

Privy Council Appeal No. 25 of 1916.

Bengal Appeal No. 54 of 1912

Maharaja Manindra Chandra Nandi - - *Appellant,*

v.

**Raja Sri Sri Durga Prashad Singh, since
deceased** - - - - - *Respondent,*

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 3TH MARCH, 1917.

Present at the Hearing :

VISCOUNT HALDANE.

LORD SHAW.

LORD PARMOOR.

SIR JOHN EDGE.

MR. AMEER ALL.

[*Delivered by* LORD PARMOOR.]

The only question raised in this appeal is whether, under the terms of a *Kabuliyat*, the respondent is entitled to an enhanced rate of royalty from the appellant. The respondent is the Raja of Jherria, and the village of Ekra is a portion of his estate. His predecessor in title, on the 20th October, 1898, granted the underground and coal-mining rights in the village of Ekra to the appellant. At that date the only railway communication with the district was afforded by the line of the East Indian Railway Company, but a new route to Calcutta, to be constructed by the Bengal Nagpur Railway Company, was under consideration.

The first clause of the said *Kabuliyat*, which fixed the royalty to be paid, was translated by the Subordinate Judge as follows :—

“The royalty payable would be 3 annas per ton of steam coal, steam rubble, hard and soft coke, and 1 anna 6 pies per ton of brick-burning rubble and dust, raised and despatched or sold by me : Be it understood that in respect of all coals despatched by the East Indian Railway Company royalty would be paid at the present fixed rates, 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, but if the aforesaid railway freight be reduced by less than 2 annas per ton, then the royalty for steam coal, steam rubble, hard and soft coke would be increased by the amount by which the freight on coal is reduced, and that for brick-burning rubble and dust by one-half of that amount."

This translation was followed by Mr. Justice Beachcroft, and it was claimed on behalf of the appellant that it was more accurate than the official translation attached to the papers. It is not necessary, in their Lordships' opinion, to go further into this question. Accepting the translation which the appellant claims to be more accurate, their Lordships are of opinion that the judgment and decree of the High Court are correct, and that the case for the appellant fails.

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 coals 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.

At the hearing of the appeal, counsel for the appellant claimed to raise the question that in any event there had been no reduction of rate within the meaning of the clause, inasmuch as the old rate of rupees 3 : 11 was a company's risk rate, and the present rate of rupees 3 : 2 is based upon a special consignment note signed by the consignor, providing that the coal should be carried at owner's risk. This issue, though raised in the pleadings and in the reasons attached to the appellant's case on appeal, was not raised either before the Subordinate Judge or in the High Court. It was assumed in both Courts that a reduction in coal rates sufficient in amount to justify a claim for an enhanced royalty had been made within the meaning of the royalty clause. Under these circumstances, and in the absence of any exceptional conditions, their Lordships held that it was not open to the appellant to raise as a fresh point on appeal, an issue which should have been raised before the Subordinate Judge or the High Court, and might then have been raised in a convenient form and at an opportune time, and that there was no valid reason in the present case for departing from the established practice in the Privy Council.

In the opinion of their Lordships, the case for the appellant fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

MAHARAJA MANINDRA CHANDRA
NANDI

v.

RAJA SRI SRI DURGA PRASHAD
SINGH, since deceased.

DELIVERED BY LORD PARMOOR.