(1952) 09 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1081 of 1948

Bholanath Roy APPELLANT

Vs

The West Jamuria Coal Co., Ltd. RESPONDENT

Date of Decision : 04-09-1952

Acts Referred:
Permanent Settlement Regulation, 1793 — Section 4, 7, 8(3)

Citation : 61 CWN 539 : (1953) 2 ILR (Cal) 301

Hon'ble Judges : Guha Ray, J;Das Gupta, J

Bench : Division Bench

Advocate : Nares Chandra Sen Gupta and Jagadish Chandra Ghose, for the Appellant;Atul Chandra Gupta and Chandra Narayan Laik, for the Respondent

Final Decision : Allowed

Judgement

Das Gupta, J.—The Appellants are the owners of touzi No. 2597 of the Burdwan collectorate, which is a revenue paying estate, formed on the resumption of lakheraj lands. The lands of the touzi are scattered over different villages and admittedly include the five plots of mouza Jamuria, in respect of which the Appellants started the present action.

2. In this appeal, we are concerned with only two of the plots, namely, C.S. plots Nos. 636 and 657 of the mouza, as it is clear now from the evidence and is no longer disputed before us, that the Appellants have no cause of action as regards the other three plots. As regards C.S. plots 636 and 657, the admitted position is that the Respondent company has worked under these plots and extracted the coal underneath these two plots in course of their operations of working the colliery, in exercise of the right which they undoubtedly have in other lands of the mouza.

3. The Appellants claim damages for the coal wrongfully taken away by the Defendant company, damages for other coal that has been rendered unworkable by the acts of the Defendant and for causing subsidence of the lands and

damages for piercing and removing the barriers which they should have kept at the extremities of their Own lands.

4. The main contention of the Defendant company is that the Plaintiffs have no right to the coal underneath the plots which are within their touzi, that even if they had any right, it had been extinguished by the adverse possession of the subsoil in question by the Defendants and their predecessors-in-interest, for more than 12 years, and lastly, that the suit for damages is barred by limitation.

5. The trial court held that as a result of working of the coal underneath these two plots, the surface subsided before the middle of 1936 and the Plaintiffs became aware of the subsidence within one month thereof and so the suit was barred by limitation. It also held that the Plaintiffs'' suit was barred by adverse possession. Accordingly, it dismissed the suit.

6. On appeal, the learned district judge held that the Plaintiffs had established their title both to the surface and the underground of the disputed plots but that title to the underground had been extinguished by the adverse possession of the Defendant company. He further held that the suit was barred by limitation but he based this decision on a finding that the cause of action arose in January, 1939, and the suit was filed more than three years after. The finding that the suit was filed more than three years after January, 1939, is obviously the result of confusion, as the plaint was actually filed on September 25, 1940.

7. Unless, therefore, the decision of the court of appeal that the suit be dismissed, can be justified on the finding that the Plaintiffs had not established that they had ever any title to the underground rights of the disputed plots or on the finding that whatever right they had, had been extinguished by the adverse possession of the Defendants, the decision of the learned district judge must be set aside and the case sent back to him for decision after a proper finding on the question of limitation.

8. On the question whether the Plaintiffs have, apart from the effect of any adverse possession, title to the underground rights of the lands in dispute, the Plaintiffs'' claim to such title is based on the fact that they are the owners of the touzi within which these lands lie.

9. It is necessary to mention, at the outset, that Mr. Gupta has conceded for the purpose of this case that the proprietor of a zemindary under the Permanent Settlement has right to the minerals under the ground in the mal lands of the estate. While rival claims of the zemindar and the holder of a tenure under the zemindar to the minerals under the ground have come before the courts, and the Privy Council has in Hari Narayan Singh v. Sriram Chakravarti (1910) ILR 37 Cal. 723 : L.R. 37 I.A. 136, Durga Prosad Singh v. Braja Nath Bose (1911) ILR 39 Cal. 696 : L.R. 39 I.A. 133 and Sashi Bhusan Misra v. Jyoti Prasad Singh Deo (1916) ILR 44 Cal. 585 : L.R. 44 I.A. 46 decided the claim in favour of the zemindar, the rights of the zemindar vis-a-vis the Government in the underground minerals have not been considered by the courts; mention may,

however, be made of the observation of the Privy Council in Hari Narayan Singh v. Sriram Chakravarti (supra) wherein their Lordships approved of the proposition in Field''s Introduction to the Regulation, that the right of mining is included in the zemindar''s proprietorship.

10. Proceeding on the assumption that the proprietor of a zemindary under the Permanent Settlement has rights to the minerals in his mal lands, we have to consider the question whether the person who receives settlement for land revenue on resumption of an invalid lakheraj grant has similar rights.

