

Privy Council Appeal No. 8 of 1941
Patna Appeal No. 36 of 1939

S. N. Banerji and another

v.

The Kuchwar Lime and Stone Company Limited (in liquidation)
and another

The Kalyanpur Lime Works Limited

v.

The Same

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1941

Present at the Hearing :

LORD ATKIN

LORD RUSSELL OF KILLOWEN

SIR GEORGE RANKIN

[Delivered by LORD ATKIN.]

These are two consolidated appeals from orders made by the High Court at Patna refusing to the appellants restoration of possession of limestone quarries in the district of Shahabad. There are two appeals because application was originally made by the first two appellants, Managing Director and Manager, respectively, of the appellant company. A separate application was afterwards made by the company, the appellants in the second appeal. No separate point arises in respect of them. The disputes between the parties have already twice been carried to this Board and the judgments given have made it unnecessary to go into detail in deciding this appeal. In 1928 the Secretary of State granted to the Kuchwar Lime & Stone Company, Ltd., the present respondents, quarrying leases for the term of 20 years of the quarries in question. There were covenants in each lease that the lessees would not assign the lease or transfer any right or interest thereunder or underlet the whole or any portion of the premises without the assent of the Board of Revenue of Bihar and Orissa, with a provision for forfeiture on breach. In 1933 the lessee company went into liquidation and in the same year the company agreed with one Bose for the sale to him of the rights under both leases, subject to the sanction of the Board of Revenue. In the meantime Bose was to act as agent for the company, pay to the company the dues payable by it to the Government, and work the quarries for his own profit. The agreement was not registered.

In 1934 the Government purported to forfeit the leases for breach of the above covenant and gave permission to the appellant company to enter and work the quarries, which they did. No formal lease to the appellants was executed. In September, 1934, the respondent company brought a suit against the Secretary of State for a declaration that their leases had not

been forfeited; and for an injunction to restrain the defendant, his servants or agents, from granting leases to the present appellants or others or authorising them to carry on quarrying operations on the premises. The Subordinate Judge dismissed the suit, but in February, 1936, the High Court allowed the appeal and made the declaration and granted the injunction claimed. On appeal by the Secretary of State to the Privy Council in November, 1937, their Lordships dismissed the appeal, holding that though the agreement with Bose purported to transfer to him pending the assent of the Board of Revenue a definite interest in the property, yet as the transfer was not registered it was invalid and did not operate to create a forfeiture.

In the meantime, in August, 1936, the respondent company filed a petition in the High Court in the action alleging that the Secretary of State and the present appellants, Banerji and Ghose, had been guilty of contempt in working the quarries. The High Court found all the parties to be in contempt: and on receiving an apology ordered them to pay the costs. The appellant company thereupon withdrew from the quarries and ceased to work them. The Secretary of State and the appellants, Banerji and Ghose, appealed to the Privy Council from the order made on the contempt application. In October, 1938, the appeal was allowed, the Board holding that the Secretary of State had committed no breach of the injunction, and that the other two appellants were not within its terms.

In November, 1938, the appellants applied by petition to the High Court for restitution of possession under ss. 144 or 151 of the Code of Civil Procedure. On objection being taken that the two applicants would have no personal right to possession, the company subsequently made a similar application. These two applications are those which are determined by the orders under appeal.

The appellants say that they were in possession when the order in contempt proceedings was made, that they were dispossessed by the order: and that as the order has been set aside justice requires that they should be restored to the position they occupied before the wrongful order was made. They cannot rely on s. 144 of the Civil Procedure Code for no decree was varied by the Privy Council: but they rely on the indirect power referred to in s. 151, founding themselves upon the words of Lord Cairns in giving the judgment of the Privy Council in *Rodger v. Comptoir D'Escompte de Paris*, L.R. 3, P.C. 465 [1871], "One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors". The power expressed in s. 151 of the Civil Procedure Code is "the inherent power of the court to make such orders as may be necessary for the ends of justice". There seems no essential difference between the duty and power so expressed. Is it then necessary for the ends of justice that the appellants should be restored to possession: or did the order in contempt proceedings do them an injury? On the facts at present before the court the appellants, as a result of the judgment of the Privy Council, were plainly trespassers. There is in existence a valid lease to the respondent company: and the lessors could grant to the appellants no rights inconsistent with it. In other words, the respondents are lawfully in possession of the premises, and it cannot be necessary for the ends of justice to oust them and put into possession the appellants who, when in, would have no right to retain possession. No "injury" was done to them in directing them to give up possession. But say the appellants: "we were not parties to the suit adjudged by the Privy Council, and it does not bind us". As against the respondent company and the lessor, the Secretary of State, this is true so far as estoppel by record is concerned. But the law laid down is authoritative so far as it goes. It is no doubt open to a party not bound by the proceedings to adduce new facts, or fresh points of law, which might indicate the previous decision to be inaccurate. But on being challenged the best the appellants could do in this respect is to revert to a point which was in fact taken in the High Court, in the suit for a declaration disposed of by them and not thought worth taking by counsel for the Secretary of State before the Privy Council. It is that the transfer of interest in the property which,

according to the judgment of the Privy Council was made to Bose by the agreement of 1933, was covered by the terms of s. 53A of the Transfer of Property Act: and if so was by that section exempt from registration. Now whether s. 53A applies at all to an agreement to transfer a partial interest in property, such as a right to win minerals or cut timber or the like, is a question which on this occasion it is not necessary to determine. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. But the words of the section make it quite plain that the section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons. The agreement in question according to the decision of the Privy Council was an effective transfer of an interest in the property. It was therefore registrable: and being unregistered was invalid: and could not operate as a breach of covenant so as to cause a forfeiture. This point fails the appellants, and they could suggest no other ground for supposing that they would establish any right to be in possession. It is of course possible, though it seems very unlikely, that if the appellants were to bring a suit to establish possession they might succeed in escaping the decision as to forfeiture already given. Nothing in the present decision will prevent them. All that is decided is that on the present materials they were trespassers, and if reinstated would still be trespassers, and that justice does not require such a preposterous conclusion as that they should be put back in a position which they have no right to occupy, and from which a second proceeding would on present materials certainly oust them. The High Court in their judgment apparently came to the conclusion that the appellants were not in possession at the time of the contempt proceedings, and were not deprived of possession by the order of the court. Their Lordships would have difficulty in accepting either of these conclusions. But it is unnecessary to discuss them: for they have come to the conclusion that the High Court were clearly right in the third ground for their decision that in any event the appellants were not entitled to an order for restitution.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs.

In the Privy Council

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