Privy Council Appeal No. 62 *of* 1947

Sri Sri Shiba Prasad Singh, Deceased,
now represented by Kali Prasad Singha - - - *Appellant*

v.

Maharaja Srish Chandra Nandi and Another - - - *Respondents*

AND

Maharaja Srish Chandra Nandi and Another - - - *Appellants*

v.

Sri Sri Shiba Prasad Singh, Deceased,
now represented by Kali Prasad Singha - - - *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 18TH JULY, 1949

Present at the Hearing:

LORD OAKSEY
LORD REID
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD REID]

The appellant is the owner of the Jharia estate. In 1898 his predecessor granted a mining lease of a part of that estate to the predecessor of the first respondent. The terms of that lease are set out in a Kabuliyat of 22nd October, 1898, which begins "This Kabuliyat regarding Mourushi Mukarrari i.e. permanent settlement on commission of coal land is executed to the following effect." The provision the meaning of which is in dispute in the present litigation is as follows:

> "1. That for the quantity of coal which I shall raise from the leasehold entire 1103 bighas 13 kathas of coal land of Ekra I shall pay commission, i.e., royalty on steam coal, rubble coal, hard coke and soft coke at the rate of 3 annas per ton and for rubble and dust for burning bricks at 1 anna 6 pies per ton. Be it stated that I shall pay royalty at the present fixed rate for the coals, which will be despatched by the East Indian Railway line. But in future if the Bengal Nagpur Railway line is constructed and the freight of coal becomes less by 2 annas at least or more than what is fixed at present per ton, I shall pay royalty for those coals, which shall be despatched in the aforesaid manner at the said reduced freight, at 5 annas per ton on steam, steam rubble, soft coke and hard coke and 2 annas 6 pies per ton on rubble and dust for burning bricks. But if the

said railway freight becomes less than 2 annas per ton, the amount which will be reduced will be enhanced on the rate of royalty at present fixed on steam, steam rubble, soft coke and hard coke and enhanced by half thereof on rubble and dust for burning coal."

There follows a number of other provisions for an annual minimum royalty, for interest, for hypothecation of the tenant's property at the colliery and for other matters which need not be farther referred to at this point.

In 1898 when the lease was granted the only railway available for transport of coal from this district was the East Indian Railway but it was contemplated that the Bengal Nagpur Railway might be extended so as also to serve this district. The Bengal Nagpur Railway was so extended and the extension was opened for traffic in 1903. At the time when the lease was granted the freight for coal from the colliery to Calcutta was Rs. 3 11 annas but in 1902 this freight was reduced to Rs. 3 2 annas and after some fluctuation both the East Indian Railway and the Bengal Nagpur Railway maintained the freight at Rs. 3 2 annas from 1904 for many years.

The interpretation of the clause quoted above gave rise to litigation in 1910 between the then lessor and lessee. This litigation ended in an appeal to His Majesty in Council and the judgment of their Lordships was delivered on 8th March, 1917, by Lord Parmoor. The question at issue was whether the lessor was entitled to the enhanced rate of royalty provided in that clause and after quoting the clause the judgment proceeded:—

"The royalty clause fixes a royalty of 3 annas per ton of steam coal, steam rubble, hard and soft coke, and of 1 anna 6 pies per ton of brick burning rubble and dust, raised and despatched or sold by the lessee. These latter words are important in construing the clause. A contrast is drawn between coal or rubble despatched and coal or rubble sold at the pit's mouth, and the claim for an enhanced royalty on coal is made in respect of coal despatched by rail. It does not appear, and it is not material, whether at the date of the lease any coal was despatched in any other way than by rail. The only railway which served the coal field at the date of the lease was that of the East Indian Company. The clause provides that royalties at the present fixed rate should be paid on all coal despatched by the East Indian Company, subject, however, to a future contingency:—

"But if, in future, the Bengal Nagpur Railway being constructed, the freight on coal is reduced by 2 annas or more per ton then on all coals despatched in the aforesaid manner (ukta rupey) at reduced (Kom) rates royalty would be paid at 5 annas per ton of steam coal, steam rubble, hard and soft coke, and 2 annas 6 pies per ton of brick burning rubble and dust."

The Bengal Nagpur Railway has been constructed, and it has been correctly held in both courts that, as a consequence of this construction, a readjustment was made in the freight on coal. It was further assumed throughout the hearing, both before the Subordinate Judge and in the High Court, that, in the readjustment, the freight on coal had been reduced by more than 2 annas per ton as compared with the freight in operation on the East Indian Company's line at the date of the lease. On this finding and assumption the contingency on which an enhanced royalty would become payable has become operative, but it is said that this enhanced royalty is only payable in respect of coals sent over the Bengal Nagpur line and only so far as the Bengal Nagpur Railway Company charge a differential rate less than the rate charged by the East Indian Railway Company.