11. For a decision of this'' question we have to examine the scheme of the legislation as regards the settlement on such resumption and to see whether the law made any distinction between the holder of a zemindary under the Permanent Settlement and the persons with whom settlement for land revenue was made on resumption of invalid lakheraj grants. The third Sub-section of Section 8 of the Permanent Settlement Regulation contained the following declarations:

The Governor-General in Council will impose such assessment as he may deem equitable on all lands at present alienated and paying no public revenue which have been or may be proved to be held under illegal or invalid titles. The assessment so imposed will belong to Government and no proprietor of land will be entitled to any part of it.

12. Regulation XIX of 1793 and Regulation XXXVII of 1793 contain the law as regards the decision of validity or otherwise of lakheraj grants and the assessment of revenue on lands the grant for which was invalid. Regulation XIX deals with non-Badshahi grants and Regulation XXXVII with Badshahi grants. Where a Badshahi grant is held invalid, settlement is to be made for the payment of the revenue assessed, with the proprietor of the estate in which the land is situate, "agreeably to the rules "for the decennial settlement contained in Regulation VIII of "1793" and in perpetuity, if the proprietor refuses, the lands will be let in farm or kept in khas. As there is nothing in this Regulation to indicate, that the proprietor of the estate with whom settlement is made, will hold the lands newly settled on different terms than those on which he holds the estate, it is reasonable to hold that the proprietor''s right in the resumed lands will be exactly the same as those in the zemindary estate and will consequently include mining rights.

13. Regulation XIX of 1793 deals, as already stated, with all grants other than Badshahi grants. Section 7 of this Regulation provides that where the invalid grant was of an earlier date than December 1, 1790, and the lands covered by it exceed 100 bighas. the revenue will belong to Government.

14. Section 8 contains the rules for assessment of the revenue and provides further that if the proprietor shall agree to pay the revenue that may be required of him, the amount shall not be liable to any variation in the future but he and his heirs and successors shall hold the lands at such fixed revenue for ever. If the

proprietor refuses, provision is made for letting the lands in farm or khds.

15. These provisions show that the ruling authority treated the grantees of these invalid grants and their successors as "proprietors" in the full sense of the term, and left the entire proprietary rights in them, subject to the payment of revenue. That this was the intention of the ruling authority is made further clear by the provisions in Section 4 of the Regulation that the grantees are to be considered as the proprietors of the lands with the same right of property therein as is declared to be vested in proprietors of estates or dependent taluks subject to the payment of revenue according as the lands covered by the grants are more or less than 100 bighas.

16. In making settlements for revenue for lands which were being held so long without payment of revenue, Government had, therefore, clearly no intention of claiming anything from these lands except the revenue assessed.

17. Leaving out of consideration grants of dates later than December 1, 1790, which were declared null and void, the only effect of the declaration of a lakheraj grant as invalid was that the grantee became liable to payment of revenue. His other rights were not in any way touched. Thus, with this difference in payment of revenue, his rights were the same as the holder of a revenue-free tenure. As Mr. Field stated in his Introduction to the Regulation at p. 36-

the largest estate or assemblage of rights in land in the Lower Province of Bengal is a lakheraj or revenue-free tenure. This tenure may be generally described by saying that it possesses all the incidents and advantages of a zemindary tenure, with this additional one that as it pays no revenue to Government, it is not liable to sale for arrears of such revenue.

18. When the lakheraj grant is declared invalid, the grantee becomes liable to payment of revenue, and the additional advantage mentioned by Mr. Field disappears; but on agreeing to pay the revenue the erstwhile lakheraj or in the case of Badshahi grants, the proprietor with whom settlement is made continues to possess "all the incidents and advantages of a "zemindary tenure."

19. My conclusion, therefore, is that the person with settlement for land revenue made on resumption of lakheraj grants has rights not only to the surface but also rights of mining in the ground below the surface.

20. There remains for consideration the question whether the Plaintiffs'' title to what lay underground these plots has been extinguished by adverse possession, by either the Defendant company or their lessor. It is important to remember that before one can speak of adverse possession one must first be satisfied that there has been possession. Only if any party has been proved to be in possession, can the question whether that possession has been adverse to the interest of the rightful owner, arise. The actual possession of the underground interest of these plots commenced admittedly not earlier than 1936-the Plaintiffs'' case being that it commenced much later. Assuming that possession

commenced in 1936 and has from that date been adverse to the rightful owner, the period of adverse possession would not be long enough to extinguish the interest of the rightful owner. The contention that has been pressed on behalf of the Defendant and which has found favour with the courts below is, that when long before 1927, the Defendant company had been working the colliery that lay under the mouza, they must in law be considered to be exercising possession over what lay under the plots in dispute, even though actual working of the coal underneath these plots commenced much later.

21. There are undoubtedly cases where possession of part of a property amounts in law to possession of the entire property. Thus, if fish is caught from one portion of a tank, that amounts in law to exercise of possession over the entire tank. If there is a garden which has twenty mango trees, a person who plucks mangoes from ten trees, in different parts of the garden, without plucking fruits from ten which lie in between them, must be held to be exercising possession over the entire garden.

