

(1947) 03 PAT CK 0001
In the Patna High Court

Kamakshya Narayan Singh Bahadur and Others	APPELLANT
Vs	
T.H. Burnett and Others	RESPONDENT

Date of Decision : 26-03-1947

Acts Referred:

Citation : AIR 1948 Patna 313

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

Bench : Full Bench

Judgement

Manohar Lall, J.—These two appeals arise out of Suit No. 81 of 1940 instituted by the plaintiff, Raja Kamakshya Narayan Singh Bahadur, for recovery of royalties and cesses together with interests from the defendants in respect of certain coal lands for a number of years. The learned Subordinate Judge has decreed the suit of the plaintiff in part with the result that the plaintiff has filed Appeal No. 127 and two of the defendants have filed Appeal No. 134. These two appeals will be disposed of together.

2. The facts which have been amply proved are these: On 9-6-1919, the Court of Wards, who were then in charge of the Ramgarh Raj during the minority of the father of the plaintiff and of the plaintiff, granted a lease of 200 bighas of coal lands in village Karmatanr to Mr. Burnett defendant 1, on the stipulation inter alia that the lessee will pay royalty and cess on the amount received if assessed on the proprietor on the royalties received. Mr. Burnett was in possession till 9-5-1922 when he transferred his interest to Kaluram Agarwala, defendant 2. Kaluram Agarwala after remaining in possession till 1929 transferred 100 bighas of coal lands on 17-12-1929 to Sreeram Coal Company. Sreeram Coal Company belongs to defendants 2 to 11, and the transfer of 100 bighas is spoken of in the proceedings as if it were a deed of release by Kaluram Agarwala in favour of the company in which he was a partner. The lease-hold lands were then treated as two separate entities from 1929 onwards after the date of this transfer, and the company and Kaluram Agarwala were liable to pay, and paid separately the dues of the proprietor. On 26-11-1932, Kaluram Agarwala surrendered the remaining

100 bighas to the Court of Wards and paid up all the royalties which were due from, him up to that date. The Court of Wards released the management of the estate to the plaintiff on his attaining majority on 10-8-1937, but apparently before that a certificate case had been filed against defendants 2 to 11, namely Sreeram Company for realisation of royalty from 1-6-1934 to 28-2-1937 and the certificate dues were realised. The plaintiff says that he served notice to quit on the defendant company and to all the defendants in October 1938 and March 1940, but the defendants have not given up possession with the result that the plaintiff filed the suit giving rise to these appeals on 9-8-1940 in which he prayed that owing to the non-payment of the royalties from 1-3-1937 to 31-7-1940, the lease of 9-6-1919 stands cancelled and he is entitled to recover possession of 100 bighas from defendants 2 to 11. The plaintiff has also claimed the amount due for arrears of royalty from these defendants. The plaintiff has further claimed from all the defendants cesses which should have been realised by the Court of Wards from the defendants which were paid on his behalf to the Government on the assessment made from the income of royalty. Interest had also been claimed on these two amounts. Originally, the plaintiff had laid a claim for Income Tax and interest thereon, but that claim was abandoned at the time of the hearing of the suit. The case of defendant 1, the original Iesse was that the plaintiff was not entitled to claim any cess or interest thereon under the terms of the lease and that in any event he was not liable to pay any cess after the date of the transfer by him to defendant

3. The plea of Kaluram Agarwala, defendant 2, was also to the same effect and further that all the dues to the estate for the period prior to the assignment by defendant 1 in his favour were paid in full to the Court of Wards and defendant 2 could not be made liable for the dues for that period. His further plea was that when he surrendered 100 bighas to the Court of Wards, it was done on full payment of the dues to the estate, and the plaintiff is bound by the acts of the Court of Wards who did not make any further claim on him. It was also pleaded that the claim for cess not having been made in the certificate case against defendants 2 to 11, the claim in the suit to that extent is barred by the provisions of Order 2, Rules 2. Civil P.C.

4. The plea of the Company was practically the same as that of defendant 2, and their further plea was that when the plaintiff intimated to the Company that the lease stood cancelled and asked for possession, the Company actually gave up possession of the land to the plaintiff and requested him to come and take possession. It is pleaded that thereafter the company is no longer in possession and is not liable for any claim for royalty and cess.

5. The defendants' case also was that defendant 9 has or never had any interest in the leased property and his name was expunged as a result of an order of the learned Subordinate Judge.