Their Lordships cannot find any reference to such a differential rate in the terms of the clause or any support for the argument of the appellant under this head. The decision of the Subordinate Judge is rested on evidence of the intention of the parties to the

deed, but this evidence is clearly inadmissible. In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used.

Apart from any question of differential rate, it is clear from the context that the words 'coals despatched in the aforesaid manner at reduced rates' cannot be restricted as applicable only to coals sent over the Bengal Nagpur system. At the date when the lease was executed, no coals had been despatched over the Bengal Nagpur system and the deed speaks from the date of its execution. It might be argued that, grammatically, the words in question referred only to coals despatched by the East Indian Company but this construction would be adverse to the contention of the appellant. If the words in question are not limited in their application to coal despatched by the East Indian Company, they must refer back to the earlier context in the clause and include all coals despatched by rail at a reduced rate, either by the East Indian Company or the Bengal Nagpur Company. Their Lordships are of opinion that this is what the words naturally mean, and agree in the judgment of the High Court."

After this judgment royalty was regularly paid at the enhanced rates of 5 annas and 2 annas 6 pies per ton until 1923. At this period Messrs. H. V. Low & Co. Ltd. were managing the colliery for the lessees and they had been in the habit of paying the royalty. During 1923 payment of royalties fell into arrear and on 28th January, 1924, the lessee the Raja of Kasimbazar himself paid Rs. 57.069-3-0 to the lessor "in full payment of Ekra royalty from 1st January to 30th September, 1923". This payment was calculated at the enhanced rates of 5 annas and 2 annas 6 pies per ton. Messrs. Low's agency was terminated in February, 1924, and before this date Mr. F. F. Lyall, C.I.E., I.C.S., had been appointed manager of the Kasimbazar Estate. On the 8th March, 1924, Mr. Lyall wrote to the Rajah of Jharia, the lessor, stating that the rate of freight for coal had been raised on 1st April, 1921, to Rs. 3-13-0; that the highest rate of royalty of 5 annas and 2 annas 6 pies per ton was "only payable on coal which may be despatched at a freight of 2 annas less than the freight which was in force at the time of the execution of the lease"; and that the lessor had been very much overpaid. He added "Please note that we shall make no further payments on account of royalty until this excess is wiped out." The lessor's manager wrote in reply "I am sorry you have put a wrong construction upon the lease and the Raja is not prepared to accept the same; the contingencies mentioned in the lease having happened, the Raja is entitled to claim the enhanced royalty for all time to come". After some further correspondence the lessor's manager wrote to the lessees on 18th August, 1924, "It is useless carrying on further correspondence as there is no chance of the matter being settled out of Court. If you think you are entitled to any refund you may sue for the same".

The contentions of the parties had been clearly stated. The lessor contended that once the higher rate of royalty had come into operation it was permanent and not affected by a subsequent rise in the rate of freight. On this view there had been no overpayment and royalties were still payable at the higher rate. The lessee on the other hand maintained that on a true construction of the lease the higher rate of royalty was only payable on coal despatched by rail at a freight more than 2 annas below the freight at the date when the lease was entered into. On this view the higher rate of freight ceased to operate on 1st April, 1921. By continuing to pay at the higher rate from that date until 30th September, 1923, he had paid Rs. 63,680 more than was due, and he was entitled to retain future royalties up to this amount and thereafter to pay at the lower rates. The lessee acted on this view of his rights He made no further payment of royalties until 20th August, 1925, and from that date onwards he continued to pay royalty at the lower rates.

The lessor protested and did not acquiesce but he took no steps to enforce what he asserted to be his rights until he raised the present

action on 5th February, 1936. In view of the provision for hypothecation contained in clause 10 of the lease the lessor, the present appellant, was able to bring his action in the form of a mortgage suit in which he claimed an account for the previous twelve years on the footing that royalty had been due throughout that period at the higher rates, and that he was entitled to interest on arrears unpaid.

On 29th June, 1937, the Subordinate Judge at Dhanbad held that during the period in question royalty had only been payable at the lower rates but that the lessee, the present respondent, was not entitled to set off against such royalty the amount of his earlier overpayments, and that no interest was due. On this footing he held the plaintiff the present appellant entitled to a decree for Rs. 52,197-5-6 in addition to a small sum in respect of a matter not now in dispute. After certain further procedure the High Court at Patna on 4th December, 1942, decided the case on appeal, affirming the decision of the Subordinate Judge on the main issues but allowing in addition certain interest. Against that decision an appeal and cross appeal have been taken to His Majesty in Council.

