition of the  
 “ same as prayed for therein and in so far as the same  
 “ declares that the tenures mentioned in the plaint were  
 “ created by the Defendants for their own benefit benami  
 “ and in so far as the same directs the Defendants to pay  
 “ to the Plaintiffs their costs of suit in that Court, be and  
 “ the same is hereby affirmed. And it is further ordered  
 “ and decreed that the accounts be taken by the Lower  
 “ Court as and in the manner directed in the said decree  
 “ of the said Court, that is to say an account of the profits  
 “ of the twelve annas of the properties described in the  
 “ schedule to the plaint from the 12th of November 1864;  
 “ an account of the money spent by the Defendants from  
 “ time to time for the due management of the said twelve  
 “ annas share and for the collection of the rents and profits  
 “ thereof; for its preservation from destruction, forfeiture,  
 “ and sale; for supporting the mortgagor's title to the said  
 “ share and for making his own title thereto good against  
 “ the mortgagor, with simple interest thereon at twelve per  
 “ cent. per annum from the respective dates of such  
 “ payments upon such items of expenditure as aforesaid  
 “ and for improvements, if any, of the said share, without  
 “ interest, and of the money which becomes due to the  
 “ Defendants under the mortgage deed dated the 16th May

“ 1862 with interest thereon as provided for in the mortgage  
“ and of the principal sum of money which becomes due to  
“ the Defendants under the Further Charge dated the  
“ 6th February 1863, without interest; and in case the  
“ interest due on the said mortgage exceeds the annual  
“ rents and profits let annual rests be made on the 16th day  
“ of March of each year, and let what shall become due on  
“ account of rents and profits be applied in the manner  
“ declared in the decree of the Court of First Instance, subject  
“ to the modification made in regard to compound interest  
“ and that the amounts spent on improvement and not  
“ carrying interest rank last. And it is further ordered  
“ and decreed that this suit be referred back to take the  
“ foregoing accounts, and in case it shall appear, upon the  
“ taking of the said accounts, that anything remained due  
“ to the Defendants, at the date of this decree, then upon  
“ the Plaintiffs paying into the Lower Court to the credit  
“ of the suit what shall be declared by the Lower Court to  
“ be so due within six months of the said Court making  
“ such declaration, together with interest on such sums as  
“ bear interest under the directions hereinbefore mentioned  
“ at the rate and in the manner hereinbefore provided, the  
“ Defendants do reconvey to the Plaintiffs the mortgaged  
“ premises free and clear from all incumbrances done  
“ by them or anyone claiming through or under all or any  
“ of them, and do deliver up to the Plaintiffs, or to such  
“ persons as they appoint, all documents in their custody or  
“ power relating thereto, and on such reconveyance being  
“ made and documents being delivered up, the Lower Court  
“ do pay out to the Defendants the sum so to be paid in as  
“ aforesaid. But in default of payment by the Plaintiffs of  
“ what shall be found due as against them, it is ordered and  
“ decreed that this suit will stand dismissed and the  
“ Plaintiffs' right to redeem will be for ever barred and  
“ foreclosed. But in case it shall appear that there was not  
“ anything due to the Defendants at the date of the decree,  
“ then it is further ordered and decreed that the Defendants  
“ do, within two months, reconvey to the Plaintiffs the  
“ three-fourths share of the property mentioned in the  
“ schedule to the plaint free and clear from all incum-  
“ brances done by them or anyone claiming by or through  
“ and under all or any one of them and do deliver up to the  
“ Plaintiffs, or to such persons as they appoint, all documents  
“ in their custody or power relating thereto, and it is further  
“ ordered and decreed that the Defendants do, within two  
“ months, pay to the Plaintiffs the amount which shall be  
“ found by the Court below to be due from the Defendants

