CALCUTTA HIGH COURT

L.A. Creet

Vs

Firm Gangaraj-Gulraj

(D.N Mitter, J.)

22.05.1936

JUDGMENT

D.N. Mitter, J.

1. This is an appeal by defendant 1, the representatives of defendant 2 and defendant 3 against the decree of the Additional Subordinate Judge of Asansol dated 6th June 1933, by which he decreed the suit for ejectment and recovery of mesne profits in respect of a coal mine consisting of 1,124 bighas of land in the village of Sathgram. The plaintiff who instituted the suit claims by right ofauction purchase all the right, title and interest of the Limited Company known as the Sathgram Coal Company Limited. Mr. A.T. Creet, defendant 3 in the suit took a lease of 2024 bighas of coal lands in the village Sathgram from the Searsole Raj for a period of 999 years on 18th September 1919. On 2nd July 1920 defendant 3 let out to the Sathgram Coal Company Limited the whole of the lands covered by his lease for 999 years. Some of the questions which are raised by this appeal are dependent on the construction of this sub-lease and on its true legal effect. The document is printed at page 1 of the second part of the paper book. The Sathgram Coal Company Limited went into liquidation and defendant 10 has been appointed Official Liquidator. On 3rd July 1923 A.T. Creet (defendant 3) brought a suit for recovery of royalties for the quarters beginning with 30th September 1921, and ending with 31st March 1932 for Rs. 30,329-13-6 and the plaint in this suit has been marked as Ex. J in the case which is to be found printed at p. 118 of the second part of the paper book. On 21st June 1924 there was a final decree for sale: see Ex. J (2) printed at p. 124 of the second part of the paper book. It appears that some time before April 1923 the Sathgram Coal Company Limited transferred 900 bighas of coal land to one Keshoram Poddar and this transfer was recognized by A.T. Creet, defendant 3. On 21st August 1924 there was a second suit by the lessor Mr. Creet for royalty: see Ex. K, printed at p. 203 of the second part of the paper book. This was for the royalties of the quarter ending with June 1923 for a period of 1 year and 3 months. In this suit there was a preliminary decree for sale dated 13th December 1924: see Ex. K-2 printed at p. 214 of the second part of the paper book. Thus ended the second suit for royalty and the total period for which these two suits for royalties were brought is about three years.

2. We now proceed to state the plaintiffs' title as set forth in the plaint. On 8th July 1924, the plaintiff, who is a firm, obtained a money decree against the Sathgram Coal Company Ltd. and one Arthur Jardine & Company for a sum of Rupees 45,000: see Ex. 8, printed at p. 126 of the

second part of the paper book. On 25th July 1924 a precept was issued from the Original Side of this Court under Section 46 of the Code for effecting attachment of the Sathgram Colliery (p. 126, P. II). The attachment was effected on 3rd August 1924: see Ex. 3(a) printed at p. 131 of the second part of the paper book. On 21st August the decree was transferred from the Original Side of this Court to the Burdwan Court: see p. 134, P. II. In execution of that transferred decree the property in question, viz. the Sathgram Colliery, was advertised for sale. On 4th July 1925 a petition was put in by defendant 3, A.T. Creet, stating that he had re-entered on the property which he had advertised for sale, as the Sathgram Coal Company had gone into liquidation. This petition is to be found printed at p. 176 of the second part of the paper book and he prayed by this petition that the fact of his having entered into khas possession of the disputed colliery on 15th October 1924, and the fact of his having let it out to Mr. L.A. Creet and Mr. J.P. Peters should be read out at the time of the sale in execution of the said transferred money decree against the plaintiff and another.

3. The Court granted this application and ordered that the petition be read out to the intending purchasers: see Ex. Q printed at p. 154 of the second part of the paper book. It appears that this petition was actually read over at the time of the sale: see Ex. A printed at p. 178 of the second part of the paper book. On 14th July 1925 the plaintiff purchased the right, title and interest of the judgment-debtors, Arthur Jardine & Company and the Sathgram Coal Company, Ltd., in 1124 bighas of coal land of the disputed colliery with equipment, boilers, engines, lines, headgear, coal-tubes and machinery, pumps, pipes, office room, cooli lines, bungalow, manager's quarters and all sorts of tools and implements, etc. On 14th October 1924 a resolution was passed for voluntary liquidation of the said Sathgram Coal Company, Ltd.: see Ex. P printed at p. 221 of the second part of the paper book. The resolution to which we will have to refer later is in these words:
Resolved that the Sathgram Coal Company Ltd., cannot by reason of its liabilities continue its business, so the Company do wind up, and Mr. A.C. Bose, Attorney-at-law of 10 Hastings Street, Calcutta, be appointed liquidator.

