

Privy Council Appeal No. 38 of 1929.
Patna Appeals Nos. 25 and 26 of 1928.

Mayasankar Bhagwanji - - - - - *Appellant*

v.

Sachindra Mohan Ghosh - - - - - *Respondent*

Same - - - - - *Appellant*

v.

Raja Shri Shiv Prasad Singh - - - - - *Respondent*

(Consolidated Appeals)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY, 1930.

Present at the Hearing :

LORD THANKERTON.

SIR LANCELOT SANDERSON.

SIR BINOD MITTER.

[*Delivered by* SIR LANCELOT SANDERSON.]

These are two appeals (consolidated) from one judgment and two decrees dated the 27th of April, 1928, of the High Court of Judicature at Patna, which reversed two orders dated the 7th of January, 1928, and 3rd March, 1928, of the Subordinate Judge of Dhanbad.

The appellant is a decree holder, and the above-mentioned orders of the Subordinate Judge were made on two applications by the appellant for the execution of a consent decree dated the 15th February, 1926, and made in a Suit No. 72 of 1924, which was brought by the appellant against the respondent, Raja Shri Shiv Prasad Singh (hereinafter called "the Raja").

The respondent, S. M. Ghosh, was appointed on the 22nd of December, 1927, Receiver of the Jharia Raj by the High Court of Calcutta in a suit brought by the Ranees of the late Raja against the Raja.

On the 7th March, 1916, the Raja succeeded to the Jharia Raj.

On the 6th March, 1919, the widows of the late Raja (hereinafter referred to as the Ranees) sued the Raja in the Court of the Subordinate Judge, Alipore, for possession of the Jharia Raj.

On the 3rd November, 1921, the Subordinate Judge at Alipore dismissed the Ranees' suit and the Ranees appealed against that decree to the High Court at Calcutta.

By two agreements dated the 16th and 18th November, 1921, during the pendency of the Ranees' appeal, the appellant agreed to take from the Raja, who agreed to grant, mining leases in respect of 1,050 *bighas* of land, in *mouza* Barki Bowa, one of the villages of the Jharia Raj, on the terms and for the consideration therein mentioned.

The Ranees thereupon obtained an order from the High Court at Calcutta restraining the Raja from executing any mining *patta* in favour of the appellant.

On the 14th November, 1924, the appellant brought Suit No. 72 of 1924 in the Court of the Subordinate Judge, Dhanbad, against the Raja for a decree for specific performance of the said agreements, or, alternatively, for a decree for Rs. 1,89,313.

On the 10th February, 1926, the High Court at Calcutta gave the Raja permission to grant a lease to the appellant in the following terms :—

“ Permission is granted to the petitioner to grant a lease to Mayasankar Bhagwanji on the terms mentioned in the petition subject to the following conditions :—

“ 1. That the lease will be without prejudice to the rights of the plaintiffs (meaning the Ranees) if any.

“ 2. That the defendant (meaning the Raja) will bring into Court all rents and royalties which he may receive under the proposed lease.

“ 3. That the defendant (meaning the Raja) will procure a report within a month from either Bird & Co. or Jardine Skinner & Co. estimating the value of the coal which may reasonably be extracted from the lands proposed to be demised within three years from date having regard to the present conditions of such land, and the defendant further undertakes that he will furnish security within a fortnight of the date of the report to the satisfaction of this Court for the amount so reported.”

On the 15th February, 1926, the appellant and the Raja entered into a compromise in Suit No. 72 of 1924, and on the same date the Subordinate Judge of Dhanbad passed a consent decree, of which the material portion was as follows :—

“ 1. That the plaintiff will get a decree for Rs. 1,40,353 (one lac forty thousand three hundred fifty-three) and Rs. 2,701·14-9 pias as costs therefore *i.e.* in proportion thereto.

“ 2. That the plaintiff will not be competent to execute the said decree within six months from this day, and if the defendant according to the

order of the Honourable Calcutta High Court dated the 10th February 1926 executes a *patta* in terms of the agreement and the plaintiffs execute a *kabuliat* in similar terms the plaintiff will not be competent to realise this decree money from the defendant. Otherwise the plaintiff will be competent to realise the decree money by executing this decree after the expiry of the said six months and with interest at the rate of 8 annas per cent. per month from the date of the decree from the defendant. To that the defendant will not be competent to raise any objection."

On the 10th March, 1926, it was reported by Mr. Bathgate to the Calcutta High Court that no coal could possibly be extracted within three years of the order of the 10th February, 1926, and on the 22nd March, 1926, the said High Court made the following order :—

" Let the report of the 10th March 1926 made by Mr. Bhagat (? Mr. Bathgate) be recorded. It is not necessary in our judgment to make any further order except that we make it clear that no security need be given at present. As the learned Advocate-General on behalf of his client (meaning the Raja) has no objection we add that the appellants (meaning the Ranees) shall have liberty to apply."