6. The learned Subordinate Judge has not accepted the defendants' case that the Company gave up possession in 1937 and has come to the conclusion that

the plaintiff is entitled to recover cess with interest from defendant 1 for a small item and also a small amount from the Company, defendants 2 to 8 and 10 to 11. He has also held that the plaintiff is entitled to royalty together with interest from the company. He has disallowed the amount of cesses claimed by the plaintiff after the amendment of the Cess Act in 1936 not on the ground that the plaintiff has not paid this sum, but on the ground that the assessment of cess on the plaintiff under the Cess Act was illegal and, therefore, the payment of cess by him was voluntary. The learned Judge has also held that the plaintiff cannot recover cess for the period 1st June 1934, to 28th February 1937, on the ground that the provisions of Order 2, Rule 2, Civil P.C. stand in his way. The plaintiff, therefore, has preferred an appeal with regard to that portion of his claim which has been disallowed, and only two of the defendants have preferred another appeal against that portion of the claim which has been decreed against Kaluram Agarwala and as against the Company.

7. Claim for royalty Mr. S.C. Mazumdar on behalf of the defendants gave up possession and draw attention to the letter, Ex. B(17) dated 25th April 1937, in which the Company writes to the Manager of the Ramgarh Estate that the possession of 100 bighas of coal lands in village Karmatanr has already been given up by them in favour of the estate and as such they have no more concern with the same. This letter was evidently in answer to the letter, Ex. B(5) dated 20th March 1937, and its reminder, Ex. B(7), dated 20th April 1937, from the Manager of the Court of Wards to defendant 2 to show cause within a fortnight why 100 bighas of lease land held by Sreeram Company should not be cancelled.

8. The oral evidence in support of the defendants' case that he gave up possession is the evidence of Kaluram Agarwala himself and of one James Allen. The learned Subordinate Judge has not believed the evidence of these two persons, and we agree with him. Kaluram says in his evidence that after the receipt of the reminder they gave up possession and removed the materials of the huts which had been put up for the use of the coolies. He says that eight or ten days after he sent a reply, Ex. B (17), the mines clerk and the tahsildar of the Raj came and took possession of the land by beat of drums, but the witness added that he heard this from Ganesh Narayan, a shop-keeper and from his own men. Apart from Mr. Allen neither Ganesh Narayan nor any of the men of Kaluram has been examined.

9. In cross-examination he states that excepting the papers filed he has no papers to show that he gave up possession over the coal land and further "After receipt of the reminder slip I gave up possession and informed the Raj accordingly a day or two later. Nobody was present on behalf of the Raj when I gave up possession. I did not write a letter to the Raj on the day I gave up possession." This evidence is also discredited by the notice, Ex. C, given by the General Manager of the Ramgarh Estate on 19th October 1938, asking the defendant to vacate the coal lands and to pay up arrears of royalty with interest up to 30th November 1938. If defendant 2 or the Company had already given up

possession, they must have protested to the statement in the notice, Ex. C, and sent a reply stating that they had already given up possession in March and April 1937. This circumstance supports the case of the plaintiff that the defendant's story that they gave up possession cannot be believed.

10. The evidence of the other witness, James Allen, is equally untrustworthy. He was originally a servant of the Ramgarh Wards Estate and was sued by the plaintiff for recovery of some unauthorised collections. He says he was unemployed on the date of the suit. His evidence cannot carry any conviction. He is coming to depose against his former employer and wants the Court to believe that he himself took possession on behalf of the estate by beat of drums. He admits at p. 15 of his cross-examination that Kaluram Agarwala was not present at the time of the alleged resumption of possession and that he does not remember the name of any of the office clerks. He also says that he met Kaluram several times after the alleged dakhaldehani but he had no talk with him about his taking possession over the property. For these reasons the finding of the learned Subordinate Judge must be accepted and it must be held that the suit has been rightly decreed for the claim of royalty and the interest thereon against defendants 2 to 8 and 10 to 11.

