

Privy Council Appeal No. 86 of 1932.
Bengal Appeal No. 38 of 1931.

The Baraboni Coal Concern, Limited - - - - *Appellants*

v.

Deba Prasanna Mukherjee and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN
BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH JANUARY, 1934.

Present at the Hearing :

LORD THANKERTON.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

This appeal is concerned with the rights of the parties in a 5/16th share of certain coal-bearing lands known as Mauza Monaharbahal. The transactions out of which the litigation arises are complicated, and bring in at different stages other properties and interests with which the appeal is not concerned. They are referred to in detail in the judgments below, but it will be sufficient for the judgment of the Board to confine the narration to the 5/16th share of Monaharbahal.

The second respondent is the present owner of the Searsole estate, in which the said share is comprised. On the 10th August, 1908, his predecessors in title executed a deed in favour of Mukhunda Lal Laik, by which they demised the said share to him on a 999 years' lease for coal-mining purposes, upon certain terms and conditions including the payment of royalties at

varying rates which were charged upon the leasehold interest. By the same deed the lessors, in consideration of the sum of Rs. 1,00,000 advanced to them by the lessee, mortgaged the demised premises to him to secure repayment of this advance with interest.

Mukhunda Lal Laik was in this transaction admittedly acting on behalf of the firm of Laik Banerjee & Co., in which he and certain other persons were partners. It will be convenient hereafter to refer to them collectively as the Laiks.

By another Bengali deed of a date equivalent to the 20th May, 1909, the Laiks mortgaged their interests under the former deed to Tara Prasanna, the father of the first respondent, to secure repayment of Rs. 2,00,000 advanced to them by Tara Prasanna.

In 1911 Tara Prasanna instituted a suit against the Laiks for realization of the moneys due under the 1909 mortgage. A preliminary mortgage decree was passed in the same year and some time in 1912 a final decree for sale.

In the meantime some of the Laik partners had been adjudicated insolvents, and the Official Assignee of Bengal was brought on the record of the suit in their place. Tara Prasanna then took proceedings in execution to enforce his decree. The Official Assignee resisted the sale, and being dissatisfied with the order of the executing Court, appealed.

In November, 1913, during the pendency of the appeal, an agreement was made, in which all the parties interested (including Tara Prasanna) joined, for the sale of the Laiks' leasehold interest to the appellant company for the sum of Rs. 1,00,000, to be paid to Tara Prasanna in reduction of his mortgage claim. This sum was duly deposited with the Official Assignee, and the company was in April, 1914, put in possession of the property. The formal completion of this transaction was delayed for some time by the death of Tara Prasanna, whose interests devolved upon his son, the first respondent, then a minor. Eventually, however, the Official Assignee's appeal was compromised on the terms of the agreement with the sanction of the Court; the money was paid over to the guardian of the minor; and on the 22nd June, 1917, an assignment of the leasehold premises to the company was executed by all the parties concerned. It is admitted that by the terms of this document the property so assigned was freed from all claims under the 1909 mortgage, but that the company took subject to the covenants by the Laiks for payment of the royalties and to the other conditions of the original lease, the assignment and the corresponding liabilities of the company taking effect as from the 1st April, 1914.

Execution proceedings were then resumed under the decree in Tara Prasanna's suit, the first respondent being substituted as his representative, and on the 9th February, 1920, the right

title and interest of the Laiks in the mortgage of 1908 was brought to sale and purchased by the first respondent for Rs. 1,10,000.

On the 31st March, 1922, the suit out of which the present appeal arises was instituted by the mother and guardian of the first respondent in the Court of the Subordinate Judge of Asansol. The defendants were (1) the second respondent and his mother (since deceased), as representing the mortgagors, the claim against them being the ordinary mortgage decree, and (2) the appellant company, against whom an alternative claim was made under the following circumstances.

The company were, as above stated, liable for the royalties reserved by the lease of which they were the assignees. It is not alleged that they had attorned to the first respondent, and therefore their liability would be *prima facie* to pay the sums due in this respect to their lessor, *i.e.*, the second respondent. But by the terms of the deed of 1908 the royalties, which were charged on the leasehold premises, were made part of the mortgage security, and the following provision was incorporated in the mortgage part of the deed :—

“ And it is hereby expressly agreed by and between the parties hereto that the moneys hereby secured shall be primarily payable out of the rents and royalties hereby transferred and charged and for that purpose so long as any money shall remain due and owing on the security of these presents to the Transferee ” (meaning the Laiks) “ he the Transferee shall be at liberty to appropriate or recover and receive the said rents and royalties payable by him to . . . the owners ” (meaning the mortgagors) “ as and when they shall become due in respect of the said principal money and in the next place of the said principal money for the time being due on the security of these presents.”

