

(1971) 10 PAT CK 0007
In the Patna High Court
Case No : A.F.O.D. No. 458 of 1964

Indu Bhushan Chakravarty

APPELLANT

Vs

Hareram Narayan Deo and Others

RESPONDENT

Date of Decision : 09-10-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(5), Order 6 Rule 17, 80
Limitation Act, 1908 — Section 22

Citation : AIR 1972 Patna 229

Hon'ble Judges : Shambhu Prasad Singh, J; S.P. Sinha, J

Bench : Division Bench

Advocate : S.C. Ghose, A.C. Mitra and Paralya Kumar Sinha, for the Appellant;
J.C. Sinha, Harilal Agarwala, Lal Narayan Sinha, A.K. Saran and D.R. Guardian,
for the Respondent

Final Decision : Partly Allowed

Judgement

Shambhu Prasad Singh, J.—This appeal by the plaintiff arises out of a suit under Order 1, Rule 8 of the CPC seeking a representative decree against the defendants and other permit holders from defendant No. 3, that the plaintiff is exclusively entitled to all the materials, namely boulders, ballast, gravels, morrums, lime-stones and other building stones, open and unopen, lying in or upon any land in 68 villages mentioned in Schedule "A" to the plaint and that those materials are the exclusive properties of the plaintiff. He further sought a permanent injunction restraining the defendants, their agents, servants and workmen, from digging, quarrying, collecting and removing gravels or any other building stones from any part of 68 villages and also restraining defendant No. 3 from issuing permits or granting permission to other defendants or any one else for working, digging or getting any gravels etc., from those villages. Reliefs for a direction to the defendants to make discovery of the loss caused by them to the plaintiff by their wrongful acts and make payment for that loss and, if necessary, for an enquiry as to what should be the amount of such reasonable compensation and for damages to the tune of Rs. 1,20,780/- or for additional

amount which may be found due from the defendants on taking of account on receiving further court-fee for such excess amount, were claimed.

2. Originally, there were three defendants to the suit. Subsequently, defendant No. 4, a brother of defendant No. 1, was added as a party on 16th January, 1959. The property from which- the defendants 1. 2 and 4 allegedly removed boulders, ballast, etc., was described in Schedule B to the plaint. Originally, only three villages Betjharia, Patnaiksole and Swargachhira with their respective plot numbers were mentioned in that Schedule. A petition for further amendment of the plaint was filed on 5th July, 1962 and it was allowed by order dated 26th July, 1962. By this amendment village Kokapara Narsingarh was added to Schedule "B". The amount of damages claimed was also raised to Rs. 1.20.780 by this amendment. Formerly, the claim was only for Rs. 57.60. The suit was instituted on 11th December, 1957.

3. In order to appreciate the respective cases of the parties, it is necessary to state some facts starting from the year 1900. On 10th January, 1900, the then proprietor of Dhalbhum Raj granted a lease of properties including villages mentioned in Schedule A to the plaint of this suit to the estate of Prince Bakhtiyar Shah. By this lease, the lessee was given right to work certain minerals including gems. There was a reservation in favour of the lessor in respect of building stones. On 1st of September, 1919, the Manager of Dhalbhum (Encumbered) Estate granted a supplementary lease to defendant No. 3 Prince Kamgarh Shah. He was a Receiver appointed by the Calcutta High Court of the estate of his father Prince Bakhtiyar Shah (dead) in respect of his interest as well as the interest of other heirs of his father. By this supplementary lease, the lessee was given rights in respect of all minerals. After Jagdish Chandra Dhabal Deb succeeded to Dhalbhum estate, he granted a lease to the plaintiff on 3rd October, 1937 for 10 years in respect of all building stones and other building materials in or upon 68 villages mentioned in Schedule A to the plaint.

In 1943, the Proprietor of Dhalbhum estate brought a money suit against defendant No. 3. A question arose for decision in that suit whether the reservation in respect of building stones by one of the clauses of the lease of the year 1900 remained intact or was modified by supplementary lease of the year 1919. The suit was decreed by the trial court and the appeal against the said decree, which was numbered as F. A. 2 of 1947, was dismissed by this Court on 24th September, 1952 (Vide Ext. 11 (a)). In 1943, defendant No. 3 also filed Title Suit No. 9 of that year in the court of Subordinate Judge, Chai-bassa against the plaintiff. This suit also involved similar question as to interpretation of the leases of the year 1900 and 1919 as in the other suit filed by the Proprietor of Dhalbhum Estate. The suit was decreed by the Subordinate Judge and the plaintiff (of the present suit) filed an appeal before the District Judge of Purulia. which was numbered as Title Appeal No. 174 of 1949. After the decision of the High Court in the other suit, that is, the money suit filed by the Proprietor of Dhalbhum Estate, the appellants and respondents to the aforesaid title appeal

filed a petition of compromise (Ext. 12). The main term of the compromise was in paragraph 4 of that petition which read as follows:

"That the parties agree to abide by the decision of the High Court in the matter of the interpretation of the aforesaid two leases, but if leave to appeal to the Supreme Court is obtained by respondent No. 1 from the High Court or the Supreme Court and the Supreme Court decides the appeal in favour of respondent No. 1, he will have the right to apply before the Subordinate Judge in T S. No. 9 of 1943 for proceeding for ascertainment of the amount due to him against the appellants and thereafter to execute the decree after the amount is ascertained in the said proceeding and the present appeal will be deemed to be dismissed.