4. On the following day, that is on 15th October 1924, according to the case made by the defendants in their written statement, Mr. A.T. Creet, defendant 3, re-entered into possession of the Colliery. As to whether the re-entry by Mr. A.T. Creet or by his agent or by some one who is not an agent is valid in law is a matter which is debated in this appeal. On 20th October 1924, there was a meeting of the co-sharers, in which the resolution, regarding the voluntary liquidation was challenged: see Ex. 10 (a) printed at p. 241 of the second part of the paper book. Both the creditors and share holders were asked to bring a suit for a declaration that the resolution for winding up of the Company purporting to have been passed on 14 th 1924 is invalid and void and for an order staying and annulling the said winding up and for such other relief as they might be advised. This meeting was held under the Chairmanship of D.H. Avory. A suit was instituted in pursuance of this resolution of 20th October 1924 for annulling the winding up and for a declaration that the resolution of the 14th was void. That suit, however, was withdrawn. Although the papers showing the withdrawal of a suit were not put in evidence, there is the evidence to that effect on the side of the plaintiff-respondent: see the evidence of the witness, Janaki Nath Banerji, printed at p. 156 of the first part of the paper book.

5. On 20th August 1925, however, another suit was brought by one Surendra Nath Dutt, which seems to be a representative suit under Order 1, Rule 8, Civil P.C., to set aside the resolution of

14th October for voluntary liquidation. The plaint of this suit has been marked as Ex. 10 and has been printed at p. 233 of the second part of the paper book. This suit was decreed on 22nd March 1926, and the resolution for voluntary winding up of the Company was set aside: see Ex. 9 printed at p. 249 of the second part of the paper book. It is necessary to quote here a portion of the order as the precise nature of the order has been a matter of debate before us. The order is to the following effect: It is declared that the resolution of 14th October one thousand nine hundred and twenty four in the plaint in this suit mentioned, putting the defendant company into liquidation is void, inoperative and a nullity. And it is further declared that the liquidation proceedings be and the same are hereby set aside. And it is further ordered and decreed that an injunction be awarded against the defendant, Akhoy Chunder Bose, restraining him from acting as liquidator and interfering with the management and business of the defendant company.

6. Shortly after this it appears that two other persons who were creditors applied for compulsory liquidation on 11th May 1926. The order of compulsory winding up of the Company is marked as Ex. N and is printed at p. 226 of the second part of the paper book. That order was made by C.C. Ghose, J. sitting on the Original Side of this Court: see Ex. N-l printed at p. 229 of the second part of the paper book. That Court appointed one S.N. Mukerjee, a Chartered Accountant, as an Official Liquidator. The books of the Company were all made over to the said Mr. S.N. Mukerjee, who is defendant 10 in the suit. It seems that the plaintiff, notwithstanding the purchase, was unable to get possession from the defendants and he consequently instituted the present suit in which he impleaded defendants 1 and 2 who were sub-lessees, defendant 3, as also the Sathgram Coal Company, Ltd., by their partners who were Chatterjee & Co. and co-partners the managing agents of the Sathgram Coal Company who were defendants 5, 6, 7, 8, and 9, and S.N. Mukerjee, defendant 10, who, as has already been said, is the liquidator appointed by this Court on 11th May 1926.

7. This suit was resisted by defendants 1, 2 and 3 and the main grounds of defence are contained in the written statement of defendant 1 in paras. 22, 25, 26, 27 and 28. These statements were in answer to the statements made in the plaint by the present plaintiff that the voluntary liquidation proceedings were fraudulent and collusive. It is necessary to reproduce in substance the case made by the plaintiff about the fraudulent nature of the resolution regarding the voluntary winding up of the company on 14th October 1924 as set forth in para. 11 of the plaint. It is said there that the winding up of the company at the alleged meeting of the share holders on 14th October 1924, as stated by the defendants, is a wholly fraudulent, collusive and fictitious affair and is a mere paper transaction. Defendants 1 to 9 collusively and being actuated by improper and wrongful greed merely made such a false allegation. Defendants 1 to 3 and 8 and the shareholders of defendant 4, the company, are related to one another and are friends.

8. In para. 12 it was further stated that in fact the alleged meeting of 14th October 1924 has also been decided to be wholly invalid and void in a meeting of the share-holders and creditors of the company which was held on 20th October 1924 and moreover, this Court (High Court) also in Suit No. 2275 of 1925 has decreed as follows regarding the resolution and the meeting of 14th October 1924:It is declared that the resolution of 14th October 1924 in the plaint in this suit mentioned putting the defendant company in liquidation is void, inoperative and a nullity, and it is further declared that the liquidation proceedings in the said plaint mentioned are invalid and it is ordered and decreed that the said liquidation proceedings be and the same are hereby set aside.

