Privy Council Appeal No. 109 *of* 1919.

Patna Appeal No. 14 *of* 1917.

Maharaja Sir Manindra Chandra Nandi - - - - *Appellant*

v.

Ram Kumar Lal Bhagat and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1922.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

The present respondents brought as plaintiffs on the 15th April, 1907, a suit against Raja Makund Sahi to recover possession of six villages and jungle which they claimed. The Raja defended the action, which in due course came on for trial, and on the 21st September, 1908, the Court of first instance decided against the plaintiffs, and dismissed the suit. Just one year afterwards, on the 21st September, 1909, the Raja gave a lease of a term of years of the right of mining for mica, and otherwise exploiting the jungle, to the present appellant, whose case is that he had not notice of the pending litigation.

The unsuccessful plaintiffs appealed to the High Court, which on the 15th May, 1913, reversed the decision of the first Court and made a decree in favour of the plaintiffs ordering the Raja to put them into possession of the six villages and jungle, and it was further ordered:—

> "That the case be sent back to the lower Court [*inter alia*] to take an account of the mesne profits to which the plaintiffs-appellants are entitled for the three years prior to the institution of the suit, and also for the period thereafter till the delivery of possession or the expiration of three years from this date, whichever event happens earlier."

When the case was accordingly remitted to the Court of first instance, a Commissioner or Amin was appointed to make the necessary enquiry, and on the 22nd August, 1914, he made his report.

On the 2nd January, 1915, the Subordinate Judge recorded that the parties did not object to the report of the Amin and that it might therefore be accepted, and he ordered " that the suit be decreed finally ; that the Amin's report be considered to be a part of the decree ; and that the plaintiffs do recover possession with mesne profits. as determined by the Amin, and the costs of this suit from the defendant with interest at 6 per cent. per annum." In this way the suit came to its natural termination.

It happened, however, that the Amin took a somewhat unusual course in conducting the enquiry which led to his report. When enquiring into the mesne profits he first of all ascertained the rents which the Raja had received from the present appellant and other tenants totalling Rs. 42,075, with a further profit of Rs. 500 from the jungle. Not content with this, he proceeded further to enquire what were the profits which the various lessees might be taken to have made from the mica which they had extracted during the terms of their leases pending the somewhat protracted litigation. What exactly was his object in doing this, or who set him in motion to do it, is not quite clear. The law as to mesne profits is thus expressed in Section 2, Sub-section 12 of the Code of Civil Procedure :—

> " ' Mesne profits ' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

It might be said that in ascertaining such profits the successful plaintiffs would not be limited to the actual rents which the trespassing defendant had received. And apart from the question of mesne profits, a claim might have been preferred for damages for the mica actually removed. Again, it would be conceivable that in a suit properly framed the lessees from the Raja, who had, though ignorant of the plaintiffs' title, carried away what was the plaintiffs' mica, could be rendered liable for damages in respect of what they had so taken away. But these lessees were not included in the suit. The Amin with some *naïveté* stated twice in the course of his report that he had had little assistance from the plaintiffs or their agents, who had, in fact, taken very little interest in the execution of the enquiry, and that he obtained his information largely by the help of the defendant Raja and his servants. However, he reported under both heads, bringing what he described as the net profit obtained from the mines up to a sum considerably exceeding a lakh of rupees.

The report was in narrative form and finished without any definite recommendation. Whether the conclusion from it was intended to be that the defendant Raja was to pay as mesne

profits the rents which he had received or whether he was to pay as mesne profits the net profits of the mines—it could not be both—does not clearly appear ; though from what subsequently happened it can almost certainly be inferred that it was only the smaller figure, that is, the sum of the rents. This report having been made and filed, but before it was confirmed, the plaintiffs—the present respondents—relying upon the statements with regard to the profits obtained from the mines, made an application by a petition dated the 4th September, 1914. This petition stated that the several lessees had in collusion with the Raja obtained a settlement of the disputed property in an illegal manner, and had misappropriated a large quantity of mica, worth between one and two lakhs of rupees, and prayed that they should be ordered to appear at the time of the ascertainment of the mesne profits so as to have the matter determined and decided in their presence, and that to avoid future objections they should be made defendants. It will be observed that unless it be inferentially no relief was claimed against the appellant and the other lessees.

