

(1937) 12 CAL CK 0010
In the Calcutta High Court

Keshabji Lalji and Another

APPELLANT

Vs

Piramall Gayenka and Others

RESPONDENT

Date of Decision : 14-12-1937

Acts Referred:

Citation : AIR 1939 Cal 129

Hon'ble Judges : S.K. Ghose, J;Patterson, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—First Appeal No. 20 of 1935 is directed against the preliminary decree and First Appeal No. 143 of 1936 is directed against the final decree in a suit which was brought for khas possession, mesne profits, damages, royalties, etc., laid at Rs. 28,256-1-0 in respect of a colliery. By an indenture dated 20th March 1934, the appellants who are defendants in the suit obtained sub-lease of the coal underneath the property situated within Mouza Siduly on terms which are stated in: the document. The plaintiffs are in the position of landlords to the appellants by virtue of ?b purchase from previous lease-holders. The plaintiffs' case is that the defendants did not carry out the provisions of the lease whereupon the plaintiffs cancelled the lease and gave notice to quit on 31st August 1932. On the defendants failing to comply, the present suit has been brought. In the suit various reliefs were originally asked for, but on 30th August 1934, the parties came to an amicable settlement with regard to the claim for ejectment and khas possession. On 19th September following there was another amicable settlement by which the plaintiffs withdrew their claim for cesses. The sole reliefs that remained for trial at the hearing were the plaintiffs' claim for minimum royalty, fuel coal and interest. The material defence was that in 1929 the appellants for the first time came to know that the area of the leasehold was not 485 bighas stated in the indenture but only 452 bighas. Therefore the defendants claimed refund of a portion of the selami and minimum royalty already paid and further claimed that there ought to be a decrease of the amount of minimum royalty payable per annum. There were further defences that no interest was due according to the terms of the lease on the amount of fuel coal

and that the plaintiffs were not entitled to all the costs claimed by them. The Subordinate Judge having decided the points against the defence the defendants filed First Appeal No. 20 of 1935. The first point pressed in Appeal No. 20 of 1935 is comprised in issues Nos. 13 and 14 which are stated thus:

13. Has there been any diminution of the leasehold and is the minimum royalty liable to be reduced in proportion?

14. Are the defendants entitled to a set-off for the amount alleged to be overpaid by them, and if so what would be its amount? Can the defendants raise this plea without payment of court-fee?

2. The sub-lease was granted in consideration of a selami of Rs. 72,750 in respect of

all those pieces and parcels of land in Mouza Siduly mentioned and described in the schedule hereunder written and delineated on the map or plan hereto annexed and thereon coloured, etc.

3. The schedule referred to is:

All that piece or parcel of land in Mouza Siduly in Parganna Shergarh, Thana Ondal, Sub-Registry Ranigunge, in District Burdwan Settlement No. 2346, containing an area of 485 bighas and bounded on the north, Lala Reghumall Siduli Colliery and Ondal Sainthia Bail way; on the east Revenue Boundary of Mouza Khandra, on the south, Revenue Boundary of Mouza Mukundapur; on the west, Revenue Boundary of Mouza Bowla.

4. The Subordinate Judge has found that the selami and the minimum royalty were fixed in a lump, that the area was stated by guess, that the demised premises were fixed with reference to the boundaries, and that the defendants are in possession of the lands within those boundaries. The defence raises the question whether the governing term in the lease was the reference to the area which occurs in the schedule and not in the body of the document. It will be seen that according to the schedule description the boundaries on the north are stated to be a railway and a colliery, and on the other three sides, they are stated to be the revenue boundaries. The plan of the demised land which was attached to the indenture has however been found to be a traced copy of the district settlement map of Mouza Siduli. An explanation is furnished by the Commissioner who says that:

At the time of the lease which came into existence after the C.S. operations, the parties accepted the C.S. boundary lines as the true limits of the mouza and embodied the same in the indenture plan which merely reproduces the C.S. map.