9. The plaint further stated that the voluntary liquidation resolution was a fraudulent affair and taking advantage of this, defendant 3 took khas possession of the disputed property and granted settlement thereof to defendants 1 and 2 and defendants 1 and 2 are in wrongful possession of the disputed colliery under defendant 3. The gist of the plaintiff's action is that the plaintiff has obtained an excellent title by virtue of his auction purchase and the defendants were in wrongful possession as defendant 3 was only entitled to enter into possession in the two events which are mentioned in para. 12 of the lease granted to Sathgram Coal Company, Ltd. The two events which would justify the taking over of possession are (1) in case of arrears of rent and royalties for one year whether formally demanded or not, and (2) if the company while the demised premises or any parts thereof remain vested in him shall go into liquidation except for the purpose of re-construction. In the plaint therefore the plaintiff asked for a declaration that the plaintiff's right by auction purchase, as described in the plaint, be declared. He also asked for a decree for khas possession of the property in suit. There was also a prayer for mesne profits which is valued tentatively at Rs. 50,000. The other consequential prayers were also made. In answer to the case about the fraudulent nature of the resolution regarding the voluntary winding up of the company the defendants contended, in the paragraphs which have already been referred to, that the liquidation proceedings were in order and were not tainted by fraud as alleged by the plaintiff, that on 14th October 1924, Sathgram Coal Company, Ltd., having gone into liquidation, as they could not help doing, Mr. A.T. Creet re-entered into the property as he could in terms of the lease in the happening of such one of the above events and took khas possession thereof, that the said Mr. A.T. Creet executed a lease in favour of defendants 1 and 2 on 25th May 1925 in respect of the property in question on receipt of a bonus of Rs. 1,31,000 on terms and conditions mentioned therein. They also alleged that the suit of 1925 was instituted at the instance of Surendra Nath Dutt and that it was a collusive and fraudulent one and that it was really instituted by the plaintiff and his agents in order to carry out their plan of trying to get some sort of a footing to engage in litigation with respect to this property in order to harass the defendants.. In the written statement of defendant 3 it was further alleged in para. 14 that under the terms of the lease on the happening of one of the two events, namely, the falling into arrears of the royalties for more than one year and the company's going into liquidation, defendant 3 had a right to re-enter and that he exercised his right of reentry and took khas possession, as he was entitled to do, on 15th October 1924. The defendant further contended that they had made improvements and spent about Rs. 1,08,000 over the same since taking possession. On this state of pleadings several issues were framed in the suit: see p. 125, P.I. The issues were however at the time of hearing re-modelled and recast by the Subordinate Judge. These remodelled issues are to be found printed at p. 281, part 1 of the paper-book. Issue 3 was to the following effect: Was any meeting of the shareholders of the Sathgram Coal Company, Ltd., held on 14th October 1924 for winding up the company? Was any resolution passed in any such meeting for the voluntary winding up of the company? Was such resolution legal and valid? Did defendant 3 re-enter on the property on 15th October 1924? Did all these proceedings in any way affect the plaintiff's rights in the property?

10. Issue 4 was to this effect:
Is the alleged lease by defendant 3 in favour of defendants 1 and 2 a fraudulent transaction? Were defendants 1 and 2 put in possession of the disputed property on 1st January 1925 as alleged in the written statements?

11. Issue 3 raises practically the main contentions which have been urged before us. The Subordinate Judge has come to the conclusion that the proceedings regarding voluntary

liquidation were all fraudulent and that was a part of the scheme with which defendants 1 and 2 were associated for the purpose of depriving the plaintiff of his rightful possession and that defendant 3 subsequently ratified the acts of defendant 1 although there could be no ratification of an unauthorized act. With regard to this finding of the Subordinate Judge the main complaint which has been made on behalf of the appellant is that certain books which could have furnished important evidence in regard to the nature of the resolution of 14th October have been wrongly rejected from evidence. We are told that the minute books of the company could have shown that the resolution was one which was in accordance with the provisions of the Companies Act and an application was made before us for the reception of the minute books as additional evidence in this case. We are unable to admit these proceedings set forth in the minute books not only for the reasons given by the Subordinate Judge when rejecting this evidence when it was tendered (vide p. 225, part 1 of the paper book) but also for the reason that the defendants did not avail themselves of the opportunity to have these books proved when these books were brought into Court on 30th March 1933 by the clerk of the Official Liquidator. We will reproduce presently the reasons which have been given by the Subordinate Judge. The reason which the Subordinate Judge gave was that the reception of that evidence at that stage would operate to the prejudice of the plaintiff. The Subordinate Judge says: I am of opinion therefore, that the plaintiff has been prejudiced by the non-production of the book in proper time and it would not be fair to him to allow this evidence to go in now (P. 225, part I).