So long as the Laiks were both lessees and mortgagees this provision meant no more than that royalties were to be set off against this mortgage debt, but when the lease became vested in the company and the mortgage rights in the first respondent, the position was altogether different and the meaning and effect of the clause became of importance.

Prior to the institution of the suit now under appeal neither the first nor the second respondent seems to have taken any step to obtain payment from the company, each apparently holding that it was the duty of the other to do so, with the result that the company had paid neither of them. After the institution of the suit a Receiver was appointed, who collected some Rs. 65,000 from the company, which was held to the credit of the suit, but there was a sum of Rs. 31,500 outstanding which the company alleged they had paid to an agent of the parties—an allegation which was disproved in the suit and is no longer maintained.

The dispute between the respondents as to the collection of the royalties was the reason for joining the company as a defendant to the first respondent's suit. In his *plaint* he submitted that under the clause of the 1908 deed set out above it was optional with him, as representing the mortgagee, and not

obligatory upon him, to recover and appropriate the royalties payable by the lessees, and that inasmuch as he had not in fact made any such recoveries, he was entitled to a decree against the second respondent as his mortgagor for the full amount of principal and interest outstanding under the mortgage, which he alleged to be Rs. 1,85,139-1-6, and this was the main prayer of his plaint. But in case the Court should hold that the clause in question was obligatory upon him, he asked, in the alternative, for an account against the company of the moneys due from them as lessees and a decree against them for the amount found due, and that the same might be declared a first charge on their leasehold and realised by the sale thereof.

The second respondent (the mortgagor) by his written statement joined issue with the plaintiff on the construction of the clause in question, which he asserted was obligatory and not optional. He said that neither he nor his predecessors in title had ever made any demand for the royalties in question, and he claimed that the plaintiff could not recover anything from him under the mortgage whether by way of principal or interest without giving credit for them in full.

The company's defence is perhaps now of little importance. They denied that the plaintiff had any cause of action against them, asserted that they had always been ready and willing to pay the royalties to either mortgagor or mortgagee, but that neither of them would receive payment, and alleged that they had paid the Rs. 31,500 above referred to.

The Subordinate Judge by his judgment held that there was no obligation upon the plaintiff (the first respondent) to collect the royalties and gave him a preliminary decree against the second respondent, dated the 31st July, 1928, for the full amount due under the mortgage, which he ascertained at Rs. 1,50,734-7-2, after allowing for interest and costs and crediting the Rs. 65,047-6-9 collected by the Receiver, which was directed to be paid to the plaintiff. No relief was granted against the company, nor were they awarded costs. The decree was strictly in accordance with the main prayer of the plaint, and the plaintiff was evidently content, as he did not appeal against it, and in due course applied for a final decree for sale, which was passed on the 25th February, 1929, and followed the same lines.

The property to be sold under the preliminary decree was described in a schedule as "All that undivided five-sixteenths parts or shares of and in the *mouzah* land and hereditaments called or known as Mouzah Monaharbahal," followed by details of location, area and boundaries. It did not in terms save the leasehold interest of the company, as it should have **done in accordance** with the terms of the assignment of the 22nd June, 1917.

The company appealed to the High Court against the decree of the Subordinate Judge, formulating no less than thirty-five grounds of objection, but the only contention that appears to

have been urged on their behalf at the hearing of their appeal was that the sale of the mortgaged property should have been made specifically subject to their leasehold interest. This was conceded at once by Counsel for the first respondent, and their Lordships have little doubt that if this had been the only objection taken to the decree the slip could have been put right without resort to the Appellate Court. The real grievance of the company seems to have been the finding of the Subordinate Judge as to the non-payment of the Rs. 31,500, but this, though occupying a prominent place in the company's thirty-five grounds of appeal, was not even argued in the High Court.