“ to the Plaintiffs upon taking the accounts as aforesaid,  
 “ with interest at six per cent. from the date of the mort-  
 “ gage being satisfied. And it is further ordered and decreed  
 “ that, in the event of and after reconveyance by the  
 “ Defendants to the Plaintiffs, the entire lot No. 28, known  
 “ as Abad Mauirtat, be partitioned by the Lower Court,  
 “ and that the said Court do allot to the Plaintiffs three-  
 “ fourths or twelve-sixteenths of the same, and that the said  
 “ Court do allot to the Defendants one-fourth or four-  
 “ sixteenths of the same as described in the conveyance of  
 “ the 6th February 1863 executed by the Plaintiff, Gunga  
 “ Bahu Debi, of the one part and the Defendant, Kishori  
 “ Mohan Roy, of the other part, and it is further ordered  
 “ and decreed that the Defendants do pay to the Plaintiffs  
 “ the sum of rupees eight hundred and fifty-seven as per  
 “ details at foot, being the amount of costs incurred by them  
 “ in this Court, with interest thereon at the rate of six per  
 “ cent. per annum from this date until realization. Dated  
 “ this 10th day of September in the year of our Lord one  
 “ thousand eight hundred and ninety.”

From the decree of the 10th September 1890 of the High Court the Defendants appealed to Her Majesty in Council, their main contentions being that the equity of redemption had been extinguished by the foreclosure proceedings of 1864 under the Bengal Regulation XVII. of 1806, and that the decree of the High Court was erroneous in so far as it disallowed compound interest upon the sums spent by them in order to protect the subject of their security and in having disallowed interest upon the money expended by them on its improvement. Their Lordships of this Board by their judgment of the 27th July 1895 advised Her Majesty that the decree of the High Court should be affirmed, and the Appeal to Her Majesty in Council was dismissed with costs.

Ganga Bahu Debya and Kali Prasad Jahuri in 1891 applied that the accounts should be taken; to that application the Defendants objected, and their objection was overruled. Two pleaders were appointed by the Subordinate Judge to take the accounts, but as those gentlemen in 71 sittings examined two witnesses only,

the Plaintiffs applied for the appointment of a judicial officer for the taking of the accounts who would act with more firmness and would set his face against waste of time. The Plaintiff Ganga Bahu Debya died, and thereupon a dispute arose as to who was the legal personal representative of Ganga Bahu Debya, and that dispute was carried up to the High Court.\* Ultimately in February 1899 Nalini Nath Mitra, a judicial officer, was appointed as a Commissioner to take the accounts. Karuna Das Bose, who was then the Subordinate Judge, in his order of the 5th December 1900 stated in effect that the Defendants, and not the Plaintiffs, were responsible for the protracting of the litigation. Apparently that statement was justified. The Commissioner on the 26th October 1900 commenced his inquiry into the accounts, and on 23rd September 1901 made two reports, one for the period from February 1864 to the 10th September 1890, and the other for the period from the 11th September 1890 to the end of the Bengali year 1307. By the latter of the two reports the Commissioner found that the sum of Rs. 232,554. 6. 8. 1. was due under the mortgage of the 16th May 1862, and also the sum of Rs. 17,000 under the further charge, aggregating the sum of Rs. 249,554. 6. 8. 1.

In taking the accounts as from February 1864 the Commissioner acted in compliance with an order of the Subordinate Judge of the 24 Pergunnahs, and it has not been shown to their Lordships that any injustice to the parties on either side resulted from the Commissioner having acted in compliance with that order. The High Court by its decree of the 10th September 1890 had directed that the account of the profits should be taken from the 12th November 1864, but did not except inferentially fix the starting point or points from which the accounts of the expenses of the mortgagees and of the interest due



under the mortgage of the 16th May 1862 should be taken.

The Plaintiffs and the Defendants respectively filed objections to the reports of the Commissioner. These objections were heard and carefully considered by the Subordinate Judge of the 24 Pergunnahs, who substantially confirmed the reports of the Commissioner, and on the 29th July 1902 made a decree which declared that the sum of Rs. 3,31,162. 0. 11 was due from the Plaintiffs to the Defendants at the date of his decree of the 29th July 1902, and decreed that on payment into Court within six months from the 29th July 1902 of the said sum of Rs. 3,31,162. 0. 11, with interest at the rate of 12 per cent. per annum on Rs. 2,86,886 from the 29th July 1902 to the date of payment into Court within such six months, the Plaintiffs should have partition and a reconveyance and possession free from all incumbrances of a 12 annas share of the 18,600 bighas which had been mortgaged, and that in default of such payment the right of the Plaintiffs to redeem should be extinguished. The decree contained the usual direction as to partition, a re-conveyance of the 12 annas share, and the delivery up of documents, and ordered that each party should bear their respective expenses incurred in the adjustment of accounts.