22. Consider, however, the case of a garden of which the western half admittedly belongs to X and the eastern half to Y; by plucking mangoes from the western portion X can by no means be considered to be exercising possession over the eastern half.

23. In the present case, we have the Defendant company undoubtedly exercising possession from before 1927 over the underground interest of the portion of the village which they held as lessees. I find it impossible to say that this amounted to exercise of possession in the underground rights of such portion of the village in which they had no right. I do not think that this position that the company was not in fact exercising possession before 1936 in the underground interest of plots Nos. 636 and 657 is in any way affected by the statement that the company was working the entire colliery as one unit.

24. In holding that the Defendant company had exercised adverse possession for over twelve years over the plots in dispute though the actual working of the coal under these started not earlier than 1936, at the best, the courts below relied on the authority of the Privy Council decision in Nageshwar Bux Roy v. Bengal Coal Co. Limited (1930) ILR 10 Pat. 407, 414 : L.R. 58 I.A. 29, 35. In that case a coal company openly carried on for 12 years mining operations in various parts of a village by working pits and making trial bore holes and it was not clear whether any one pit had been worked continually for twelve years. The question was whether the plea of the coal company that they had acquired a title to the minerals of the entire village on the basis of adverse possession was well-founded. In answering the question in the affirmative, the Privy Council observed:

In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of a whole mineral field: it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial. The real question is what in fact has been possessed.

25. Their Lordships then went on to point out that in that particular case:

the village of Rajhara has always been treated as a unit of property and the minerals underlying it constitute a denned unit as much as the surface overlying them;

26. that systematic operations were begun by the company at Rajhara in 1901, that the workings had been commonly described as a colliery, a comprehensive term which includes both the worked and the as yet unworked minerals within a defined area and it was of the colliery in this sense that the company claimed to have been in possession and their acts had throughout been consistent only with the assertion of a right to the minerals under the whole village. Their Lordships further pointed out that the operations of the company were only consistent with their being in possession of the whole minerals under the village as they were in law in legitimate possession of the whole surface; and that the Plaintiff, the zemindar, received rent from the company for the village as a whole and the receipt of this rent from a company with so significant a name as the Bengal Coal Co., which was actually carrying on mining operations at various points in the village was indicative of recognition of their possession of the underlying minerals as well as of the surface.

27. While it is true that in the present case the Defendant company started mining operations under the village long before the present dispute and sank pits in different parts, it is important to remember that the surface of the village-unlike the surface of the village in the Privy Council case-was not one unit of property. The plots in dispute in the present suit, clearly formed so far as the surface is concerned, a unit of property wholly distinct from what was included in touzi No. 12 of which the Maharaja of Burdwan was the proprietor. In view of this, it will be unreasonable to say that the company in carrying on operations under the ground of the unit of property which belonged to the Maharaja of Burdwan should be held to be asserting a title under the unit of property of which the Plaintiffs are the proprietors. The fact that one continuous seam of coal ran under both these units is of no consequence. Suppose, one continuous seam of coal runs through the underground of villages A, B and C which belong to three different zemindars-a company which is carrying on operations under village A, cannot possibly be considered to be exercising possession of the unworked seam of coal under B and C. The case where two portions of one village are different units of property is essentially similar to the case of two villages forming two different units of property and the fact of possession of one unit cannot amount in law to possession of the other unit.

28. My conclusion is that the circumstances that formed the basis of the decision in the case of Nageshwar Bvx Roy v. Bengal Coal Company, Limited (1930) ILR

10 Pat. 407: L.R. 58 I.A. 29 are wholly absent here and that, in the circumstances of the present case, I am bound to hold that the Defendant company had no possession of the underground of these plots in dispute, prior to the time when they actually started operations under these. The date of these operations was according to them 1936, according to the Plaintiffs it was much later. It must, therefore, be held that the title which the Plaintiffs had in the minerals underneath these lands had not been extinguished.

29. The Plaintiffs will, therefore, be entitled to a decree for damages caused by the acts of the Defendant company in cutting away the coal under plots Nos. 636 and 657 and causing subsidence of the surface of these plots unless the claim is barred by limitation. On that question as we have already mentioned, the learned court of appeal has come to a decision based on a confusion as regards the facts of the case. It is, therefore, necessary that the case should be sent back to that court for decision in accordance with law.

30. We, accordingly, set aside the order of the courts below and remand the case for decision by the learned district judge, after coming to a proper decision on the question of limitation. If the suit is not barred by limitation the Plaintiffs'' suit must be decreed for such damages as may be found admissible in law. If the suit is barred by limitation the Plaintiffs'' suit must be dismissed.

31. The appeal is accordingly allowed.

32. Costs will abide the result.

Guha Ray, J.

33. I agree.