12. It is significant in this connexion to mention that on 30th March 1933, when Surendra Nath Dutt was examined one Bankim Chandra Dhar who was a clerk of the Official liquidator was also present. He was asked to produce all these documents which have been sought to be put in as additional evidence: see p. 182 part 1 of the paper book. He stated that he had brought the documents that had been called for from his office and yet if is somewhat significant that no endeavour was made to have these documents proved by Mr. Surendra Nath Dutt who said in his deposition that he had five hundred fully paid up shares in the company of the face value of Rs. 5,000 only. The documents were in Court on the 30th and if the defendants were in earnest they should not have waited till the plaintiff had closed his case; or at any event they might have asked for Surendra Nath Dutt's re-examination or for Bankim Chandra Dhar's re-examination, who had been examined on 30th March. We do not think that there is any just ground for this complaint having regard both to the circumstances which have been disclosed in the remarks of the Subordinate Judge printed at p. 225, part 1 of the paper book and the circumstances which we have just indicated. We therefore rejected by a separate order the application for reception of these documents as additional evidence. The Subordinate Judge has, in coming to the conclusion that the resolution of 14th October 1924 was fraudulently passed, given a number of reasons. He has found that the resolution of voluntary winding up is a part of the scheme with which the Managing Agents and the partners of the Sathgram Coal Co. Ltd., viz. the Chatterjees, were very closely associated. He has pointed out that the conditions of the company at the crucial date, viz., 14th October, was so prosperous that there was no necessity of voluntarily winding up of the company. He has referred for that purpose to certain raising of coal at or about the time of the preparation of the returns which were filed by the defendants in pursuance of the Mines Act with the Chief Inspector of the Mines. After having examined the return which is marked as Ex. B in the case he finds that: We find from 15th October 1924 to 31st December 1924, 30, 352 tons of coal were raised from the mine of this colliery.

13. This means an average raising of more than 1,200 tons of coal per month. The balance

sheets, Ex. 15 series, show that the monthly average risings from July to December 1921 was 4,997 tons, profits in that half-year were Rs. 1,31,977-14as, of course after deduction of all liabilities. This finding has been challenged by the defendants and it has been said that Ex. B on the basis of which the Subordinate Judge has arrived at this finding was not filed by them and it contains entries in red ink by some officer of the Mines office which are really interpolations and they show substantial alterations in the figures. In this connexion an application has been made before us for reception as additional evidence of the copy of the return which it is alleged was really filed by them. We do not think that we can allow the additional evidence of this kind to go in at the present stage. Ex. B on which the Subordinate Judge relied was a copy which was put in by the defendants themselves: see p. 106 of part 2 of the paper book. The figures referred to by the Subordinate Judge are taken from this Ex. B. Complaint has been made in this application for reception of additional evidence that there might have been some sort of manipulation or forgery in the Mines office. The allegations are serious. The matter should have been raised in the Court below. In appeal at this distance of time to receive additional evidence of this kind would be rather unreasonable and we do not think that in these circumstances we can accept this evidence. The application for reception of documents must be rejected.

14. The Subordinate Judge has further relied for his finding on the fraudulent character of the resolution on the evidence given by one Ram Chandra Marwari as to how this attempt was made by Chatterji with the assistance of defendants 1 and 2 to cheat the company of its money. The evidence of Ram Chandra Marwari (printed at p. 166, part 1 of the paper-book) is that on 14th October 1924 different documents were executed in respect of the disputed colliery. The first, which was a sub-lease by Mr. A.T. Creet, was in favour of L.A. Creet and Bhuban Mohan Chatterji. The second document was a counterpart of this lease. The third document was the deed of release in favour of Mira, the wife of Suresh, one of the Managing Agents (defendant 5). It is true that these documents have not been put before the Court. The deed of release seems to be in favour of Mira. It was, however, produced in a Miscellaneous case between the parties Nos. 13/1 of 1926 in the Court of the Subordinate Judge of Burdwan and was marked as Ex. 3 in that case. The document was taken from that Court by a pleader of the name of Surjya Roy Chowdhury. The document was called from this pleader and was produced before Court and was tendered in evidence but was unfortunately rejected. Mr. L.A. Creet however, denies the execution of this document. The learned Subordinate Judge has however, believed the evidence of Ram Chandra Marwari on this point in preference to that of Mr. L.A. Creet. The Subordinate Judge remarks thus: L.A. Creet in his deposition denies the execution of these documents (vide p. 9 of his deposition.) In this matter, however, I prefer to believe Ram Chandra Marwari in preference to L.A. Creet, because the existence of at least one of these documents is proved beyond shadow of any doubt, because L.A. Creet is proved to have spoken falsely in many matters, and also because L.A. Creet is vitally interested in the result of the suit, while Ram Chandra Marwari is an independent and respectable witness who paid an income-tax of Rs. 700 odd in 1932-33.

15. The evidence of Ram Chandra Marwari has been placed before us by the learned advocates on both sides, and when one closely examines the evidence it leaves no doubt as to what was intended to be done by the execution of these documents. The witness states this: After his interview with me, held on 10th October as stated above, Suresh Chatterji next saw me for the first time on the afternoon of the 14th at about 6 or 6-30 p. m. He did not see me any time between these two dates. No one came in his company when he came to see me on the 14th. He stayed at my place on that day for about ten minutes. I do not (know?) who else were present on

that occasion. Even at this time I came to entertain a suspicion that Suresh Chatterji was trying to defraud the shareholders of the Sathgram Coal Company. I did not, however, raise any objection to advancing money on that ground, because I would hot be injured in any way by that Act.