The main contention for the appellant before Their Lordships was that once the higher rate of royalty had come into operation, as it did in or about 1903, it was permanent and not affected by any future rise in railway freights. It was not and could not be argued that this question was determined in the Appeal of 1917. Their Lordships then held the contingency on which an enhanced royalty would become payable, a fall in railway freight in consequence of the construction of the Bengal Nagpur Railway, had become operative : and that the enhanced royalty was payable on coal despatched both by the East Indian Railway and by the Bengal Nagpur Railway. But this decision does not touch the question whether that enhanced royalty would continue to be payable if the rate of freight rose again to or beyond what it was when the lease was executed. This question must now be decided.

The obligation of the lessee set out in clause 1 of the Kabuliyat is that on the occurrence of two events, both of which have happened, " I shall pay royalty for those coals which will be despatched in the aforesaid manner at the said reduced freight at 5 annas per ton . . ." It has been decided that " in the aforesaid manner " means by either of the Railways mentioned. " At the said reduced freight " must refer back to " if . . . the freight of coal becomes less by 2 annas at least or more than what is fixed at present per ton ", and must therefore mean at a freight 2 annas or more below that in force at the date of the lease. The crucial question of construction can be stated thus : Do the words " at the said reduced freight " qualify the words " those coals which will be despatched in the aforesaid manner " so as to limit the obligation to pay at 5 annas etc. to coals which will be despatched " at the said reduced freights "? or on the other hand do the words " at the said reduced freight " have some different purpose and effect so that the obligation to pay at 5 annas continues to attach to all coals despatched no matter what the freights may become in future?

The argument for the appellant was that the leading words of the Kabuliyat " mourushi mukarrari " require that the payment under the lease shall be at a rate permanently fixed. But the decision of Their Lordships in 1917 established that, as regards all coal despatched by rail, the rates of royalty which were originally due under the lease—3 annas and 1 anna 6 pies—had ceased to operate and rates of 5 annas and 2 annas 6 pies had come into operation. Therefore the words " mourushi mukarrari " must be read in a sense consistent with at least one variation of the rates of royalty at a date which could not be predicted when the lease was entered into. If that is so there can in Their Lordships' view be no insuperable obstacle to those words being read in a sense consistent with more than one such variation.

The plain and obvious meaning of the provisions of clause 1 is that the higher rates of royalty shall be payable on coals despatched " at the said reduced freight " and on no other coal, so that if and when the freight

rises to or beyond the original figure the higher royalty is not payable, but if and when the freight is 2 annas or more below the original figure the higher royalty is payable. This is a simple and reasonable construction of the words which the parties have used and Their Lordships have found nothing in the contract which is inconsistent with it.

To appreciate the argument for the appellant it is necessary to examine the last sentence in clause 1. It was possible that a reduction of freight following on the construction of the new railway might occur but be less than 2 annas and the last sentence provides for this contingency. It is badly expressed and must be read as meaning "But if the said railway freight becomes less by less than 2 annas per ton . . ." In that event the rates of royalty are to be enhanced but by less than the full enhancement provided for in the preceding sentence. This is a reasonable provision which follows naturally on the preceding sentence and in no way conflicts with it. The argument for the appellant was that the sole purpose of the words "at the said reduced freight" in the preceding sentence is to differentiate that sentence from the last sentence in the clause. Their Lordships are unable to accept this argument. There is no need for any words for that purpose and if that were their purpose these words would be ill-chosen. Their Lordships have no doubt that that is not their purpose and that on this matter the decision of the High Court is right.

As the freight for coal despatched by rail after 1st April, 1921, exceeded the freight charged when the lease was made, it follows that after that date the lessee was only bound to pay royalties at the lower rates of 3 annas and 1 anna 6 pies per ton. But the lessee continued to pay royalties at the higher rates of 5 annas and 2 annas 6 pies per ton on coal despatched by rail during the period from 1st April, 1921, to 30th September, 1923, and so overpaid the lessor. The High Court have held that the lessee was not entitled to set off the amount of this overpayment against the royalties which subsequently became due by him, and the Cross Appeal has been taken against this decision. The ground of the decision of the High Court was that the overpayment had been made because the lessee, the respondent, and his agents were unaware of their right under the lease; that this was not a mistake of fact but was a mistake of law; that the law of India in this matter is the same as the law of England; and that under the law of England money overpaid in such circumstances could neither be recovered nor set off against other payments due. Harries C.J. said "There can be no doubt that under English Law money paid under a mistake of fact is recoverable but generally speaking money paid under a mistake of law is not recoverable. This has been clearly laid down in a large number of English authorities. The Indian Contract Act though it deals with the effect of mistakes of fact and law upon a contract has no express provision relating to the effect of payments made under such mistakes and it appears to me that the law relating to the matter is the same in this country as it is in England". The learned Chief Justice appears to have overlooked the provisions of section 72 of the Indian Contract Act. This section was only mentioned in passing by the Subordinate Judge and it would seem that it was not argued or only faintly argued before the Subordinate Judge or in the High Court that section 72 applied to this case. The appellant, the respondent in the Cross Appeal, submitted to Their Lordships that in these circumstances Their Lordships should not now receive an argument based on section 72 but Their Lordships are unable to exclude from their consideration the provisions of a public statute. It is regrettable that Their Lordships do not have the assistance of the views of the High Court on this matter. Their Lordships impute no blame to the learned judges of the High Court, but they feel bound to consider the argument which has now been adduced.