That if no leave is obtained by respondent No. 1 either from the High Court or the Supreme Court or if the Supreme Court decided the appeal in favour of the appellants, this appeal will be deemed to be allowed and the original suit (T. S. No. 9 of 1943) shall be deemed to be dismissed."

The Court below accepted the compromise and passed the following order on 2nd June, 1953 (Vide Ext. 13):

"The plaintiff-respondent files a petition and prays that the question of this court to hear the appeal may be heard as a preliminary point. Subsequently, defendant-appellant and plaintiff-respondent file a joint petition of compromise and pray that the appeal may be disposed of on the terms of the petition. Let the compromise be record- ed and the appeal disposed of in terms thereof."

4. Two more facts may be stated here. Leave to appeal to the Supreme Court was granted to defendant No. 3 but his appeal was dismissed by the Supreme Court during the pendency of the present suit on 21-4-1960 (Vide Ext. 11). Defendant No. 3 died during the pendency of the present appeal and his heirs including Mohammad Hussain Shah, who has been appointed Receiver of the estate in place of his father by the High Court of Judicature at Calcutta, were substituted in his place.

5. The plaintiff's case, briefly stated, is that on 14th December, 1949, the Proprietor of Dhalbhum Estate granted another lease (Ext. 15) to him for a period of 30 years with effect from 3rd, October, 1947, that is, the date of the expiry of the earlier lease (Exhibit 14) of the year 1937 in respect of 66 villages. Thus he became the exclusive and sole owner of the materials like, boulders, ballast, gravels, mor-rums and lime-stones and all other kinds of building stones, open and un-open, lying in or upon any land in the said villages. In the year 1956, he came to know that defendants 1. 2 and 4 were removing gravels from the lands mentioned in Schedule B to the plaint in collusion with each other and defendant No. 3 from whom they had obtained permits without any right whatsoever. In spite of the protest and re-monstration of the men of the plaintiff, the defendants did not stop their wrongful acts. Necessary permission from the Calcutta High Court for suing defendant No. 3 as Receiver of the Court was

obtained and a notice u/s 80 of the CPC was also duly served on him. The plaintiff suffered huge loss on account of wrongful acts of the defendants and hence the suit.

6. Each defendant filed separate written statement. They also filed additional written statements after the amendments to the plaint were allowed. Defences taken by them are similar. According to them, the Proprietor of Dhalbhum Estate could not grant any lease in respect of boulders, ballast gravels etc., to the appellant and he derived no title on the basis of leases grant-ed to him in the years 1937 and 1949. Defendant No. 3 had right to grant permits to other defendants and quarrying of stones by them from the suit property was not wrongful. The appellant, therefore, was entitled to no decree. They further pleaded that the appellant could not get any decree on the basis of the amendments made to the plaint for want of permission from the Calcutta High Court to sue defendant No. 3 on facts introduced by the amendments, for want of notice u/s 80 of the CPC to the said defendant in respect of those facts and also because the claims introduced by the amendments were barred by limitation. Defendant No. 2 denied to have quarried or extracted any stone from the property which is the subject-matter of the suit, though he admitted that he had obtained two permits from defendant No. 3 and to have worked in those lands. All the defendants challenged the quantity of gravels which, according to the appellant, were removed by them and also the rate at which the appellant claimed damages.

7. At the time of hearing of the Injunction matter in the suit, defendants 1 to 3 admitted removal of 32000 Cft. of gravels. In their additional written statement, they, therefore, admitted the appellants' claim in respect of this quantity. Defendant No. 3, however, maintained that the appellant could get compensation only at the rate of six annas per 100 cft. the rate of royalty he was receiving from other defendants for the said gravels. On 27th January, 1959, defendant No. 2 entered into an agreement with the appellant (Vide Ext. 1 (a)). In paragraph 3 of this deed, he admitted that he had taken 720713 cft. of gravels by working the quarries himself and through defendants 1 and 4 in the aforesaid four villages. In one of his additional written statements, he averred that the appellant managed to obtain his signature on this document fraudulently and on misrepresentation. He did not know English and only could write his name in English. He was given to understand by the appellant that the dispute between the parties was being settled and that he would be given right to collect and remove stones from the villages and that on that representation he signed the paper without knowing the contents thereof. The agreement was never read over nor explained to him nor he was aware of the contents thereof. Had he known about the contents, he would never have put his signatures on it.