16. The witness then goes to say: I first heard the name of Mira Chatterji on the 10th. Suresh Chatterji told me then that the Colliery would be leased out to Mira Chatterji and that she would borrow the sum of Rs. 10,000 and would execute the mortgage bond.

17. This witness then speaks about the secret arrangements. He says: On the evening of 14th October, Suresh Chatterji took me to Raniganj to the house of L.A. Greet (defendant 1) then, because I had insisted that if the three documents mentioned above were not registered, they should at least be executed before me. Up to that time I was prepared to advance money on mortgage of the property even if those documents were not registered. On the next morning I went to Kirti Babu's house at Asansol and not for the purpose of taking legal advice as to whether I should or should not advance money on the mortgage of the property but to have the mortgage bond drafted by him. I showed all the three aforesaid documents to Kirti Babu-then says-two documents were shown to him and I asked him to prepare a draft of a mortgage bond. I showed him the lease executed by A.T. Creet in favour of L.A. Greet and Bhuban Mohan Chatterji and also the deed of release executed by Bhuban Mohan Chatterji in favour of Mira Chatterji. The deed of release was in English. I read a great portion of that document as also of the lease.

18. The learned Judge of the Court below, we think, has come to a correct finding on this part of the case and we should not be justified in disturbing it more specially when the issue is a simple one and he had a greater advantage over us, sitting on the appellate jurisdiction of the Court, of watching their demeanor. Besides it seems to us that the story of Ram Chandra Marwari is more in accordance with the probabilities of the case.

19. On this part of the case another point has been taken and it has been said that no specific issue of fraud was raised when the issues were re-cast although there was a specific issue when the issues were framed in the first instance. The learned Judge, however, has compressed a number of issues including the issue of fraud into issue 3. But the parties evidently understood that they were not dropping the issue of fraud. It is further said that there was no specific allegation of fraud in the plaint, and the mere use of the expressions 'fraudulent' and 'collusive' are not sufficient. We are not unmindful of the observations of their Lordships of the Judicial Committee of the Privy Council in Gunga *Narain Gupta v. Tiluckram Choudhury*[1] *and Bal Gangadhar Tilak v. Shrinivas Pandit*[2] that the use of such general words as 'fraud' or 'collusion' is ineffectual to give a fraudulent colour to the particular statements of fact in the plaint unless those statements taken by themselves are such as to imply that a fraud has actually been committed. In view of these pronouncements the particular circumstance in which the fraud has been committed or from which fraud can be inferred should be set forth in the plaint. In this particular case the plaintiff did give the particulars with regard to fraud such as was necessary for the purpose of sustaining their case that the resolution of 14th October 1924 was a fraudulent transaction and that it was altogether fictitious. They are not bound in the plaint to disclose the evidence by which fraud was to be established and we agree with the Subordinate Judge that the plaintiff firm has complied with the requirements of the Code in giving such particulars as were necessary to sustain a case of fraud. The Subordinate Judge has dealt with this part of the case in his judgment in the portion which is printed at p. 293 of the first part of the paper book. It cannot

be said that the defendants have in any way been taken by surprise. As a matter of fact they evidently tried to negative the case of fraud but in our opinion they have failed to do that.

20. The case of fraud has also been supported by the production of two cheques, one for Rs. 24,000, dated 17th February 1925, and the other for Rs. 10,000 dated 31st March 1925, both of which have been called for from the Mercantile Bank of India: see Exs. 39 and 39(a) printed at pp. 231 and 232, part 2 of the paper book. The plaintiff suggested that by those two cheques. Mira Chatterji's interest in the colliery was bought off by defendant 1, Mr. L.A. Creet, Mira being paid off through her benamidar Sitala Kanta Banerji. It is said that the introduction of these two cheques in this case was stoutly resisted by the learned advocate for the defendants. Although Mr. L.A. Creet was ordered by the Court to re-appear and submit to further cross-examination on the point with regard to these two cheques, he never cared to enter into the witness-box. The Subordinate Judge rightly remarks, he is deliberately keeping away fearing that it he be subjected to further cross-examination on the point of these two cheques, his previous statements concerning some cheques which it was suggested by the plaintiff's lawyer that he gave to Sitala Banerji would be proved false. An inference from these circumstances is unfavourable to the case of the defendants. We have, therefore, no doubt that the resolution of 14th October 1924 was a fraudulent resolution. In addition to these cheques just mentioned the Subordinate Judge also relied on a judgment of the original side of this Court deciding this resolution to be void. The Subordinate Judge no doubt deemed that judgment was a judgment in rem. Our attention has been drawn to Section 43, Evidence Act, and it is said that it is not one of those judgments which are binding on all the world as it does not fall within the class of judgments mentioned in Section 43. A question may arise whether the jurisdiction of the High Court dealing with the winding up of companies or matters relating thereto is not exercised in the Insolvency Jurisdiction of the High Court. But it is not necessary to decide this in the present case. It has been conceded that judgment of the High Court is evidence as a transaction under Section 13, Evidence Act. The judgment is the evidence of the fact that there was a suit in the High Court regarding the resolution of 14th October and the result of the suit was that the resolution was declared illegal or void. The findings may not be binding on the persons not parties to the suit. The fact that the resolution has been set aside reinforces the conclusion we arrive at in this case that the resolution of 14th October regarding voluntary winding up was fraudulent.