11. Claim for cess The learned Subordinate Judge was in error in holding that the assessment of cess on the plaintiff was illegal and, therefore, the plaintiff could not recover the cess in respect of the year 1938-39. This question was examined by a Division Bench of this Court in Kamakshya Narain Singh v. Arjun Lal AIR 1946 Pat. 143 where it was pointed out that the amendment of the Cess Act in 1936 did not make any difference whatsoever to the application of the principles enunciated in Manindra Chandra Nandi v. Secretary of State (07) 34 Cal. 257 and that if the Collector had realised direct from the owner cesses proportionate in amount to the royalties received by him and from the occupier proportionate to the balance of net profits left in his hand after payment of the royalties, the realisation was slightly irregular but not illegal. The plaintiff, therefore, is entitled to recover cesses for the period 1938, 39 from the defendant company, and I would order accordingly.

12. With regard to the claim for cess for the period 1st June 1934 to 28th February 1937, the learned Subordinate Judge was also in error in applying the principle of Order 2, Rule 2, Civil P.C. That rule enacts that where the plaintiff omits to sue or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. In the present case, the plaintiff never omitted to sue the defendant for the cesses, all that was done was that the Court of Wards filed a certificate case in which they omitted to make a claim for the amount of cess. But certificate proceedings cannot be held to be a suit within the meaning of Order 2, Rule 2, Civil P.C. I would, therefore, reverse the decision of the learned Subordinate Judge and hold that the plaintiff is entitled to recover cesses for the year 1935-36 also. It may be added that the plaintiff has not claimed any cess for the years 1928-29,

1933-34, 1934-35, 1936-87 and 1937-38.

13. Mr. L.K. Jha rightly conceded that he is not entitled to any interest on cesses as there was no contract to pay any interest.

14. No serious argument could be advanced that defendants 1 and 2 are not separately liable to pay cess for these amounts which have been found due by the learned Subordinate Judge. Mr. Mazumdar on behalf of the defendants raised an interesting argument that it was the Court of Wards alone who are entitled to bring a suit for recovery of cess, and as they did not do so, the suit of the plaintiff was barred by limitation. He relied upon two cases in support of his argument. In *Ramanuja Ayyanger v. Sadagopa Aiyangar* (05) 28 Mad. 205 a minor sued by his next friend in August 1903, to recover the amount due on a promissory note executed in September 1897, in favour of his mother. It was held that the suit was barred by limitation as the infant son was not the holder or payee or a person entitled to sue upon the note. It will be observed that this was a case under the Negotiable Instruments Act, and the only person entitled to sue was the payee or the holder.

15. In *Vishnu Narayan Deo v. Keshav Gajanan* AIR 1924 Bom. 468 it was held that a minor is not entitled to institute a suit on a promissory note taken by the guardian. This again was a suit on a promissory note governed by the Negotiable Instruments Act.

16. These two cases were considered by the Bombay High Court in the year 1926 in *Pandharinath Manikshet and Others Vs. Ajamkha Sardarkha*, . In this case an instalment bond was executed on 26th June 1916, in favour of two minors represented by their guardian mother by one Anakha Sardarkha. On 6th November 1924, one of the minors having come of age instituted a suit to recover the amount due on the bond himself and for his minor brother. The suit was instituted within three years of his attaining majority. It was contended on behalf of the defendant that the suit was barred by limitation and that the guardian should have instituted the suit within the period of limitation. But it was held that the suit was within time as the bond on its true construction was a document not given solely to the guardian but was given to the minors acting by their guardian and had substantially the same effect as if given to the minors alone. I would respectfully adopt the reasoning of the learned Chief Justice in this case and hold that in the present case the lease in favour of the defendants must be taken to be a lease in favour of the plaintiff and was not given solely to the manager of the Court of Wards and is substantially to the same effect as if given to the plaintiff himself. If the argument of the defendant is accepted it will lead to the somewhat remarkable result that after the estate had been released no suit can be brought upon the royalties due from the defendants. Mr. Jha also relied *Ram Das v. Ram Babu* AIR 1936 Pat. 194.

17. Mr. Mazamdar also argued that as the Court of Wards did not take any proceeding against the defendants with regard to the claim for cesses, the

plaintiff on coming of age is barred from recovering those sums. But this argument was expressly negated by the Division Bench decision *Kamakshya Narain Singh v. Arjun Lal* AIR 1946 Pat. 143 already referred to.

18. The result is that in my opinion First Appeal No. 127 of 1942 must be allowed to the extent indicated above, and the decree of the learned Subordinate Judge will be varied by allowing the plaintiff's claim for ceases for the periods 1935-36 and 1938-39. But in the circumstances each party will bear his own costs in this Court. First Appeal No. 134 of 1942 must be dismissed with costs.

Mukharji, J.

I agree.