8. The court below framed as many as 11 issues, his important findings are

i) the amendment allowed by order dated the 26th July, 1962 was subject to limitation and was barred by limitation. Therefore, a portion of the claim, namely,

the amount of damages, which was inserted by the amendment, could not be decreed;

ii) it was necessary for the appellant to give notice u/s 80, Code of Civil Procedure, to defendant No. 3 of the additional claim prior to the amendment;

iii) the appellant had title with regard to the stones mentioned in 68 villages covered by the lease of 1949;

iv) defendant No. 3 issued permits bona fide under the belief that he was entitled to issue those permits;

v) defendant No. 2 or other defendants were not bound by the agreement (Ext. 1 (a));

vi) defendant No. 1 had removed only 32000 cft. of gravels from villages Betjharria and Patnaiksole and had sold them to defendant No. 2;

vii) the milder rule of awarding damages would apply to the case;

viii) the price of gravels during the relevant time was Rs. 17/- per 100 Cft. Deducting Rs. 13/8/- as cost of extraction, removal etc. and -/8/- annas as sales tax, the appellant was entitled to damages at the rate of Rs. 3/ per 100 Cft. only;

ix) as defendant No. 3 did not employ his own men for removal of the stones, the appellant was not entitled to any damages from him;

x) defendant No. 4 was not liable to any damages because there was no reliable evidence that he worked independently;

It accordingly decreed the suit as against defendants 1 and 2 for damages at the rate of Rs. 3/- per 100 Cft. in respect of 32000 Cft. of gravels, but granted a decree for permanent injunction against all the defendants. Decree for costs, proportionate to the success was passed against defendants 1 and 2 only.

9. In view of the judgment of the Supreme Court (Ext. 11) the title of the Proprietor of Dhalbhum Estate to grant leases in respect of ballast, boulders, gravels and other kind of building stones could not be challenged. The trial court has held on the question of title in favour of the appellant because of that judgment. Mr. J. C. Sinha. appearing for some of the respondents, however, challenged the title of the appellant on another ground; not on the ground of want of title in his lessor. Though that argument was advanced in reply, I propose to deal with it at the very outset. According to Mr. Sinha, the lease in favour of the appellant was a mere encumbrance and, therefore, with the vesting of Dhalbhum Estate in the State of Bihar, the right whatsoever granted to the appellant by the lease came to an end. This plea, though available to the respondents, was not taken in the court below and not averred in their written statements. Apart from this technical difficulty, the appellant who examined himself as P. W. 5 stated in his cross-examination as follows:--

"The estate of Raja Saheb vested In the Government in 1951. I pay 6 annas per

100 Cft. to Bihar Government for gravels. I have deposited money of royalty to Government in 1951 and subsequent years by draft and it was acknowledged. (Volunteers) I have been, furnishing statements also regularly. I do not remember when Bihar Government for the first time accepted royalty from me but it was either in 1963 or 1964."

The above quoted statements, which were elicited in cross-examination of the appellant, leave no room for doubt that before the suit was decreed, the lease in his favour was recognised by the State of Bihar which accepted royalty from him from the year 1951. Thus, he had title to the property in suit and could maintain the suit.

10. I next take up for consideration the question whether any part of the claim in the suit is barred by limitation. Mr. S. C. Ghose, learned Counsel appearing for the appellant, vehemently urged that once an amendment to the plaint was allowed, it dated back to the filing of the original suit and whatever was not barred on that date could not be held to be barred with reference to the date of the amendment. Mr. J. C. Sinha did not challenge the correctness of the proposition that ordinarily amendment dates back to the filing of the original plaint. But according to him, it is for this reason that amendments are not generally allowed in respect of barred claims. He pointed out with reference to the order of amendment dated 26th July, 1962 that the amendment allowed was subject to the Question of limitation and hence the question whether any part of the claim in the suit was barred by limitation or not was also to be considered with reference to the date of amendment. As stated earlier two amendments were allowed to be made in the plaint. The first was in the year 1959 by which defendant No. 4 was added as a party. While making this amendment, the court below did not observe that it was subject to limitation. But that does not make any difference. A new plaintiff or defendant may be added to the suit under Order 1. Rule 10 of the Code of Civil Procedure. Sub-rule (5) of this Rule says that subject to the provisions of the Indian Limitation Act Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Section 22 (1) of the Indian Limitation Act (IX of 1908), which was in force on the date of the institution of the suit and the amendment, lays down that where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been Instituted when he was so made a party. According to Sub-section (2) of this Section, nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff. Sub-section (2) of section 22 is not relevant for our purposes. Therefore, as against defendant No. 4. the suit shall be deemed to have been instituted on 16th January, 1959 when he was made a party to the suit and so far he is concerned, the limitation shall have to be counted with reference to that date. This finding,

however, is not of any real help to him for according to the plaint, wrongful removal of gravels by the defendants started in October, 1956 only, within three years of the amendment.