21. The next point that was taken is that the decision of the Subordinate Judge that possession was not taken by defendant 3, A.T. Creet, but by L.A. Creet, defendant 1, is wrong. It is common ground that Mr. A.T. Creet, defendant 3 was in England at the time, that is on the crucial date, viz. 15th October 1924, when L.A. Creet purports to have taken possession under a power of attorney which has not been produced in this case, and an endeavour was made after the final reply to get this document admitted in evidence. We have rejected that application by an order which has been recorded separately with regard to that application. This surely is a document which ought to have been produced at an earlier stage of the case. We agree with the Subordinate Judge that there is a very slender evidence of L.A. Creet's acting on behalf of A.T. Creet on the day following the voluntary winding up of the company. It has been contended on behalf of the appellants that under authorities an agent who was acting as such for the general management of the property of Mr. A.T. Creet could determine the lease and we have been referred to in this connexion to pp. 672 and 673, Edn. 6 of Foa's "Law of Landlord and Tenant," to *Jones v. Phipps*[3] to In re Knight and Hubbard (1923) 1 Ch 130 and to Woodfall's "Law of Landlord and Tenant" 22nd Edn., at p. 444. Here a question might arise whether such an agent has a right to take possession under certain covenants in a lease, where the state of things have been brought about

by the fraud of the agent. Be that as it may, the evidence with regard to defendant 1 being a general agent is meagre and we cannot act upon it. We need not go into the question which has been canvassed before the Subordinate Judge as to whether the condition for re-entry is valid and opposed to public policy. We find that the re-entry was really at the instance of defendant 1 who had no right to be there.

22. It has next been argued that even if the resolution were a void resolution after defendant 3 had entered into possession at a time when there was the resolution with regard to the winding up of the company, his acts cannot be affected by the subsequent avoidance of the resolution and our attention has been drawn to the decision of the House of Lords in *Morris v. Harris*[4] In that case the House of Lords by a majority of three to two decided with reference to Section 223 of the Companies Act, 1908(Edw. VII), which corresponds to Section 243, Indian Companies Act, that the effect of the subsequent declaration that the resolution of 14th October 1924 was void is not to invalidate any proceedings which have been taken at a time when the resolution was not declared to be invalid. In the case before the House of Lords, as appears from the speech of Lord Sumner, an order of the Court made under Section 223, Companies Act, 1908, declaring the dissolution of a company to have been void, does not affect the validity of proceedings taken during the interval between the dissolution and its avoidance. The relevant passage is to be found in the last paragraph of p. 258 of the report. That paragraph is as follows: My Lords, I think it follows that only in the rarest cases and always contrary to the contemplation of the Act is it possible for proceedings to have continued in fact during these three months when the company is moribund, and further that after dissolution, which is an event calculable by anybody from a date of which public notice has been given whatever is done at the actor's peril. The legislature would never have bestowed on the Court a power to declare a dissolution void, without imposing terms, as by the section, it certainly is empowered to do, if the effect of this order of avoidance might be to undo the reversion of freeholds to an original grantor or the acceleration of a reversioner's immediate title to leaseholds in the case of lands accidentally undisposed of in the winding up: Co. Litt 136; *Hastings Corporation v. Letton*[7] In re Working Urban Council (Basingstoke Kanal) Act, 1911 (1914) 1 Ch 300, In re Albert Road Norwood (1916) 1 Ch 289; yet such would be the effect of the construction contended for, with a consequent avoidance of all dispositions made by such grantor or reversioner in favour of third parties, wholly innocent of any irregularity. This must be the result, if the judge's order simply puts back clock and restores things, as though the dissolution had never been. Accordingly I see no reason why the legislature should be deemed to have had in its contemplation any intermediate proceedings.

23. Lord Wrenbury took a somewhat different view from the one which Lord Sumner took. But this case does not assist the appellant, for it would not apply to a case where the transaction is affected or tainted by fraud as would appear from the following extract from the speech of Lord Sumner quoted above: Yet such would be the effect of the construction contended for, with a consequent avoidance of all dispositions made by such grantor or reversioner in favour of third parties wholly innocent of any irregularity and this is practically conceded by the learned advocate for the appellant. He has referred to this case on the footing that fraud had not been established.

