
(1928) 01 PAT CK 0005
In the Patna High Court

Devjee Trikamjee

APPELLANT

Vs

Dayamoy Mukharji

RESPONDENT

Date of Decision : 25-01-1928

Acts Referred:

Citation : AIR 1928 Patna 225

Hon'ble Judges : Wort, J; Ross, J

Bench : Full Bench

Judgement

Wort, J.—This is an appeal from the decision of the learned Subordinate Judge of Dhanbad in which he gave a decree to the plaintiff for a sum of Rs. 3,580-14-9 for dues under a kabuliyat dated 10th July 1902. The amount of the decree included various items amongst which were (1) royalty, (2) fuel coal, (3) rent, (5) salaami and (4) interest on the total sum claimed. The appeal refers to items of royalty, fuel coal and rent. Under the kabuliyat the defendant was liable to pay royalty at the rate of three annas per ton for all sorts of coal raised from the pit excepting dust. Now the plaintiff's claim to this royalty is in respect of a description of coal known as slack. A few days before the suit was brought the receiver of the estate of the grantors of this kabuliyat, who is the plaintiff in this suit wrote a letter stating that under the terms of the kabuliyat (or lease as it was described in the letter) the defendant was liable to pay three annas per ton for slack coal; but through an inadvertence he had been charged in the past at the rate of one anna only. The receiver in the letter clearly refers to the claim for royalty attached to or subsequently attached to the plaint which was for the period from the June kist of 1917 to the June kist of 1922; and, at the end of his letter, he goes on to state that as regards the arrears due, this matter will be settled later on. The learned Subordinate Judge decided that the claim set out in the letter was right and that under the construction of the conditions of the kabuliyat the defendant was in fact liable to pay at the rate of three annas for slack coal and not at the rate of one anna, the rate at which he had been charged in the past.

2. The first question we have to determine therefore, is whether, on a proper construction of Clause 1 of the kabuliyat the defendant was liable to pay three annas as royalty or whether he was liable to pay one anna per ton only. The expression used in the first condition is

I shall pay you a commission of three annas per ton for all sorts of coal, excepting dust.

3. The argument addressed to us by the learned advocate for the appellant is that there is an ambiguity in this deed and for the purpose of construing it, evidence is admissible, and the evidence which he seeks to rely upon in the case is the conduct of the parties with regard to this deed in the past. He makes reference to the letter of the receiver which was written before the suit and says that it is clear from that letter that the conduct of the parties in the past had been to charge at the rate of one anna only per ton for slack coal; that that is evidence which the Court is entitled to receive in order to construe the deed and to arrive at a decision as to the meaning of the words used in the condition to which I have made reference.

4. Now he relies upon the decision in the case of *The Attorney-General v. Drummond* [1842] 1 Dr. & War. 353, a decision by Sir Edward Sugden. The rule that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted.

5. It is clear to me in this case that there are other means at our disposal for a determination of this question without having recourse to the method which the learned advocate for the appellant seeks to adopt.

6. Now the first thing that is clear is that slack is a description of coal and I suppose it would have been unnecessary to take evidence on this point; but if it is necessary, there is the clearest possible evidence in this case that that is so. I ought to state that as regards the quantity of this slack and as regards the fact that the plaintiff has consigned a description of coal called "slack" from their coal mine, there is no dispute. If we have once come to the conclusion that "slack" is a description of coal, we have next to determine whether this particular description of coal comes within the category of all sorts of coal subject to the exception. The learned advocate for the appellant seeks to argue that slack is merely a description of dust. I have made reference to the evidence in the case on this point.

7. The first matter to which I would refer is the forms which the defendants themselves have brought into existence. I refer to Exs. 11(b), (c), (d) and (y). In these forms there are certain main descriptions set out: steam, slack, dust and coke. From that it is clear that the defendant himself differentiated between slack and dust. As I have already stated that slack is quite clearly a form of coal and in fact the witnesses for the defendant describe in their evidence what slack is. They say that slack consists of rubble and dust and that when you screen slack

you get these two constituents, rubble and dust.

8. Now from this evidence and from these forms it is perfectly clear that slack is a description of coal which is distinct from dust. When one has stated that the construction of Clause (1) of the conditions of the kabuliyat becomes a very simple matter. It says that the defendant shall pay three annas for all sorts of coal making certain exceptions. The evidence is clear that slack does not come within the exception dust and, therefore, in my judgment it is quite rightly charged at the higher rate coming as it does within the description of all sorts of coal and not within the exception. That, in my opinion, disposes of the first point and the appeal, so far as that is concerned fails.

9. Now the next question for determination in this appeal is the question of the rent. Under the kabuliyat Clause 4 the defendant was entitled to enter upon the surface land for the purposes of the works connected with the coal-mine, but that as regards surface lands in the khas possession of the plaintiff or his tenants then, he was to pay compensation. Clause (5) of the written statement alleges the defendant's liability in this regard. It says:

That this defendant submits that the plaintiff is only entitled to realize rent for such Patit lands occupied by this defendant as were not in the cultivating possession of Chakravartys and other persons.

10. In my opinion in order that the plaintiff should succeed in this case he must show first that the defendant had occupied the surface lands and that those surface lands occupied were in the khas possession of himself. (The judgment then discussed evidence relating to the possession and proceeded.) I, therefore, hold that the plaintiff in the suit has failed to show by evidence that the defendant had in fact occupied these lands in regard to which he seeks to claim rent. In my judgment therefore the learned Subordinate Judge was wrong in holding that the claim for rent was established in the case. This disposes of the second point.

11. Now the other point remaining is one relating to fuel coal. The relevant clause with regard to this is Clause (16) of the conditions by which the defendant undertook to deliver at the mouth of the pit free of charge 12 tons of coal per annum for consumption as fuel, the price being fixed approximately at Rs. 12. The learned advocate for the respondent, as I understand him, says that this was not a fixed charge, that is to say, fixed indefinitely, but was an approximate figure for the purpose of stamp duty and that from time to time the plaintiff was entitled to vary it according to the market price of the coal at the pit's mouth.

12. It is, therefore, unnecessary to determine what the expression "approximately" meant in this connexion. I fail to see how the argument by the respondent can be supported. It seems to me that the expression means that in order to obviate small differences they arbitrarily or "approximately" fixed the price at Rs. 12 that is to say, Re. 1 a ton. In my judgment therefore the learned Subordinate Judge in giving a decree for fuel coal at the rate of Rs. 4, was clearly

wrong. It should be charged at Rs. 12 for 12 tons; that is to say, at the rate of Re. 1 per ton.

13. The learned advocate for the appellant had argued that in order to determine the question of the rent parties should have been added; but by reason of the decision to which I have arrived it is unnecessary to come to any conclusion on that matter. In the result, therefore, as regards the royalty the appeal fails; as regards the rent the appeal is allowed; as regards the fuel coal the decree is amended to the extent I have indicated; and the interest will be worked out accordingly.

14. One other question arises and that is the form which the decree takes. The learned Subordinate Judge under Clause (7) of the kabuliyat has made the total claim allowed a charge on the whole property. In so far as he has made the amount recoverable under item "fuel coal" a charge, he is clearly wrong. It is a money decree to that extent and the decree will be amended accordingly. The costs of this appeal are allowed in proportion to the success of the appellant.

Ross, J.

15. I agree.