11. By amendment dated 26th July. 1962, two important changes were made in the plaint; firstly, village Kokapara Narsingarh was added to Schedule "B". and, secondly, the amount of damages claimed was raised from Rs. 5760/- to Rs. 120780/-. As this amendment was made subject to limitation and village Kokapra Narsingarh was not mentioned in the original plaint, limitation with regard to the claim for damages in respect of that village shall have to be considered with reference to the date of the amendment. Mr. S. C. Ghose could not successfully challenge that this would be the correct position in law so far this village is concerned. However, he submitted and, in my opinion, rightly that the court below erred in holding that the question of limitation with regard to the claim for damages over Rs. 5760/- would have also to be decided with reference to the date of the amendment. The plaint, as originally filed, itself claimed a separate relief for an order directing the defendants to make discovery of the loss caused by them to the appellant by their wrongful acts and make payment for that loss, as claimed in paragraph 16 of the plaint, and, if necessary, for an enquiry as to what should be the amount for such reasonable compensation.

In the relief for damages, no doubt, the amount in the original plaint mentioned was Rs. 5760/-. (This was also the amount of estimated damages mentioned in paragraph 16 of the plaint), but that relief also claimed a decree for, any additional amount that may be found due from the defendants on taking of account on receiving court-fee for such excess amount. It cannot, therefore, be said that the appellant had limited his claim for damages in the original plaint to Rs. 5760/- only. That was merely a tentative claim. If on discovery made by the defendants or on an enquiry being made by the Court the appellant was found entitled to a higher sum as damages, a decree for that amount could be passed in his favour even on the original plaint. In my opinion, therefore, the question of limitation with reference to the quantum of damages so far as the properties mentioned in Schedule B to the plaint as originally filed are concerned, has to be decided with reference to the date of filing of the plaint itself and not with reference to the date of the amendment. The finding of the court below contrary to what has been held above is not correct and cannot be upheld.

12. As for the reasons stated in the preceding paragraphs, the appellant could get a decree for damages in respect of three villages for any amount found due against the defendants on, the original plaint itself. The raising of the claim for damages from Rs. 5760/- to Rs. 120780/- did not make any material change in the plaint and the claim cannot be defeated on the ground of want of a fresh notice u/s 80 of the CPC to defendant No. 3 or for want of a fresh permission from the Calcutta High Court for the purposes of introducing the amendment in the plaint. The view of the court below in this respect does not appear to be correct in law. However, as no claim for damages was made in the original plaint

in respect of village Kokapara Narsingarh. no decree for damages in respect of that village could be claimed against defendant No. 3 without a fresh notice u/s 80 of the CPC to him and fresh permission of the Calcutta High Court to sue defendant No. 3. who was a Receiver, for damages in respect of that village. The finding of the court below that a fresh notice u/s 80 of the CPC on defendant No. 3 was necessary for the claim introduced by the amendment is correct to the extent it relates to village Kokapara Narsingarh.

13. Ext. 1 (a) Is the agreement which defendant No. 2 entered into with the appellant during the pendency of the suit on 27th January, 1959 and, as stated earlier, in paragraph 3 of it, he admitted that from time to time he took 720713 Cft. of gravels by working quarries himself and through defendants Nos. 1 and 4 in the aforesaid villages. The court below accepted the contention of defendant No. 2 that the agreement was executed on the understanding that the suit would be compromised and defendant no. 2 would be set free and that he executed the agreement without understanding its contents. Therefore, in its opinion, he and other defendants were not bound by the agreement. I am not inclined to believe the case of defendant No. 2 that he signed the agreement without understanding its contents. His claim that he does not understand English but merely can sign his name in English does not appear to be true. We have examined his signature on this document, his written statements and other documents, such as, Exts. B (1). B (2), B (3), D (1), 5 (a) and 7. His is a set hand, not of a person who does not know English but has any how managed to learn to sign his own name in it.

He examined himself as P. W. 3. In his examination-in-chief. besides stating that he signed the agreement on the representation made by the appellant that he would withdraw the suit against him, he has further stated that the figures in ink of quantity of gravels taken by him in Ext. 1 fa) were not in the body of the deed when he signed it. He did not make out any such case in his written statements. In his cross-examination, he admitted that the talks of compromise between him and the appellant were bilateral and were not initiated by the appellant. The appellant who examined himself as P. W. 5 has denied that the agreement was obtained fraudulently. In my opinion, the evidence of defendant No. 2 is not sufficient for holding that he signed the document on misrepresentation and the quantity of gravels as mentioned in that document in ink was not there when he signed it. Further there is no reliable evidence in support of any fraud in obtaining that document The admission, therefore, made in Ext. 1 (a) is of defendant No. 2 which can be used as evidence. What is the effect of that admission on the result of the suit is a separate matter which will be examined hereinafter.

14. I now take up for consideration the question as to the amount of damages for which a decree can be passed in favour of the appellant. It was contended by learned Counsel for the appellant that as relief No. (d) of the original plaint was not limited to Es. 5760/- only, it was a fit case where only a preliminary decree should be passed in favour of the appellant and the quantum of damages should

be left for decision in a proceeding for final decree. This contention of learned Counsel for the appellant cannot be accepted for various reasons. There was an order of injunction against defendants 1, 2 and 3 on 19th February 1958. There was another order of injunction on 16th January, 1959 by which the aforesaid defendants as well as defendant No. 4 were restrained from quarrying any stone in the properties mentioned in Schedule B of the plaint as originally filed. The court below has rightly observed that the defendants were not likely to work stones in those properties after the second order of injunction. Evidence, therefore, as to what quantity of gravels were removed by these defendants before the order of injunction could be led in the suit itself. If the appellant has not led any evidence, he must suffer for that.