The second respondent (the mortgagor) also appealed against the decree, and cross-objections were filed by the first respondent to his appeal. The second respondent supported the contention of the company as to the payment of the Rs. 31,500 : he contended that the first respondent was responsible for the collection of the royalties, and was bound to give credit for them in full in the mortgage account. He also pointed out that there was an error in the calculations of the Subordinate Judge and that the sum due under the mortgage should have been found to be less by Rs. 12,000 than the decretal amount. This again was at once admitted by the first respondent, and could, their Lordships think, have been corrected by the Subordinate Judge.

The cross-objections of the first respondent may be disregarded. They raised no contention against the company, and no order was made upon them in the High Court.

The only substantial question, in their Lordships' opinion, for determination upon the appeal was whether the Subordinate Judge had rightly construed the clause in the 1908 mortgage which has been set out above—in other words, whether the first respondent as mortgagee was liable for the unrealized part of the royalties, *i.e.*, the Rs. 31,500, and was bound to give credit for it to the second respondent.

The judgment of the High Court was delivered by the Chief Justice, his learned colleague merely concurring. On the question just referred to he seems to have agreed with the Subordinate Judge, and to have held (as their Lordships read his judgment) that the first respondent was not bound to collect the royalties due from the company, and this is, in their Lordships' view, the proper construction of the clause—indeed, it has not been disputed by Counsel for the first respondent.

Under these circumstances the result should have been, in their Lordships' opinion, the affirmance of the Subordinate Judge's decree subject only to correction of the two admitted slips above referred to. Upon the finding of the Court the second respondent was clearly liable to the first respondent for the full mortgage debt, as claimed by the plaintiff.

The learned Chief Justice, however, was impressed by the hardship which such a result would impose on the second

respondent, who, he said, would be left with only a time-barred claim against the company. He thought the proper course, therefore, was to give the first respondent a decree for the Rs. 31,500 against the company, and to allow the second respondent credit for this sum in the mortgage account, and he found it sufficient to justify this course, that the first respondent did not object. He also ordered the company to pay the costs of both appeals.

It is against a decree in these terms that the present appeal is brought by the company, and their Lordships think that it must succeed.

The first respondent had prayed for, and had clearly elected to take, a decree on the mortgage against his mortgagor, the second respondent, and both Courts had held him entitled to it. He had merely sought to hold the company liable in the event of his failing against the second respondent. The decree made by the High Court would only have been justified if the one material point in the second respondent's appeal had been decided in his favour, but it was not. If the second respondent's claim against the company was time-barred, it was rather his fault than his misfortune, as he had never made any attempt to recover the royalties from the company, and had from the outset disclaimed all liability in connection with them.

But with all respect to the learned Chief Justice, their Lordships cannot think that he was entitled to assume that the claim was barred. No question as to this had been raised or considered in the case. No part of the royalties can have been due from the company till some time after April, 1914: they were clearly charged upon the leasehold, which would allow 12 years for their recovery: the suit was filed in 1922, and before any conclusion could be arrived at with regard to limitation, it would have to be considered whether the written statement of the company and the correspondence between the parties did not contain a sufficient acknowledgment of the debt to save the operation of the Limitation Act. Their Lordships offer no opinion upon these questions, which have not been argued before them: they only desire to point out that it is by no means certain that the Subordinate Judge's decree imposed any undue hardship upon the second respondent.

Nor can their Lordships see any justification for saddling the company with the second respondent's costs of the appeals. So far as the company's appeal was concerned they had succeeded, though on a point which their Lordships think might well have been settled without an appeal. So far as the second respondent's appeal was concerned, he had failed upon the main question in dispute, and the only point upon which he had succeeded, viz., the miscalculation of the mortgage debt clearly did not affect the company.

For these reasons their Lordships think that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored, subject to the modifications referred to above, viz., (1) that the amount found thereby to be due by the second respondent be reduced by Rs. 12,000, and (2) that the sale of the mortgaged property be made subject to the leasehold interest of the appellant company in the five-sixteenths share of the Mouzah Monaharbahal. The appellant company should have their costs of this appeal from the respondents. There should, their Lordships think, be no order as to costs in the High Court, and any costs incurred there which have been paid should be returned. They will humbly advise His Majesty to this effect.

In the Privy Council.

THE BARABONI COAL CONCERN, LIMITED,

v.

DEBA PRASANNA MUKHERJEE AND
ANOTHER.

DELIVERED BY SIR GEORGE LOWNDES.

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