Section 72 enacts: "A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it". This section makes no distinction between mistakes of fact and mistakes of law, but it must of course be read together with the rest of the Act and in particular with sections 21 and 22 which also deal with mistake. Section 21 enacts: "A contract is not voidable because it was caused by a

mistake as to any law in force in British India, but a mistake as to a law not in force in British India has the same effect as a mistake of fact". Section 22 enacts: "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact".

The construction of section 72 has given rise to differences of opinion in India. There is a considerable body of authority dealing with the meaning of "coercion" in this section but Their Lordships have not found in those authorities anything which is of material assistance in deciding the present case. The authorities which deal with the meaning of "mistake" in the section are surprisingly few and it cannot be said that there is any settled trend of authority. Their Lordships are therefore bound to consider this matter as an open question.

Those learned judges who have held that mistake in this context must be given a limited meaning appear to have been largely influenced by the view expressed in Pollock and Mulla's commentary on section 72 of the Indian Contract Act where it is stated (Indian Contract and Specific Relief Acts, 1931 Edn. p. 402): "Mistake of law is not expressly excluded by the words of this section: but section 21 shows that it is not included". For example in *Wolf & Sons* v. *Dadyba Khimji & Co.* (1919) 44 Bombay 631, Macleod J. said (p. 648) referring to section 72 "on the face of it mistake includes mistake of law. But it is said that under section 21 a contract is not voidable on the ground that the parties contracted under a mistaken belief of the law existing in British India, and the effect of that section would be neutralised if a party to such a contract could recover what he had paid by means of section 72 though under section 21 the contract remained legally enforceable. This seems to be the argument of Messrs. Pollock and Mulla and as far as I can see it is sound". In *Appavoo Chettiar* v. *South Indian Railway*, All India Reports 1929, Madras 177, Ramesam and Jackson JJ. say "Though the word mistake in section 72 is not limited it must refer to the kind of mistake that can afford a ground for relief as laid down in sections 20 and 21 of the Act . . . Indian Law seems to be clear, namely, that a mistake in the sense that it is a pure mistake as to the law in India resulting in the payment by one person to another and making it equitable that the payee should return the money is no ground for relief". Their Lordships have found no case in which an opinion that "mistake" in section 72 must be given a limited meaning has been based on any other ground. In Their Lordships' opinion this reasoning is fallacious. If a mistake of law has led to the formation of a contract, section 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that that money was paid under mistake of law: it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment "by mistake" in section 72 must refer to a payment which was not legally due and which could not have been enforced: the "mistake" is thinking that the money paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover if the argument based on inconsistency with section 21 were valid, a similar argument based on inconsistency with section 22 would be valid and would lead to the conclusion that section 72 does not even apply to mistake of fact. The argument submitted to Their Lordships was that section 72 only applies if there is no subsisting contract between the person making the payment and the payee, and that the Indian Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it. But there appears to Their Lordships to be no good reason for so limiting the scope of the Act. Once it is established that the payment in question was not due, it appears to Their Lordships to be irrelevant to consider whether or not there was a contract between

the parties under which some other sum was due. Their Lordships do not find it necessary to examine in detail the Indian authorities for the wider interpretation of " mistake " in section 72. They would only refer to the latest of these authorities *Pannalal* v. *Produce Exchange Co. Ltd.*, All India Reports 1946, Calcutta 245, in which a carefully reasoned judgment was given by Sen J. Their Lordships agree with this judgment. It may be well to add that Their Lordships' judgment does not imply that every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise.

In this case there was not sufficient evidence to show why the lessee and his agents made the overpayments. They may have acted on inadequate information, they may have taken a wrong view of their legal rights or they may have continued paying at the old rates without giving any thought to the matter. But it is clear that there was no intention to make a present to the lessor of money which was not due. The money was paid under the belief that it was legally due. This belief was mistaken. In Their Lordships' view that is sufficient to bring the case within section 72 and therefore the cross appeal must succeed. That being so the question of interest involved in the appeal does not now arise.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed and the cross appeal allowed and the plaintiff's suit dismissed with costs in the Courts in India to the defendant. The appellant will pay the costs of the appeal and cross appeal.

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In the Privy Council

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