A Pleader Commissioner was appointed by the court below to assess the quantity of gravels removed by the defendants and their price. He submitted a report stating that it was not possible for him to ascertain the quantity and money value of the gravels removed. After lapse of so many years it is not now likely that in a proceeding for final decree any real assessment as to what quantity of gravels were removed by the defendants can be made. It was submitted on behalf of the appellant that as there was no injunction order in respect of village Kokapara Narsinghar, that village stands on a different footing, but it is not claimed on behalf of the appellant that he is entitled to damages more than Rs. 120780/-. This amount is based on the admission of defendant No. 2 in the agreement Ext. 1 (a) dated the 27th January, 1959. Thus, the appellant is not claiming any damages even in respect of village Kokapara Narsinghar for any gravels removed after 27th January, 1959. The claim in respect of gravels removed from village Kokapara Narsinghar before 27th January, 1959" is barred by limitation, as that relates to a period more than three years before the date of the amendment or even filing of the petition for amendment, that is, 5th July, 1962. The appellant, therefore, is really entitled to no damages in respect of any gravels removed from village Kokapara Narsinghar. In absence of any reliable evidence on his behalf as to the quantity of gravels removed by the defendants, the appellant is entitled to damages only in respect of that quantity of gravels which, has been admitted by the defendants.

15. According to Ext. 1 (a), 720713 Cft. of gravels were removed from all the four villages. As held above, the appellant cannot get a decree in respect of the gravels removed from village Kokapara Narsinghar. It is difficult to decide on the materials on the record what quantity of gravels out of the total quantity of 720713 Cft. was removed from village Kokapara Narsinghar and what quantity from other villages. The appellant, therefore, cannot get a decree for damages in respect of 720713 Cft. of gravels on the basis of Ext 1 (a). Defendants 1, 2 and 3 have admitted removal of only 32000 Cft. of gravels from other three villages and on the materials on the record the court below has rightly held that he can get a decree only in respect of the aforesaid quantity of gravels and not more.

16. Next comes the question of rate at which the appellant be allowed a decree

in respect of the aforesaid quantity of gravels. In determining the quantum of damages for materials which are quarried, one has to decide first which rule, harsher or milder, has to be applied to the facts of the case. The measure of damages in a case where trespasser works a mine is the fair market value of the mineral at the pit mouth at the time when it was severed subject to just allowances. Allowances depend on the conduct of the parties and the other circumstances of the case. Where harsher rule applies, only cost of bringing the material to the bank is allowed as just allowances. Where milder rule applies, expense of the wage and haulage, that is, the cost of working and severing as well as of bringing to bank is allowed. On the question whether harsher or milder rule should apply to the facts of the present case, large number of decisions of England as well as of our country were cited before us, but I do not consider it necessary to refer to those decisions except the case of *Currimbhoy and Co. Ltd. Vs. L.A. Creet and Others*, . After taking into consideration large number of decisions on the point, their Lordships, if I may say so with respect, have correctly summarised the law on the question as follows:--

"The harsher rule, only allowing the expense of bringing to bank, has been applied where the misconduct has been of a substantial character; e.g. where the wrongful working has been wilful and fraudulent¹ See *Martin v. Porter* (1839) 5 M W 351 : 2 H & H 70 *Morgan v. Powell* (1842) 11 LJ QB 263 : 3 QB 278 6 Jur 1109 : 2 G & D 721. also see Lord Macnaughten's remarks in *Peruvian Guano Co. v. Dreyfus* (1892) AC 166 : 61 LJ Ch 749 Asp. M. C. 225 : 66 LT 536, or the workings have been continued by a person in possession after it was known that a lease would not be granted and that he had no title and had no right to expect a title; see *Trotter v. Maclean* (1879) 13 ChD 574 : 28 WR 244 : 42 LT 118. So, also where the working has been unauthorised and without mitigating circumstances : See *Wild v. Holt* (1842) 9 M & W 672 = 11 LJ Ex 285 = 10 NS 876. wholly unauthorised and unlawful: See *Ilynvi Coal Co. v. Brogden* (1870) 11 Eq 188 = 40 LJ Ch 46 = 19 WR 196 = 23 LT 518, the decree herein it may be noted is the model form fraudulently concealed, or continued after negotiations for purchase had fallen through: See *Phillips v. Homfray* (1871) 6 Ch. 770; negligent, and notwithstanding that the employers relied on their certificated manager and had no personal knowledge or notice of the wrongful working: See *Joicey v. Dickinson* (1881) 45 LT 643, malicious, and with full knowledge that wrong is being done: See *Per Curiam Livingstone v. Raw-yards Coal Co.* (1880) AC 25 : 28 WR 357 : 42 LT 334 furtive and in bad faith. The reason why allowances are made in favour of an innocent mistaken, trespasser and disallowed as against a wilful and intentional trespasser, is because the latter must not "qualify" his own wrong: See per Lord Blackburn, *id.* But the milder rule, allowing the deduction of the expense of working and severing the coal as well as of bringing it to bank, will be applied where the wrongful working has not been done with a guilty or negligent mind, or sinister intention e.g. where the wrongful working has been done without fraud or negligence, but fairly and honestly: See *Wood v. Morewood* (1841) 3 Q. B. 440 inadvertently and under a

