

Privy Council Appeal No. 42 of 1924.

Patna Appeal No. 2 of 1923.

Gajadhar Prashad Sahu - - - - - *Appellant*

v.

Mahadeo Prashad Sahu - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 8TH FEBRUARY, 1926.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* VISCOUNT DUNEDIN.]

In this case an uncle and a nephew had certain properties. A partition suit was instituted in which, in 1901, a compromise decree was passed. By it certain properties, which will be referred to as Properties A, were allotted to the uncle, and others, referred to as Properties B, to the nephew. In 1904 another suit was instituted in which, in 1908, there was another compromise decree, the effect of which was simply to substitute A for B and B for A.

The present application for execution was instituted by the nephew against the uncle. He says that the properties of which under the decree of 1908 he is entitled to receive possession are not in their entirety in three respects. First, because, between 1901 and 1908, the uncle had made over a certain portion to a family doctor ; secondly, because *zirat* lands which he (the nephew) was entitled to have in his possession had been made over to

tenants under leases, and, thirdly, because certain other lands had been let on leases not for their full value, but in respect of a sum down, which had been paid to the uncle.

The learned Judges of the High Court, differing from the learned Judge of first instance, held that the decree-holder was right as to what he said, but they came to their decision in respect of a certain term of the decree of 1908. The decree of 1908, after providing that the one set of properties should be changed for the other, went on, under clause 7, to say this :—

“ That if the plaintiff or the defendant No. 1 has sold at a time when he was in possession under the decree of the 17th April, 1901, any of the said properties respectively allotted to him he do pay to the other party the consideration money received by such sale, and if any property have been mortgaged or otherwise encumbered, the party mortgaging or encumbering it do redeem the property or otherwise indemnify the other party of any loss that the latter may sustain.”

Accordingly, when they come to deal with the question in dispute, they say, referring to these properties :—

“ The question with regard to these properties is whether the disposition of them made by the respondent was an encumbrance in respect of which under the terms of the decree, which I have read, there would be a liability upon the respondent to indemnify the appellant.”

Their Lordships think that, although in substance the learned Judges of the High Court were quite right, they have not put it on the proper ground. It is not really because of that clause 7. Clause 7 was put in in order to get rid of the general question as to damages if one of those things should happen. But their Lordships consider that the right which the decree-holder here has, to be put in a position to which he is entitled, depends on the very simple proposition that under the decree of 1908 his opponent has to hand over, so to speak, intact those lands which he got under the decree of 1901, and, if he cannot do it, then he is liable for damages.

Their Lordships, therefore, propose that the decree should be varied in its form ; that the case should go back to the learned Judges in India to determine what damage the respondent has suffered in respect of (1) the gift to the doctor, (2) the deprivation of the personal possession of the *zirat* lands, (3) the letting of other subjects at lower rents in respect of a sum paid and received by the respondent. The case will then be worked out on those lines. Subject to this variation, the appeal will be dismissed and the appellant will pay the respondent's costs.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

GAJADHAR PRASHAD SAHU

2.

MAHADEO PRASHAD SAHU.

DELIVERED BY VISCOUNT DUNEDIN.

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