The Plaintiffs appealed to the High Court against the decree of the 29th July 1902, and the Defendants filed cross-objections to that decree. The learned Judges of the High Court on the hearing of the Appeal and cross-objections were not asked to go into the detail of the figures of the account, they were asked only to decide the principle upon which the account ought to have been taken. Apparently the question as to the starting point from which the account should have been taken, if referred to in argument, was

not pressed at the hearing in the High Court. The learned Judges of the High Court having fully considered the questions which were pressed in the arguments before them on behalf of the Plaintiffs and on behalf of the Defendants respectively by their decree of the 27th March 1907, dismissed with costs the Appeal and the cross-objections. From that decree of the 27th March 1907 these Consolidated Appeals were brought.

On the hearing of these Consolidated Appeals the main questions which were argued before this Board depended on the construction of the direction in the decree of the High Court of the 10th September 1890 that, "in case the interest due  
" on the said mortgage exceeds the annual rents  
" and profits let annual rests be made on the 16th  
" day of March of each year, and let what shall  
" become due on account of rents and profits be  
" applied in the manner declared in the decree  
" of the Court of First Instance, subject to the  
" modification made in regard to compound  
" interest, and that the amounts spent on  
" improvement and not carrying interest rank  
" last." It was contended on behalf of the Plaintiffs before this Board that the "annual  
" rents and profits" in the passage which their Lordships have quoted should be construed as meaning the gross annual rents and profits, and not, as they were construed by the High Court, the Subordinate Judge, and the Commissioner, as meaning the net annual rents and profits. The High Court held, as their Lordships consider correctly, that "the  
" annual rents and profits" in the passage quoted must mean annual rents and profits, which were directly available for the payment of interest, and that there were no rents and profits so directly available, until the revenue, cesses, costs of preservation, management, and collection had

been paid. As the High Court has pointed out, it is for the interest as well of the mortgagor as of the mortgagee that the security should be preserved, and that "if interest were to come first out of the gross rents and profits, and exhausted them, the mortgagees would have to dip into their own pockets to pay what was necessary for revenue, cesses, costs of collection, and what was required to preserve the property, a very serious factor in the case of property in the Sunderbuns."

It was also contended on behalf of the Plaintiffs before this Board, although not apparently before the High Court, that in taking the accounts the Commissioner had allowed compound interest on expenditure for which simple interest only was allowable under the decree of the 10th September 1890, and had also allowed compound interest on moneys spent for improvements in respect of which no interest was allowable under that decree. On such examination of the accounts as took place before their Lordships the Plaintiffs have failed to satisfy their Lordships that any compound interest has been allowed on expenditure or on other moneys spent for improvements, or that any interest has been allowed which was not allowable by the decree of the 10th September 1890.

On behalf of the Defendants, who are the representatives of Kishori Mohan Roy, deceased, it was contended that in taking the accounts the surplus proceeds of the mortgaged property should in the first place have been appropriated towards the debt of Rs. 17,000, on which no interest was chargeable, and that the learned Judges of the High Court had erred in holding that the mortgagees had in fact made no appropriation. The learned Judges of the High Court found that the mortgagees "have never appropriated, nor have they ever affected to

“appropriate.” With that finding their Lordships agree. Their case was inconsistent with any appropriation and with any intention on their part to appropriate. Down to the decision of this Board on the 27th July 1895 the case of the Defendants was, not that they were mortgagees, it was that since 1864 they or those whom they represent were owners in possession and were not liable to account. The appropriation which they now claim to be entitled to have made is inconsistent with the terms of the ekrarnama of the 6th February 1863, which they produced and put in evidence in the suit. Whatever the rights of the Defendants to appropriate the surplus proceeds of the mortgaged property in the first place towards the discharge of the debt of Rs. 17,000 may have been, those rights were extinguished by the decree of the High Court of the 10th September 1890, which was affirmed by this Board on the 27th July 1895. Their Lordships agree with the decision of the High Court of the 27th March 1907, in accordance with which the decree now under appeal was drawn up, to the effect that by the decree of the 10th September 1890 the debt of Rs. 17,000 should in taking the accounts rank last.