bona fide belief of title: See *Hilton v. Woods* (1867) 4 Eq 432 : 36 LJ Ch 491 : 15 WR 1105 : 16 LT 736, as that a lease which had in fact expired was still continuing. See *Jagon v. Vivian* (1871) 8 ChA 742 = 40 L.J. Ch. 389 without the express authority, though with the knowledge of the rightful owner: See *Ashton v. Stock* (1877) 6 Ch D 719. under a mere mistake and without any sussestion of fraud: See *Re United Merthyr Collieries Co.* (1872) 15 Eq 46 : 21 WR 117, neither tortious nor negligent, but in the assertion of a right: See *Job v. Potton* (1875) 20 Eq. 84 : 44 LJ Ch 262 : 32 LT 110. So, if the workings were continued on the fair expectation that a lease would be granted: See (1879) 13 ChD 574 : 28 WR 244 : 42 LT 118 or have been innocent, and in ignorance, and with a little negligence or carelessness as possible, and in the belief that it belonged to the trespasser: See *Livingstone v. Rawyards Coal Co.* (1880) AC 25 : 28 WR 357 : 42 LT 334."

Learned Counsel for the appellant and the respondents did not challenge the correctness of the principles for determining which of the two rules should apply, as stated in the passage quoted above; rather they relied on this decision. On the facts of this case, in my opinion, the milder rule ought to apply.

17. Defendant No. 3 had a decree in his favour. By the compromise, as evidenced by Exts. 12 and 13 in the appeal of the appellant, the decree in favour of defendant No. 3 against the appellant was made subject to decision of the High Court in the litigation between the Proprietor of Dhalbhum Estate and defendant No. 3, if no leave to appeal to the Supreme Court was granted, and subject to the decision of the Supreme Court, if leave was granted. Leave was granted to appeal to the Supreme Court, but it did not give its decision before 21st April, 1960. Until that date a decree in favour of defendant No. 3 as against the appellant was there and, therefore, he cannot be said to have acted not bona fide in granting permits. Learned Counsel for the appellant drew our attention to the fact that the appellant was in possession of the property in dispute and the defendants were aware of that fact. According to him, therefore, the conduct of defendant No. 3 in granting permits and of other defendants in working on the basis of those permits cannot be said to be bona fide; it must be held mala fide. Attempt on the part of a successful party to dispossess judgment-debtors even without the help of the Court cannot be said to be mala fide and, in my opinion, therefore, it is a case in which milder rule ought to apply and the court below has rightly applied that rule. The court below has also rightly held that defendant No. 3 issued permits bona fide under the belief that he was entitled to issue those permits.

18. The price of gravels during the relevant time, as found by the court below, was Rs. 17/- per 100 Cft. It has mostly relied in support of its finding on three documents. Ext. 1 filed on behalf of the appellant and Exts. D. (1) and B (5) filed on behalf of the defendants. Exhibit 1 is an agreement of the year 1956-57 between Messrs Dhalbhum Stones Agency, of which the appellant is the Proprietor, and the President of India through the Chief Engineer of the South

Eastern Railway for supply of ordinary washed gravels at the rate of Rs. 18/- per 100 Cft. Ext. D (1) is an agreement dated 23rd July, 1956 between Messrs. Dhalbhumgarh Gravel Supply Agency, of which defendant No. 2 was the proprietor, and the President of India through the Chief Engineer, South Eastern Railway. Ext. B (5) is a letter dated 15th July, 1956, approving the tender from the District Engineer, S. E. Railway, Kharagpur to Messrs. Dhalbhum Gravel Supply Agency. The agreement Ext. D (1), it appears, was executed after the tender of Messrs. Dhalbhum Gravel Supply Agency was accepted on behalf of the other party by letter Ext. B (5). The two documents read together show that the rate of supply of gravels of the same size, as mentioned in the agreement (Ext. 1) was Rs. 17/- per 100 Cft. It appears from these documents that the rate of gravels in the years 1956-1957 used to vary from Rs. 17/- to Rs. 18/- per 100 Cft. The court below has accepted the lower rate at Rs. 17/- per 100 Cft. It was contended by learned Counsel for the appellant that in assessing damages the price which the appellant could have got was more relevant than the price the respondents could get and, therefore, the court below ought to have taken the price at the rate of Rs. 18/- per 100 Cft. There is no material on the record from which it can be ascertained whether there was any difference in the quality of gravels which were supplied by the appellant and defendant No. 2 to the same other party, namely, the Management of South Eastern Railway. The difference in the rates in the aforesaid documents can be explained only on the ground that during the period intervening between the execution of the two documents, there was some rise in the price of gravels. Reliance was placed by learned Counsel for the appellant also on Exts. 3 series, the bills. The rates in the various bills vary from Rs. 14/- to Rs. 22/-. The higher rate of Rs. 20/- to Rs. 22/- appears to be for specially washed gravels. The rate for ordinary washed gravels was mostly Rs. 18/- per 100 Cft. except in one case which, as stated earlier, was Rs. 14/- only and that was on account of the fact that the size of the gravels at that rate was 1 1/2" and down. In the circumstances, in view of the various rates mentioned in the bills (Exts. 3 series), I am inclined to accept the argument of learned Counsel for the appellant that in assessing the damages the rate of gravels should be taken at Rs. 18/- per 100 Cft. and not at Rs. 17/- per 100 Cft. as done by the court below.

