(1939) 01 PAT CK 0038

In the Patna High Court

Byomesh Mukharji APPELLANT

Vs

Madhabji Mepa Maru and Others RESPONDENT

Date of Decision : 10-01-1939

Acts Referred:

Citation : AIR 1939 Patna 421

Hon'ble Judges : Manohar Lall, J;Harries, J

Bench : Full Bench

Judgement

Harries, J.—This is an appeal by defendant 3 in the suit against a decree passed by the learned Subordinate Judge of Manbhum for a sum of Rs. 9416-14-3 for certain coal royalties due with interest thereon. On 16th June 1894, one Joseph Chater together with a Mr. Smith acquired by a lease the minerals underlying 838 bighas, 4 khatas in mouza Kusunda excluding two plots of 150 and 100 bighas respectively. The interest under this lease is now admittedly vested in the plaintiff. On 11th February 1896, Messrs. Chater and Smith gave a sublease of these minerals to two persons of the name of Patel, and this sublease contains terms as to the payment of royalty by the sub-lessees. On 15th January 1923, this sublease became vested in A. Patel by reason of an assignment to him of the interest held by D. Patel. On 16th November 1923, A. Patel, the sub-lessee, executed a mortgage in favour of defendant 4, the Central Bank of India, Ltd., and later, on 1st December 1925, A. Patel executed a deed of gift of this lease in favour of N. Patel. Obviously this deed of gift was subject to the mortgage which he had created in favour of the Central Bank of India, Ltd.

2. It appears that at the beginning of the year 1930, defendant 3 desired to purchase the interest of the Central. Bank of India, and there can be no question that defendant 3 did make a payment to the Bank and was put in possession of these minerals. The sale to defendant 3 however was never completed, and on 10th January 1931, the Central Bank of India transferred their interest in the minerals to one Bijoy Kumar Chatterji. The present appellant, defendant 3, and N. Patel, the donee under the deed of gift to which I have referred, joined in this

transaction and transferred their interests for whatever they were worth to Chatterji. Royalties had not been paid by the sub-lessees to the plaintiff, and accordingly this suit was brought on 10th April 1934 to recover a sum of Rs. 25,020-12-3 as arrears of royalty together with interest thereon. There was also a claim to possession of the property comprised in the indenture of 11th February 1896, on the ground that the sub-lease had been forfeited by reason of the failure to pay the royalties. Eventually, the learned Subordinate Judge came to the conclusion that the present appellant, defendant 3, was liable to pay a sum of Rs. 9416-14-3 as arrears of royalty due for the period from March 1930 to January 1931. He further decreed the plaintiff''s claim against defendants 1, 2 and 5 for Rs. 21,816-2-3 for arrears of royalty due from them and-interest thereon. Against this decree defendant 3 has preferred the present appeal.

3. In the first place, it has been argued by Mr. B.N. Mitter on behalf of the appellant that his client cannot be made liable for royalty for the period from March 1930 to January 1931. It is clear that Mr. Mitter''s client was in possession of the coal seams during that period and that he actually worked the same. He contends that if he is liable to pay any royalty such liability is to the Central Bank of India who placed him in possession. In short his argument is that as between the appellant and the plaintiff there is neither privity of estate nor privity of contract of tenancy. The learned Subordinate Judge has agreed with this contention, but he has found as a fact that the appellant had entered into an independent or separate contract with the plaintiff to pay the royalty due in respect of coal mined during the period in which the appellant was actually in possession. As I have pointed out, the appellant was put into possession as a prospective purchaser of these coal seams by defendant 4, the Central Bank of India. The interest of the Bank had not been assigned to defendant 3 and was never in fact so assigned; It would appear that defendant 3 was some form of tenant of the Bank, and it is clear that such an arrangement would not entitle the plaintiff to sue the appellant direct. He did not hold the sublease by assignment: neither had he taken a tenancy from the plaintiff.

4. The learned Subordinate Judge has found that towards the end of the year 1930, the appellant agreed directly with the plaintiff to pay the royalty, and if such an agreement was made the appellant could be successfully sued upon it, though he did not hold any assignment of the Bank''s interest or was not in any way a tenant of the plaintiff. It is dear that when defendant 3 was negotiating with the Central Bank of India for the purchase of the latter''s interest he was anxious to obtain possession of these minerals. He paid the Bank Rs. 10,000 and did obtain possession of the mineral area. It is also clear that defendant 3 was somewhat anxious as to the liability for royalties, and this will be seen from certain letters which passed between the parties. On 11th January 1930, the appellant wrote to the Central Bank of India pointing out that he was desirous of taking immediate possession of the colliery on payment of Rs. 10,000 with a view to taking advantage of the season and the market.