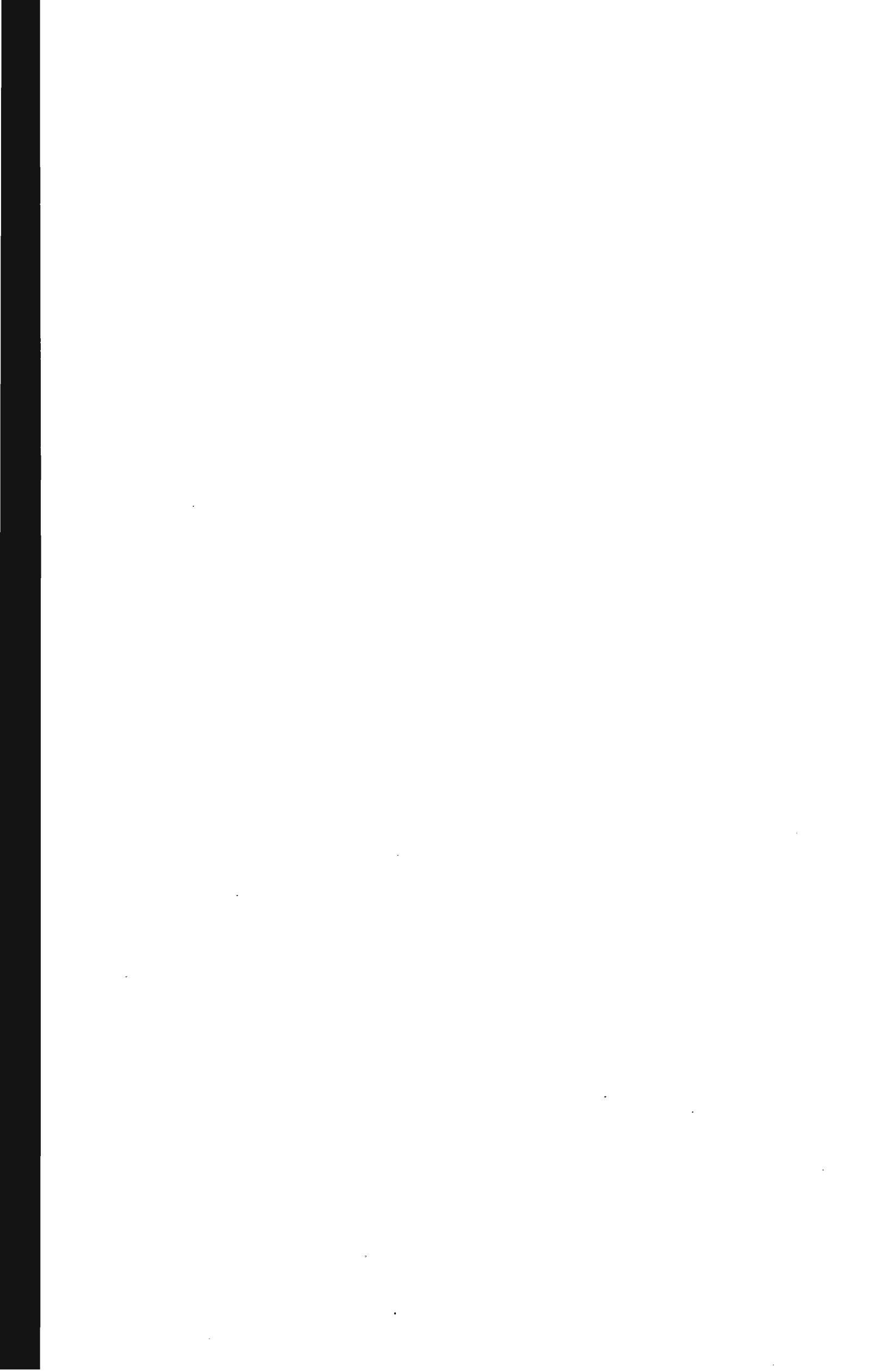
It has not been shown to their Lordships that the accounts as modified by the decree of the Subordinate Judge of the 29th July 1902 were not in accordance with the decree of the High Court of the 10th September 1890, or that the decree made by him was open to objection.