19. Another question which arises for consideration in assessing the damages is, what deductions are to be allowed to the defendants. The court below has allowed deductions at the rate of Rs. 13/8/- per 100 Cft. for quarrying gravels and making them into saleable condition, and annas 8/- per 100 Cft. as sales tax, total Rs. 14/- per 100 Cft. In support of its finding as to the deductions to be allowed, it has relied on Exts. A (1) and A (2), the permits granted by Dhalbhum Gravel Supply Agency of defendant No. 2 to Amal Mukherji and Amal Banerji respectively in the year 1954. The rate in Ext. A (1), which was paid to the contractor for raising gravels was Rs. 13/8/- per 100 Cft. The rate in Ext. A (2) for the same purpose was Rs. 12/- per 100 Cft". The difference in the two rates appears to be on account of the fact that the size of gravels for which permit Ext.

A (1) was granted was 3 1/2" whereas the size of gravels for which the permit Ext. A (2) was granted was 3/4." The size of the gravels which were to be supplied under the agreements Exts. 1 and D (1) was 3/4" and not 3 1/2" As the appellant and the defendants relied on Exts. 1 and D (1) read together with Ext. B (5) respectively, it can safely be presumed that the size of the gravels wrongfully taken by the defendants was 3/4". In the circumstances, Ext. A (2) is to be preferred to Ext. A (1) and the court below has erred in not doing so,

20. Learned Counsel for the appellant, however, submitted that the rate mentioned in Ext. A (2) was for making supply at the Railway siding and even under the milder rule, the defendants were not entitled to the cost which they might have to incur for carrying gravels from the quarry site to the Railway siding. Ordinarily, I would have accepted this contention of learned Counsel for the appellant, but as the rate of Rs. 18/- per 100 Cft. was also for supply at the Railway siding, in allowing deductions, the charges for carrying gravels from the quarry site to the Railway siding have also to be taken into account; if they are not to be taken into account, then the price of the gravels at the quarry site shall have to be taken into consideration and in doing that the charges for carrying gravels from the quarry site to the Railway siding shall have to be deducted from the price at the rate of Rs. 18/- per 100 Cft. The net result in either case will be the same. But learned Counsel for the appellant further argued that the profit which the contractor might have made in making supply at the rate of Rs. 12/- per 100 Cft. (Vide Ext. A (2)) shall have to be excluded from consideration as the defendants are not entitled to any deduction as profits. There appears substance in this contention of learned Counsel for the appellant. D.W. 1 in his examination-in-chief has said that the rate of raising gravels was Rs. 6/-per 100 Cft. and carting charge upto Railway siding was Rs. 4/- or Rs. 5/-per 100 Cft. and that the profit of the contractor was Rs. 2/- per 100 Cft. in the above. If the rate of raising at Rs. 6/-, carting charge at Rs. 4/- and profit at Rs. 2/- per 100 Cft. are added together the total comes to Rs. 12/- per 100 Cft., the charge mentioned in Ext. A (2). In my opinion, therefore, the defendants are entitled to a deduction at the rate of Rs. 10/- per 100 Cft. only and not at the rate of Rs. 13/8/- per 100 Cft. as found by the court below. They are also not entitled to any deduction of the amount which the appellant might have paid as sales tax.