24. The next point which we shall take up is with regard to the form of the decree for sale to which reference has been made at the beginning and which was obtained by the appellant against the Sathgram Coal Co., Ltd. It is contended that these decrees have been marked as Exs. J-2 and

K-2 respectively. It was contended before the lower Court-and that contention has been repeated before us-that in. view of the landlord defendant 3's two mortgage decrees the said Exs. J-2 and K-2, plaintiff, if he purchased anything, purchased only a right of redemption and that at any rate he cannot get possession of the properties without first paying up the landlord's dues. The decrees however, as the learned Sub. ordinate Judge said, were not mortgage decrees but only charge decrees and he held accordingly that the plaintiff is not affected by the charge decrees as he had no notice of them.

25. But the Subordinate Judge does not seem to us to be right in law, for it is established on authorities that notice is not necessary, in the case of a purchaser at an execution sale. The position of a purchaser at an execution sale is the same as that of a judgment-debtor. His position is somewhat different from that of a purchaser at a private treaty. Execution purchasers purchase subject to all the charges and incumbrances, legal and equitable which would bind the debtors. We have been referred to in this connexion to the decision of their Lordships of the Judicial Committee of the Privy Council in *Wickham v. New Brunswick & Canada Rly., Co*[8]. The passage occurs at p. 76 of the report. We have also been referred to the decision in *Madell v. Thomas & Co*[9].. Reference has also been made to the decision in *Fateh Ali v. Gobardhan Prasad*[10] These authorities no doubt support the contention of the appellant and we think that the view taken by the Subordinate Judge must be taken not to be the correct views of the matter. The Subordinate Judge held that the plaintiff is not affected by the charge decrees. As a large sum of money was due to the landlord on account of rents and royalty and the landlord was in wrongful occupation of the property since October 1924, he directed that when accounts would be taken in the final decree Stage there should be an adjustment, if necessary, as against the plaintiff's claim for damage and mesne profits and the plaintiff would get a decree for the balance only after such adjustment after payment of additional court-fees if necessary. It is contended on behalf of the appellant that if these decrees are held to be binding on the plaintiff the decree ought to be on the footing of an ordinary decree for redemption. In other words it should be held that possession must not, be restored to the plaintiff until accounts are taken. That would be so in a case where possession is attributable to the mortgage or charge, in other words where the mortgagee has been let into possession by the mortgagor.

26. The effect of a decree on a charge which is under the provisions of the Civil Procedure Code is the same as that of a decree on a mortgage: see Order 34, Rule 5. But in this particular case, possession of defendant 3 is not one which is attributable to the mortgagor or of person against whom the charge is held. It is a case of wrongful possession. It is a possession which was wrested from the plaintiff and in such circumstances we do not think that the mortgagee, who holds the charge, is entitled to insist on possession being retained till his dues are paid. In these circumstances we think that notwithstanding our holdings in disagreement with the Court below, that defendant 3 has a charge in respect of the decree on the property in question we should not be justified in disturbing the order in the decree of the Subordinate Judge as made. If on accounts being taken any balance be found in favour of the defendant the property in question would be liable to a charge and this charge will be enforced in proceedings in execution of this decree by the defendant. It is not necessary to make this declaration seeing that a suggestion was made by the Court to the learned advocate for the respondent (plaintiff) that it would be better if possession be deferred in so far as the plaintiff firm is concerned, for one year during which accounts might be taken. We think, having regard to equitable considerations and to suit the convenience of the parties, the proper order to make in this case is that possession should be

deferred till one year elapses from the date of the arrival of the record in the Court below within which period we direct the Subordinate Judge to finish the accounts already directed to be taken. If the taking of accounts be not finished by that date it would be open to the plaintiff to take possession which has been decreed to the plaintiff by the Subordinate Judge.

27. It remains to notice one point which was pressed in the argument that the right of re-entry by the lessor would be justified on another ground, namely the contravention of the covenant with regard to the payment of royalties. We have already found that the entry was by L.A. Creet and not by defendant 3(A.T. Creet); but even assuming that the entry was not by A.T. Creet, i. e. defendant 3, it does not appear that possession was taken for the breach of the covenants regarding the payment of rent and royalties. On the other hand it appears to be the case of defendants 1 and 2 that on 14th October 1924, as soon as the company voluntarily wound up and went into liquidation defendant 3 being entitled to re-enter into the property and take possession thereof under the terms of the lease, took khas possession: see para. 22 of the written statement of defendants 1 and 2. It is no doubt true that in the written statement filed by defendant 3 there is a paragraph which states that by the terms of the lease the defendant had a right to re-enter on the rent and royalties falling into arrears for more, than a year. But the whole course of events shows that defendants 1 and 2 did take possession because the company voluntarily wound up. As we shall show presently defendant 3 could not take possession on account of breach of covenant to pay rent and royalty without some overt act in view of the authorities of this Court. The Subordinate Judge also rested his decision on the ground that there has been waiver in so far as the covenant regarding payment of the arrears of royalties are concerned. Authorities were cited before us to show that in the circumstances mentioned there was no such waiver. We do not think it necessary to consider that question in view of our decision with regard to entry which is really by defendant 1.

