

Privy Council Appeal No. 4 of 1921.
Patna Appeals Nos. 69 and 70 of 1917, and 3 of 1920.

Rai Baijnath Goenka, since deceased (now represented by
Kedarnath Goenka) - - - - - *Appellant*
v.
Maharaja Sir Ravaneshwar Prasad Singh - - - - - *Respondent*
v.
Same - - - - - *Appellant*
v.
Maharaj Kumar Babu Bageshwari Prasad Singh and others - *Respondents*
v.
Musammat Bibi Nabi Zohra - - - - - *Appellant*
v.
Rai Baijnath Goenka, since deceased (now represented by
Kedarnath Goenka) - - - - - *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 9TH FEBRUARY, 1922.

Present at the Hearing :

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

[*Delivered by* SIR JOHN EDGE.]

These are three consolidated appeals. It will be convenient to dispose at once of the appeal in which Musammat Bibi Nabi Zohra is the appellant. That appeal is not supported, and will be dismissed with costs.

In the other two appeals which will now be considered, Rai Baijnath Goenka was the appellant; he is now dead, and is

represented by his minor son through his mother and guardian, his next friend. These two consolidated appeals are from two decrees, dated the 24th April, 1917, of the High Court at Patna, which reversed the decrees, dated the 22nd February, 1916, of the Subordinate Judge of Monghyr, by which the Subordinate Judge dismissed applications by the respondents here or those whom they represent for the execution of a decree of the Subordinate Judge of Monghyr of the 30th June, 1904, which on the advice of the Judicial Committee of the Privy Council had by an order of His Majesty in Council of the 3rd February, 1915, been restored, except as to villages Matasi and Mirzagunj.

In order that the questions in dispute in these appeals may be understood, it is necessary to refer briefly to some facts and to the history of the litigation in which these appeals have arisen.

Mahal Bisthazari, in the District of Monghyr, which included 360 villages, was jointly owned by a number of persons, including the respondents or those whom they represent. The owners of the specified but undivided shares had applied for and obtained from the Collector a separation of accounts under Act XI of 1859. There was left a large area of the Mahal called the *ijmali*, or joint share, the owners of which remained jointly liable for the revenues due, or to become due, in respect of that area. The respondents or those whom they represent owned in the *ijmali* share 14 annas, 1 dam (*pucca*) out of 16 annas (*pucca*) of village Lohara, and shares in village Padmaot and other villages. The revenue due in respect of the *ijmali* share was in arrear in 1901, and the *ijmali* share was sold by the Collector by auction on the 9th September, 1901, and was purchased by Baijnath Goenka, who was placed in possession as the purchaser. Applications to the Collector for the partition of Mahal Bisthazari had been made in 1876, and the proceedings to partition were continued under the Bengal Estates Partition Act, 1897. The partition had not been completed on the 9th September, 1901, but it had been completed before the decree of the Subordinate Judge of the 30th June, 1904, was made in suit No. 596 of 1902.

In 1902 the respondents or those whom they represent and other share owners brought suit No. 596 of 1902 against Baijnath Goenka to have the sale of the 9th September, 1901, set aside, and to obtain possession, and the Subordinate Judge, by his decree of the 30th June, 1904, set aside the sale and decreed possession and mesne profits in favour of the respondents, the mesne profits to be ascertained in execution. The Subordinate Judge, when he made that decree apparently had not been informed that the Collector had completed the partition, or indeed that proceedings for partition had been commenced. He made his decree in favour of each plaintiff or set of plaintiffs in the suit for possession of his respective share as if no partition had taken place. The shares specified in his decree are the shares to which the plaintiffs would have been entitled respectively if no partition had taken place, and Section 26 of the Estates Partition Act, 1897,

was not in the decree complied with. Baijnath Goenka appealed from that decree to the High Court at Calcutta, and that High Court, holding that the sale was valid by its decree of the 1st May, 1907, set aside the decree of the 30th June, 1904, of the Subordinate Judge. From that decree of the High Court at Calcutta, the respondents appealed to His Majesty in Council. That appeal to His Majesty in Council came before the Board in 1915, and the Board taking the same view of the irregularity and invalidity of the sale of the 9th September, 1901, upon which the Subordinate Judge had made the decree of the 30th June, 1904, advised His Majesty that the decree of the High Court at Calcutta should be set aside and that the decree of the Subordinate Judge should be restored, except as to the villages Matasi and Mirzagunj, as mentioned in the order of His Majesty in Council of the 3rd February, 1915. The Board in so advising His Majesty was unaware of the proceedings for partition, and was not informed by the parties or by any one of those proceedings.

After the order of His Majesty in Council of the 3rd February, 1915, had been made, the respondents applied to the Subordinate Judge of Monghyr for execution of the decree of the 30th June, 1904, and for possession of the lands which had been substituted by the partition for the shares which they had been entitled to before the partition. Baijnath Goenka objected, and the Subordinate Judge, being of opinion that he could not in execution of the decree of the 30th June, 1904, grant possession of the substituted shares, as they were not the shares mentioned in the decree of the 30th June, 1904, and that the decree-holders could not get possession of the substituted shares without bringing a regular suit to establish their title to them, by his decree of the 22nd February, 1916, dismissed the applications for execution. From that decree of dismissal the respondents appealed to the High Court at Patna. The appeals were heard together, and it was contended on behalf of Baijnath Goenka that the decree of the 30th June, 1904, could not be executed, and that it would be necessary for the respondents here either to get that decree varied by an application to the Judicial Committee, or to establish their titles by a suit. The learned Judges of the High Court at Patna held that the decree of the 30th June, 1904, could be executed by giving possession of the substituted shares, and that an application to the Judicial Committee was not necessary, nor was a separate suit necessary, and by their decree of the 24th April, 1917, they allowed the appeals and directed the Subordinate Judge to restore the applications for execution to his pending file and to hold the enquiries necessary for ascertaining which were the shares which by the partition had been substituted for the original shares. From these decrees of the 24th April, 1917, Baijnath Goenka brought these two consolidated appeals.

Their Lordships agree with the High Court at Patna that the decree of the 30th June, 1904, could be executed by giving these respondents respectively possession of the substituted shares, and

that no application to the Judicial Committee was necessary. The questions as to what were such substituted shares were questions which arose within the meaning of Section 47 of the Code of Civil Procedure, 1908, between the parties and related to the execution and satisfaction of the decree of the 30th June, 1904.

At the conclusion of the arguments in these two consolidated appeals their Lordships were informed by counsel that no stay of execution having been granted, the decree of the 30th June, 1904, has been executed pursuant to the directions given in the decree of the High Court at Patna of the 24th April, 1917.

Their Lordships will humbly advise His Majesty that these two consolidated appeals should be dismissed with costs.

In the Privy Council.

RAI BALJNATH GOENKA, SINCE DECEASED
(NOW REPRESENTED BY KEDARNATH GOENKA)

^o.

MAHARAJA SIR RAVANESHWAR
PRASAD SINGH

SAME

^o.

MAHARAJ KUMAR BABU BAGESHWARI PRASAD
SINGH AND OTHERS

MUSAMMAT BIBI NABI ZOHRA

^o.

RAI BALJNATH GOENKA, SINCE DECEASED
(NOW REPRESENTED BY KEDARNATH GOENKA)
(*Consolidated Appeals.*)

DELIVERED BY SIR JOHN EDGE.

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