5. The appellant also points out that he had received a notice from the plaintiff''s agent holding him responsible for all the arrears of royalty due to the plaintiff. He mentions that he had not replied to the plaintiff because of the negotiations. He was anxious to hear from the Bank in order to enable him to send a reply to the plaintiff before taking possession of the property and thus avoid future difficulties. On 22nd January 1930, a cheque for Rs. 10,000 in part payment of the purchase price of the colliery was sent by the appellant to the Bank. On 31st January the appellant again wrote to the Bank, and in that letter he makes his position clear as to the payment of the royalties. He says:

It is understood that we shall not be liable for royalty and surface rent prior to our taking over possession.

6. From this letter it is clear that the arrangement made between the appellant and the Bank was that the Bank were to remain liable for arrears of royalty due up to the time when the appellant took possession and thereafter the appellant was to be liable for such royalties. Clearly, such an arrangement between the appellant and the Bank could not give the plaintiff a cause of action, and the plaintiff does not contend that such is the case. However, it is clear that towards the end of the year the plaintiff was ''becoming anxious concerning the royalties, and on 2nd November 1930, the plaintiff''s agent wrote to the Bank pointing out that ''the Bank''s tenant, namely the appellant, had not paid anything towards royalty since March. The plaintiff further points out that owing to the appellant''s failure to pay the royalty they had no alternative but to look to the Bank. On 5th November 1930, the Bank wrote to the appellant pointing out that royalty was in arrear and ''the letter ends with this sentence:

We have to give you this final notice that if you do not satisfy the landlords immediately we shall have to take against you very unpleasant measures, which please note. Please let us hear immediately what you decide.

7. On 7th November 1930, the appellant wrote to the Bank in reply to the Bank''s letter of 5th November 1930. In that letter the appellant states that he had seen Mr. Rawal, the agent of the plaintiff, and had made arrangements with him for royalty payment. On 18th November 1930, the Bank wrote to the appellant stating that Mr. Rawal had informed them that no arrangements had yet been made by the appellant for payment of royalty and the Bank made it clear that they were very anxious about the matter. Again on 19th November 1930, the Bank wrote to the appellant that no arrangement had yet been made for payment of the royalty by the appellant and the latter is warned that unless royalty is paid in future he would foe inviting serious trouble for himself. The letter concludes with these words:

We should like to know immediately and definitely and in a straightforward manner from Mr. Mukherjee himself as to how he proposes to settle the question of royalty in arrears and of future payments.

8. From this correspondence it is clear that the appellant had arranged with the

Bank that he would pay the royalty whilst he was in possession. Further, it is clear that he had failed to do so and was being pressed both by the Bank and the plaintiff to discharge the obligation for royalty. On 23rd November 1930, Ex. 13 (n), the appellant wrote to Mr. Rawal, the plaintiff''s agent, and in this letter he refers to some verbal arrangement made between the two for payment of royalty. The letter is an important one and I quote it in extenso:

I am sorry I could not go over to your placa this afternoon for my friend suddenly fell 111. I hope to spend some pleasant evening in near future at your place. Herewith I am sending a cheque for Rs. 300, rupees three hundred only, as per our verbal arrangement. I hope you will kindly take the trouble of informing the Central Bank people and smooth the situation for myself.

9. This letter makes it clear that the appellant was realizing the seriousness of the position. Both the Bank and the plaintiff were pressing him, and it is clear that if the royalties were not paid, the plaintiff would have been turned out of possession by the Bank and any hope of completing the purchase would be gone. Accordingly he must have made some arrangement direct with Mr. Rawal, the agent of the plaintiff, for payment of these royalties and on 23rd November 1930 he makes a payment of Rs. 300 towards the arrears of royalties due from March 1930. The matter does not end there, because on 1st December 1930, the appellant wrote another letter to the plaintiff, Ex. 13 (o). That letter is in these terms:

I beg to enclose herewith please find the cheque No. CX-829448 of 30th November 1980 on the Central Bank of India Ltd., in favour of M.M. Maru, Esq., for Rs. 800 (three hundred only) against our royalty.

Here again there is another payment by the appellant to the plaintiff in respect of "our royalty," that is royalty due from the appellant, who was trading as B. Mukherjee & Co., to the plaintiff. On 20th December 1930 the appellant wrote another letter, Ex. 13 (p) to the plaintiff and that letter is in these terms:

I beg to enclose herewith the cheque No. 0-812826 of 15th December 1930 on the Oen-tral Bank of India Ltd., for Rs. 800 (rupees three hundred only) drawn in favour of M.M. Maru Esqr.

Please credit this amount to our account for the royalty due to you from this Company. A for-mal receipt is requested.

10. As I have stated, the appellant was trading as B. Mukherjee & Co., and the reference "royalty due to you from this Company" is a reference to the royalty due from the appellant to the plaintiff. There was also evidence that the plaintiff had opened separate royalty account in the name of the appellant and in this account these payments by the appellant have been credited. On that evidence the learned Subordinate Judge came to the conclusion that the appellant had agreed directly with the plaintiff''s agent to pay the royalty due from him during the period of his possession and that in pursuance of the agreement he had

actually made three payments of Rs. 300. It is somewhat unfortunate in this case that no verbal evidence was led on this point; but, in my view, the learned Judge was perfectly entitled to hold upon these letters and upon the facts that such an arrangement had been made. It must be remembered that the appellant, as stated by him in the letter of 11th January 1930, was anxious to obtain possession and thus take advantage of the season and the market.