21. At this stage, I would like to deal with another argument of learned Counsel for the appellant. His submission was that by production of their account books, the defendants - could have very well proved the actual costs incurred by them in raising gravels and carrying them from quarry site to the Railway siding. As they have not done that, they are entitled to no deduction. As observed earlier, the evidence of D. W. 1 is supported by Ext. A (2), and Ext. A (2) bears the signature of the appellant which shows that the rate was approved by him. It is not therefore, a case where the defendants should not be allowed any deduction because they have not produced their account books. Allowing deduction at the rate of Rs. 10/- per 100 Cft, from Rs. 18/-, the price of the said quantity of gravels, I hold that the appellant is entitled to damages at the rate of Rs. 8/-per

100 Cft.

22. The only question which remains to be considered now is the extent of personal liability of defendants 3 and 4. The court below has not made defendant No. 4 liable for any damages because there was no reliable evidence that he worked independently. That does not appear to be a good ground for not holding him liable. A person who assists a wrong-doer even if he does not work independently is also liable for damages. In his written statement, defendant No. 4 did not deny that he did not quarry and raise gravels; rather paragraph 12 of his written statement runs as follows :--

"That the statements made in paragraph 13 (a) are all incorrect. This defendant has been carrying on the business of quarrying, digging, stacking and removing stones for several years long before the institution of the suit and has stacked vast quantity of Stones on the northern side of the Railway line as well as in the quarries in Patnaik-sole, Sargachhira and Kokapara Narsingarh and he obtained permits from defendant No. 3 the real owner of the mines."

He also did not examine himself to deny the statement of the appellant that he also used to work together with his brother, defendant No. 1. His brother (defendant No. 1) who examined himself as D. W. 4 admitted that defendant No. 4 used to work stones and he (witness) had seen him (his brother) working in village Betiharia. In my opinion, therefore, defendant No. 4 is equally liable for damages as defendants 1 and 2 are and the suit ought to have been decreed as against him as well.

23. The court below has not made defendant No. 3 liable for any damages on the ground that defendant No. 3 never went to the spot. This also does not appear to be a good ground for disallowing damages against defendant No. 3. In his additional written statement filed on 16th December, 1963. defendant No. 3 stated that he issued permits to defendants 1, 2 and 4 for gravels on payment of royalty at the rate of -/6/- annas per 100 Cft. and the appellant's claim for damages at the rate of Rs. 18/- per 100 Cft. was preposterous. Impliedly, he admitted that he was liable to damages at the rate of -/6/- annas per 100 Cft. Mr. S. C. Ghose in support of his contention that defendant No. 3 is equally liable as other defendants placed reliance on passages in Articles 177 and 179 of Clerk and Lindsell on Torts, Thirteenth Edition, which say that if one of a number of joint tortfeasors, or of several tortfeasors causing the same damage, is sued alone, he is liable for the whole damage, though he did but a small part of it and if cause of action against each tort-feasor is the same and the same evidence will support an action against each of them, they are joint tortfeasors. He also relied on passages in Articles 1077, 1078, 1079 and 1101 of the said book. Article 1077 says that conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right to his possession or his right to the possession of it and to be liable the defendant need not intend to question or deny the plaintiff's rights; it is enough that his conduct is inconsistent with those rights. Article 1078 enumerates various modes of conversion including when

property is wrongfully taken and is dealt with in such a manner which constitutes a denial of title in the person entitled to the property. Article 1079 says that anyone who deals with goods in a manner inconsistent with the right of the true owner is guilty of a wrongful conversion; provided there is an intention on the part of the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith. According to Article 1101, there may be a conversion of goods, even though the defendant has never been in possession of them, if he has acted in such a way as to deny absolutely the right of the owner or to assert a right which is inconsistent with the owner's right. Applying these principles. Mr. Ghose submitted that defendant No. 3 was a joint tortfeasor along with other defendants and liable for damages with them. He also relied on the decision in *Brooke v. Bool* 1928 All ER 155. In this case, the tenant of a lock-up shop requested her landlord, who lived on adjoining premises communicating internally with the shop, to visit the shop occasionally at night to see that everything was secure. A lodger complained one night to the landlord of a smell of escaping gas. which he believed came from the shop, and both went to investigate. A gas pipe, terminating in a burner accessible from the floor, ran down the wall of the shop. The landlord examined the lower part of the pipe with a naked light, and lit the burner, but found no leakage there. The lodger got on the counter of the shop and proceeded to examine the upper part of the pipe, also with a naked light. An explosion followed, and the tenant's goods on the premises were damaged. The landlord was also held liable on the ground that the lodger was his agent and that the undertaking constituted a joint tortious enterprise. In another case relied on by Mr. Ghose, the case of *Doe v. Harlow* (1838) 113 ER (KB) 724 it was held that in trespass for mesne profits, a verdict may be found against defendant, though he never actually occupied during the time of the trespass. In that case, the defendant lawfully underlet to a tenant a premises. When the defendant's and tenant's interest became determined and right of possession vested in the plaintiff, the tenant held on and the defendant continued to receive rent of him and declared him to be his tenant when plaintiff demanded possession. The defendant was found liable for damages. In my opinion, defendant No. 3 being a joint tortfeasor is also liable for damages to the same extent as other defendants are liable.

24. In the result, I allow the appeal in part and modify the decree of the court below. The appellant is entitled to a decree for damages in respect of 32000 Cft. of gravels at the rate of Rs. 8/-per 100 Cft. He is also entitled to his costs of the court below proportionate to his success against all the defendants. He is entitled to his costs of this Court as well against major defendants appearing in and contesting the appeal.

Shiveshwar Prasad Sinha, J.

25. I agree.