The appellant was summoned, and put in a counter petition in which he raised various objections or defences. He stated that the plaintiffs had been aware all along of what he was doing under his lease ; he claimed that the application was barred by limitation ; he said that the application was made in collusion with the defendant Raja ; and that since he knew of the plaintiffs' claim to the property he had surrendered his lease, namely, on the 1st August, 1914 ; and he disputed the plaintiffs' title to the minerals even on the footing that they were entitled to the land, averring that the minerals belonged to the superior lord, the zemindar. He also took objection to the form of procedure.

On these statements the matter came before the Subordinate Judge, who on the 13th September, 1914, rejected the plaintiffs' application, holding that under the construction of Order XXII, Rule 10 of the Code of Civil Procedure there was no such assignment of interest by the defendant Raja to the present appellant and the other lessees as to warrant their being brought into the suit.

From this order the plaintiffs appealed to the High Court. There is no date upon their memorandum of appeal and nothing to show whether it was lodged before or after the order of the 2nd January, 1915. It rather looks as if it was later, but it is not material. Their appeal came on before the High Court, which, on the 16th November, 1916, allowed the appeal and ordered the Subordinate Judge to make the six tenants, including the present appellant, parties to the suit, and to ascertain the mesne profits in their presence.

It is from this decree that the present appeal is brought.

From a perusal of the order in its bare form it is not easy to see what could be its object. What advantage could it be to the plaintiffs or the defendant Raja that the mesne profits which the defendant Raja was to pay should be assessed in the presence of the lessees ? Moreover, they had been already assessed, and that,

finally, the report of the Amin had been accepted, and the mesne profits, whatever they were found by it, had been decreed, and the decree had not been appealed from.

But light is thrown by the language of the learned Chief Justice. He says: " In my opinion the appellants are entitled to have the persons in question added as parties to the proceedings, and compel them to account for any profits which they may have received from the land."

This opinion appears to be founded on the language of Order XXII, Rule 10, and it is desirable to examine the Code of Civil Procedure with a view to seeing whether it lends support to this opinion. By section 47

> " (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
>
> " (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding. . . ."

Order XXII, Rule 10, states :—

> " (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

The High Court appear to consider that in an action to recover possession of land where the defendant while he is in possession has granted leases, proceedings in execution may involve removal of the tenants, and that for such a purpose a lease may be considered an assignment within the meaning of Rule 10.

It is unnecessary for their Lordships to express any opinion as to whether this view is right or not, because the appellant is not setting up his lease or claiming to remain in occupation as tenant—on the contrary, he states that he has surrendered his lease—and because the application was not to remove him. The order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon someone else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of Rule 10 for all other cases. But they are all cases of devolution. There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in Section 372 as follows :—

> " In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require."

The words " in addition to " in the earlier Code have disappeared. But the matter does not rest upon this change. The liability, if any, of the appellant to pay damages for removal of

the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers, and a case, if any, against the appellant must rest upon his action and the direct relation established thereby between him and the plaintiffs.

Serious injustice would be done if any other view was taken. A party added by devolution during the pendency must take the suit as he finds it. Judgment already rendered would be binding upon him. He would not, in the present case, be able to question the title of the plaintiffs to the mica, though he has a serious contention that the title to the minerals rests with the zemindar. Again it is all very well to say that the mesne profits, by which is meant the value of the lost mica, are to be ascertained in his presence. There has been at least a preliminary assessment by the Amin which he would have considerable difficulty in setting altogether aside, and this assessment has been made in his absence. He would come before the Subordinate Judge with a preliminary finding against him for over a lakh of rupees. Order XXII, Rule 10, does not apply. There has been no assignment, creation or devolution of any interest within the meaning of that rule.

Their Lordships have been reminded of the decision of this Board in the case of *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (19, I.A. 166) and of the general principle therein expressed, that a wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and of the desirability of ascertaining all possible points in execution proceedings without a fresh suit.

But giving all force to these considerations, they cannot see how that which should in reality form the basis of an independent suit against a separate party, for some act done by himself, can be introduced as a question to be tried in execution proceedings in another suit. Section 47 ofthe Act does not apply. If the added persons did commit trespasses, these were distinct ones, and not committed by them as representatives of the original defendant. To hold otherwise, would be to confuse the rights.

Considerations both of form and of substance are opposed to the order from which this appeal is brought.

Their Lordships will therefore humbly recommend His Majesty that this appeal should be allowed, and the decree of the High Court discharged and the decree of the Subordinate Judge restored, and that the appellant should have his costs before this Board and in the two Courts below.

In the Privy Council.

MAHARAJA SIR MANINDRA CHANDRA NANDI

v.

RAM KUMAR LAL BHAGAT AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

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