11. That letter also makes it clear that the appellant was prepared to pay the royalty whilst he was in possession though he was not prepared to pay arrears of royalty due before he took possession. The later letters passing between the appellant and the Bank show that the Bank were growing very anxious owing to the failure of the appellant to pay the royalties and they were threatening the appellant with most unpleasant consequences. The plaintiff was also anxious, and had not some arrangement been made concerning the payment of these royalties, it is clear that the appellant would have soon been dispossessed. In those circum. stances, it is most probable that the appellant did make an arrangement direct with the plaintiff''s agent for the payment of these royalties. The terms of the three letters passing between the appellant and the plaintiff, namely Exs. 13 (n), 13 (o) and 13 (p) show that an agreement was made and that the appellant had undertaken to pay the royalty directly to the plaintiff.

12. That such an agreement was made is further evidenced by the fact that a royalty account in the name of the appellant was opened by the plaintiff. The references made by the appellant to "our royalty" and "royalty due to you from this Company" show that the appellant had undertaken to pay this royalty to the plaintiff. In my view there was abundant documentary evidence to show that the appellant and the plaintiff had entered into an agreement whereby the appellant was to pay royalty to the plaintiff in order to retain possession of this property. There was consideration for this agreement and accordingly the plaintiff could sue the appellant upon it. In my view, the learned Subordinate Judge was right in holding that the appellant was liable under this agreement to pay the royalties due from March 1930 to January-1931.

13. Mr. Mitter has relied on certain later letters showing that the plaintiff claimed the royalty in question also from the Bank. The Bank were the mortgagees of the sublease, and as they were holding the property the plaintiff was entitled to claim the royalties from them in the event of the appellant failing to perform his contract. The fact that the Bank is also liable for this is no defence to the appellant upon a claim on a special contract which he made with the plaintiff. The plaintiff might have two strings to his bow, but that is no reason why he should not in the first place sue the appellant. Mr. Mitter has also'' urged that upon the plaintiff''s own showing the royalty for March 1930 had been paid. He referred to a letter, Ex. A-2, addressed to the appellant from the plain, tiff. In that letter, the royalties are said to have accrued from April 1930 and according to Mr. Mitter that is an admission that nothing was due for March 1930. The present claim is for arrears from March 1930 to January 1931, and Mr. Mitter argues that the

royalty for March 1930 should not be included in the present claim.

14. In point of fact, the appellant had paid more than the royalty due in March and therefore the plaintiff was quite right when he said in Ex. 2 on 16th November 1933, that royalty was due from April 1930. In. the present claim what has happened is this, that the plaintiff has shown the royalty due from March 1930 to January. 1931 and credited towards that amount the payments made. It is to be observed'' that no real point was made in the Court below upon the amount due and in our view the decree cannot be challenged ;on that ground. It seems to have been agreed that the only question was who was liable-to pay the amounts claimed.

15. Lastly Mr. Mitter has contended that the plaintiff''s claim against defendant 3 is barred by limitation. The agreement under which the appellant has been held liable, was made in 1930 and under that agreement the appellant was to pay royalty for the period he was in possession. He ceased to be in possession after January 1931 and accordingly he was bound to pay the royalties at latest on 1st February 1931. Mr. Mitter has argued that this is a contractual debt and that the period of limitation is three years. The suit was not brought until 10th April 1934, and according to Mr. Mitter the suit was barred on 1st February 1934. Accordingly he says that the suit is a little over two months out of time.

16. It is to be observed that limitation was not pleaded in the written statement of appellant, defendant 3, nor indeed in the written statement of any of the defendants. It is further clear that the point was never taken in the Court below. No issue was framed on the question of limitation and there is no reference to this point anywhere in the long and detailed judgment of the learned Subordinate Judge. Clearly, the point has been appreciated for the first time in this Court. Mr. Chattarji who appears on behalf of the plaintiff-respondent has urged us to reject this plea on the ground that it was not taken in the Court below. The Court however must take notice of the point if it appears to the Court that the suit is barred by time. It may be that there are acknowledgments of this debt or other grounds upon which it can be urged that the period of limitation has been extended. As the point was never raised in the Court below, it is obvious that the plaintiff-respondent is not in a position to meet it here.

17. In my view before this question of limitation can be decided, it will be necessary to remit an issue to the Court below in order that that Court can go into the question and record its findings. I would therefore remit the following issue to the Court below: "Is the claim against defendant 3 barred by time." The parties will be at liberty to adduce such further evidence upon this issue as they may deem proper, and the Court below will return its findings to this Court within three months of the date of receipt of the record from this Court. The usual fifteen days will be given to the parties to make objections to the finding.

Manohar Lall J.

I agree.