28. It is argued for the appellant that defendant 3 could re-enter for breach of covenant without any overt act showing his intention to determine the lease, and has relied on a recent decision of this Court where it was held that no overt act was needed to determine the lease on the ground of forfeiture: see Prakash Chandra v. Rajendra Nath .This decision is contrary to the view taken in an earlier decision of the Court in *Nawrang v. Janardan*[11] where it was held that the institution of a suit cannot be regarded as an overt act within the meaning of Section 111(g) T.P. Act, before its amendment by Act 20 of 1929. It was held in this case that the act showing the intention to determine the lease was a condition precedent to the institution of the suit for ejectment, This was the view maintained by the Madras and the Allahabad High Courts: see *Venkataramana v. Gunduraya*[12], *Prag Narain v. Kadir Bux*[13] *and* Shib Charan v. Kharka . The Bombay High Court took the contrary view *in Isabali v. Mahadeo*[14] *In* Prakash Chandra's case Prakash Chandra v. Rajendra Nath , Costello, J. (with whom Jack, J. concurred) expressed a preference for the Bombay view notwithstanding the contrary decision of this Court in Nawrang's case *Nawrang v. Janardan AIR 1918 Cal 969(SUPRA)*. In doing so the learned Judge did not follow the constitutional principle of referring the matter to a Full Bench which is the proper procedure to be followed as we are reminded by the Privy Council: see Bindeshri Prasad Singh v. Kesho Prasad AIR 1926 P C 79.(SUPRA) We are not prepared to dissent from the view taken in Nawrang's case Nawrang v. Janardan AIR 1918 Cal 969 and hold that the forcible entry of 15th October, even if it was by defendant 3, was wrongful. I find that in a recent case, Dhavle, J., with whom Sir Courtney-Terrell, C.J. concurred, has preferred to follow Costello, J.'s view: see Ram Chandra Naik v. Ajodhya Singh AIR 1935 Pat 508, at p. 13(Supra). We may state that the

appellants have given the following undertaking which they desire should be incorporated in the judgment: In the event of the appellants filing an appeal to His Majesty in Council they undertake not to apply for the stay of further proceeding regarding the ascertainment of mesne profits or delivery of possession as ordered by this Court during the pendency of this appeal to His Majesty's Privy Council.

29. The respondents also give an undertaking that they desire this to be made a part of the decree that the respondents would put in costs of the Commissioner or any other costs necessary for the enquiry within a fortnight from the date of demand. It remains to notice an argument advanced on behalf of the appellants, that in taking accounts, the sum spent by the defendants in effecting improvements in the colliery should be set off against the sum due to plaintiff for mesne profits. This argument would have prevailed if the possession of defendants was not wrongful possession from 15th October 1924. The right to get compensation for improvements is founded on Section 51, T.P. Act. A trespasser is not a transferee within the meaning of Section 51 and is not entitled to any compensation for improvements. There are no equities in favour of a trespasser or of a person who is fraudulently in possession: *Madhoo Sudhan v. Juddoopaty*[15] *In re Thakur Chuader Pramanick* [16] *Ganga Din v. Jagat Tiwari*[17] *Musadee Mahomed v. Meerza Ally*[18] *Sadasiv Bhaskar v. Dhaku Bai*[19] *and Muralidhar v. Parmanand*[20] We do not think any of the defendants are entitled to a set off for the compensation for improvements. With regard to the machineries brought on the mines by the defendants, Mr. Bose for respondents has conceded that they may remove them. For the above reasons, subject to the variation that possession will not be restored to plaintiff before one year from the arrival of the records in the lower Court, the appeal stands dismissed with costs. The cross-objections are not pressed. They are dismissed with costs. Let the records be sent to the Court below with greatest possible expedition.

30. I agree.

Cases Referred.

1(1888) 15 Cal 533
2AIR 1915 P C 7
3(1868) 3 Q B 567
4(1927) A C 252
7(1908) 1 K B 378
8(1866) 1 P C 64
9(1891) 1 Q B 230
10AIR 1929 Oudh 316
11AIR 1918 Cal 969
12(1908) 31 Mad 403
13(1913) 35 All 145
14AIR 1917 Bom 5
15(1868) 9 WR 115(P C)
16(1866) 6 WR 228
17AIR 1914 All 89
18(1854) 6 M I A 27, at p. 50
19(1880) 5 Bom. 450
20AIR 1932 Bom 190