Their Lordships are satisfied that the action of the Defendants in this suit for redemption, which commenced on the 30th May 1888, has been obstructive and oppressive, and has unduly and intentionally prolonged the litigation to the advantage of the Defendants and to the serious detriment of the Plaintiffs. The Defen-

dants or those whom they represent have been in possession of the mortgaged property since the 11th February 1864. As their Lordships have said, the Subordinate Judge of the 24 Pergunnahs by his decree of the 29th July 1902 fixed the amount at which the Plaintiffs might have redemption at Rs. 3,31,162 0. 11, with interest added at the rate of 12 rupees per centum per annum on Rs. 2,86,886 from the 29th July 1902 to the date when payment might be made into Court within six months from the 29th July 1902. No further payment of interest by the Plaintiffs to the Defendants after the 29th July 1902 was decreed by the Subordinate Judge, and their Lordship's consider that no further sum as interest beyond the interest on the sum of Rs. 2,86,886 so decreed by the Subordinate Judge for the period from the 29th July 1902 to the 28th January 1903 should be allowed to the Defendants. The Defendants have been in the receipt of the rents and profits since the 29th July 1902 when the Subordinate Judge made his decree. Their Lordships cannot take an account of the rents and profits which the Defendants have received since the 29th July 1902. In order that an account of such rents and profits may be taken and a fixed sum ascertained on payment of which the Plaintiffs will obtain redemption, partition, possession, and a reconveyance with delivery to them of title deeds and documents, it is necessary to remit this suit to the High Court at Fort William in Bengal so that such account may be taken either in the High Court, the Court of the Subordinate Judge, or by a Commissioner, as to the High Court shall seem right, the expenses of taking such account and all procedure incident thereto and to the striking of the balance upon payment of which redemption may be made, to be borne by the Defendants. Their Lordships will humbly advise His Majesty that this suit be remitted to the High

Court of Judicature at Fort William in Bengal with directions to cause an account to be taken of the rents and profits of the 12 annas share of the 18,600 bighas from the 29th July 1902 up to such date, subsequent to the passing of His Majesty's order as the High Court may fix, allowance being made in the taking of such account for money, if any, necessarily spent by the Defendants after the 29th July 1902 in the proper management and preservation of the said 12 annas share; that no interest be allowed in the taking of such account to the Defendants on any money spent by them after the 29th July 1902, but that simple interest be allowed to the Plaintiffs on the balance or excess of each year's receipts over expenditure, this interest to be at such rate as the High Court may fix; and that any sum of money found to be due to the Plaintiffs on the taking of such account be deducted by the High Court from the amount which would have been payable by the Plaintiffs into Court on the 28th January 1903 if payment had then been made under the decree of the Subordinate Judge of the 29th July 1902, and that the High Court be further directed to allow the Plaintiffs to have redemption on payment by them into the High Court, within the time to be fixed by that Court, of the balance which shall be ascertained in the manner aforesaid to be due by the Plaintiffs. Their Lordships will further advise His Majesty that these Appeals from the decree of the High Court of the 27th March 1907 should be dismissed. The respective parties will bear their own costs of these Appeals, except those in connection with the application for special leave to cross-appeal, which in accordance with the order granting such leave, must be paid by the Cross-Appellants.

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In the Privy Council.

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(NOW REPRESENTED BY SHAMA  
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DELIVERED BY SIR JOHN EDGE.

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