On the 19th of April, 1926, the pleader for the Raja sent a draft *patta* to the pleader for the appellant for approval, and asked for a *kabuliyat* in the terms thereof, but the latter failed to comply with that request. Correspondence took place in June, 1926, between the pleader for the appellant and the pleader of the Raja. The appellant's pleader however refused to accept the *patta*.

The ground taken on behalf of the appellant was that the draft was not in accordance with the consent decree of the 15th of February, 1926, and that the order of the Calcutta High Court dated 22nd March, 1926, for which the Raja was alleged to be mainly responsible, had made the execution of the *patta* by the Raja according to the terms of the consent decree, impossible.

The Raja's pleader asserted that the draft *patta* was in accordance with the said consent decree, and suggested that the appellant's pleader should send a draft of his own or alter the draft which had been submitted, so as to bring it into conformity with the terms of the decree, and stated that he would accept the same. The appellant's pleader did not comply with the last-mentioned request, but repeated the objection that the execution of the *patta* by the Raja in accordance with the terms of the consent decree had become impossible.

It appears that the High Court of Calcutta, on the hearing of the Ranees' appeal in August, 1925, dismissed the Ranees' claim to the Jharia Raj, but allowed it in respect of the self-acquired properties of the late Raja, and remanded the suit to the Subordinate Judge of Dhanbad to ascertain what those properties were, and on the 7th May, 1927, the Subordinate Judge held that the village of Bowa, both as regards the surface and underground, was the self-acquired property of the late Raja, and made a decree for possession in favour of the Ranees.

The matters in dispute between the Raja and the Ranees are the subject of an appeal to His Majesty in Council now pending.

On the 9th August, 1927, the appellant made the application (Execution Case No. 464 of 1927) giving rise to the second appeal, for execution of the compromise decree for realization of the decretal amount. The Raja filed objections opposing the application, but on the 7th January, 1928, the Subordinate Judge made an order dismissing the Raja's objections. The Raja thereupon appealed to the High Court of Judicature at Patna. The appellant's application for execution was, however, struck off on the 24th January, 1928.

On the 25th January, 1928, the appellant made another application for execution (Execution Case No. 49 of 1928), giving rise to the first appeal for realization of the decretal amount by sale of certain properties described therein.

On the application of the Raja the Subordinate Judge made the Receiver, who was in possession of the property proposed to be sold, a party to the last-mentioned application. The Receiver filed objections to the application, contending that the appellant was not entitled to execute the compromise decree as a money decree on the grounds that the Raja had submitted a draft *patta*, but the appellant failed to approve it, and thus prevented the Raja from executing the *patta*, that the appellant was therefore not entitled to take advantage of his own default by executing the decree as a money decree, that the Raja had always been ready and willing to execute the *patta*, and that there was no difficulty in granting the *patta* with the permission of the Calcutta High Court.

On the 3rd March, 1928, the Subordinate Judge of Dhanbad made an order disallowing the Receiver's objection and allowing the appellant's application for execution to proceed. In making the order he followed his previous order of the 7th January, 1928, disallowing the Raja's objections. The learned Subordinate Judge held that the order of the Calcutta High Court dated the 10th February, 1926, directing the Raja to furnish security, was intended to indemnify the appellant in case it should be held that the property to be leased belonged to the Ranees and not to the Raja; that the Raja by his conduct in consenting to the order of the 22nd March, 1926, giving the Ranees liberty to apply for security, prejudiced the position of the appellant, and consequently the appellant was justified in refusing to approve the draft *patta*; that by the decree of the 7th May, 1927, of the Subordinate Judge of Alipore, the title to the property to be leased was with the Ranees, and not with the Raja; and that the Raja by his conduct had made the condition for the execution of the *patta* impossible of performance, and consequently the decree for the payment of money by the Raja must be given effect to, and that the execution must be allowed to proceed.

Against the said order of the 3rd March, 1928, the Receiver appealed to the High Court of Judicature at Patna. His appeal and the appeal of the Raja were heard together and disposed of by one judgment delivered on the 27th April, 1928. The learned Judges held that under the terms of the consent decree the appellant had not reserved to himself the right to refuse to execute a *kabuliat*; that the order of the Calcutta High Court did not affect the appellant's position, and, if anything, it was more favourable to him than the order of the 10th February, 1926, of the said High Court; that the decree dated the 7th May, 1927, of the Subordinate Judge of Alipore, which was under appeal, did not affect the rights of the parties under the consent decree, because the appellant had agreed to take the mining lease during the pendency of the litigation between the Raja and the Ranees; that the Receiver had agreed to apply for leave to execute the *patta* on behalf of all the parties and under a *patta* so executed the title of the appellant would be complete; and that the appellant was not entitled to execute the consent decree as a money decree. In the result they allowed the appeals with costs in both Courts, set aside the orders appealed from and dismissed the appellant's applications for execution.

Against this decree of the High Court the appellant has lodged the present appeal. At the hearing it was not contended that the decree of the Subordinate Judge which decided that the village of Bowa was the self-acquired property of the late Raja, and which gave possession thereof to the Ranees, affected the rights of the parties under the consent decree. It is obvious that the appellant agreed to take the lease while litigation between the Raja and the Ranees of the late Raja was pending with respect to the Raj, of which the village in question was alleged to be part, and the appellant must be taken to have known of the Ranees' claim with respect thereto, and to have agreed to take the lease for what it was worth. It is also to be remembered that the aforesaid litigation has not yet been finally determined in view of the appeal to His Majesty in Council.

The only point argued on behalf of the appellant before the Board, shortly stated, was that by reason of the order of the High Court of Calcutta dated the 22nd of March, 1926, the Raja was not in a position to execute a *patta* in accordance with the terms of the consent decree of the 15th of February, 1926.

It was argued that the Raja, by consenting to the order of the 22nd March, 1926, of the Calcutta High Court in the Ranees' suit, had altered the position contemplated at the time of the consent decree in the appellant's suit. It was said that it was then intended that such security as should be necessary should be given within a fortnight of the date of the report, mentioned in the order of the 10th February, 1926; that this was varied by the terms of the 22nd March, 1926, and that if the appellant worked the colliery vigorously and did succeed in raising coal, the Ranees would insist on security being given by the Raja,

who might or might not give the same, whereby the position of the appellant was altered and prejudiced.

Their Lordships are unable to accept this argument.

They are of opinion that the Raja, by consenting to the terms of the order of the High Court of Calcutta dated the 22nd March, 1926, did not render it impossible for him to grant a lease in accordance with the terms of the consent decree, dated the 15th February, 1926, and they are further of opinion that in fact the Raja was prepared and did offer to grant a lease in accordance with the said consent decree.

It is necessary to refer again to the terms of the said consent decree dated the 15th February, 1926. It provided among other matters, that if the Raja, according to the order of the Calcutta High Court, dated the 10th of February, 1926, executed a *patta* in terms of the agreement . . . the appellant would not be competent to realise the decree money from the Raja.

The important words relating to the question now under consideration are, "According to the order of the Honourable Calcutta High Court dated the 10.2.26." On reference to the order of the 10th February, 1926, which was made in the Ranees' suit against the Raja, it appears that permission was thereby granted to the Raja to grant a lease to the appellant on the terms mentioned in the petition, subject to the conditions therein stated. There is no suggestion that the terms of the draft *patta* were not in accordance with the terms mentioned in the petition. What, then, were the conditions? They have already been fully stated.

Nothing turns upon the first condition. The second amounts to an undertaking by the Raja to bring into Court the rents and royalties which he may receive under the lease.

The third refers to two undertakings by the Raja, viz., (a) that he will procure within a month the report therein mentioned and (b) that he will furnish security within a fortnight of the date of the report to the satisfaction of the Court for the amounts so reported.

The Raja gave these undertakings. Upon the Raja giving these undertakings, the conditions imposed by the Court were fulfilled and the permission to grant a lease became complete and effective.

It so happened that the report was to the effect that no coal could possibly be extracted within three years, and consequently the High Court of Calcutta directed, on the 22nd March, 1926, that no security need then be given; but in order to protect the interests of the Ranees, and with the consent of the Raja, liberty to apply was given to the Ranees. The liberty to apply so granted to the Ranees did not in any way affect or invalidate the permission to grant a lease which the Court had given to the Raja on the 10th February, 1926, and which became effectual when he gave the undertakings required by the Court.

If the Raja had failed to carry out the undertakings given by him, or any of them, the Raja might have become liable to the sanction of the Court, but the validity of the lease, if granted by him with the permission of the Court, would not have been affected thereby.

For these reasons their Lordships are of opinion that the decree of the High Court was correct, and that this appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

In the Privy Council.

MAYASANKAR BHAGWANJI

vs.

SACHINDRA MOHAN GHOSH.

SAME

vs.

RAJA SHRI SHIV PRASAD SINGH.

(Consolidated Appeals.)

DELIVERED BY SIR LANCELOT SANDERSON.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.