5. It is not likely that the parties should think of the old revenue survey when the district settlement had recently taken place, and the expression in the schedule "revenue boundary" must have been loosely used to mean the boundary as depicted on the cadastral survey map. This is also borne out by the settlement

number being mentioned in the schedule. The Commissioner's report shows that according to this view no difficulty is presented, the plaintiffs having identified the lease lands almost in accordance with the C.S. boundary lines, so that the indenture plan and the C.S. lines tally substantially. There is no justification for discarding the plan which in the present case must be treated as forming part of the deed:

though the words of the description in the instrument are primarily relied upon, in case of ambiguity the plan may control the body of the instrument : *Lyle v. Richards* (1866) 1 H.L. 222. Also *Darpali Sadagar Vs. Najir Ahmed*, .

6. The defendants do not deny that they actually possess the land which is depicted on the plan, nor is there any doubt that the land is within the boundaries which are well defined. In such a case if there is a question as between boundaries and area, the former should prevail : *Bara Kalim v. Rajendranath Roy* AIR (1920) Cal. 865 and *Gossain Das Kundu v. Mrittunjoy Agnan Sardar* (1913) 18 C.L.J. 541. The next thing is that admittedly no measurement took place at the time of the creation of the lease and the area which was mentioned in the schedule was taken for granted. This appears from the deposition of defendant 1. The boundaries show that the lands outside them do not belong to the lessor and it cannot be said that there was any intention to go beyond the limits of the mouza in which? the land is situated. It is noteworthy that-although the lease was executed on 20th March 1924 there was no objection by the appellants till the filing of the written statement in 1933. Defendant 1 admits that he did not notify the plaintiffs of the alleged deficiency in the area. That the selami and the minimum royalty were fixed in a lump will further appear from the fact that the document does not contain any provision for refund or abatement in case of deficiency in area. As a matter of fact the defendants are actually possessing more than 452 bighas as the Subordinate Judge has found. It must be found" therefore that the lease was not based on the area as stated in the schedule to the indenture Ex. 1 that there has not been a diminution of the leasehold, and that the selami and the minimum royalty are not liable to be reduced. No question of refund" therefore arises. The next point urged is that the Court below is wrong in allowing; any interest on the price of fuel coal and at any rate should not have allowed interest at the rate of 15 per cent. It is pointed out that although the lease provides for interest at 15 per cent, on arrears of minimum" royalty, it says nothing about interest on arrears of fuel coal, nor was such interest expressly asked for in the plaint. We have to look however to the terms of the compromise of 30th August 1934 (p. 55 of the paper book) which provides that

the plaintiffs will in the alternative for mesne profits get a decree for royalty, fuel coal since 1st September 1932 up to the date of the institution of the suit together with interest and costs as maybe found due by the Court.

7. The only question is as to the amount of interest. The lease itself fixes 15 per cent as the rate of interest on royalty and minimum royalty and then the Court

allowed the same rate on fuel coal, it cannot be said that it used its discretion wrongly. The appeal therefore cannot succeed on this point. The next point is as to the costs of the suit. In the decree (p. 69 of the paper-book) the stamp for the plaint has been calculated at Rs. 1980 and pleader's fee on Rs. 28,256-1-0 at Rs. 632-9-0. But; according to the compromise.

with regard to costs in respect of the prayer for khas possession plaintiffs will get a decree only for the amount of court-fees paid by them upon. Rs. 4712-8-0.

8. According to para. 17. of the plaint the-claim for mesne profits and compensation is laid at Rs. 5779-6-0. Since this has been given up, it should be deducted from the total claim of Rs. 28,256-1-0 and the pleader's fee should be calculated on the balance. The stamp for plaint should also be calculated on the whole amount of Rs. 28,256-1-0, so that it will be Rs. 1470 in place of Rs. 1980. The. decree for costs should be modified accordingly. This concludes F.A. No. 20 of 1935 which is thus allowed in part with costs to the parties in proportion to success.

F.A. No. 143 of 1936.

9. I now take up F.A. No. 143 of 1936 which is directed against the final decree. The first point is that the decree is without jurisdiction as it was made after the High Court had passed an order staying further proceedings. The preliminary decree was made on 25th September 1934 and the Commissioner was appointed on 19th December 1934 to take accounts and directed to report by 25th February 1935. The question was with regard to raisings for a limited period and the information could have been obtained from the papers of the appellants. The Commissioner notified the parties on 4th January 1935. His order sheet dated 11th January 1935 shows that while plaintiff was ready, defendant was not. On 16th January 1935, defendant asked for a month's adjournment and on this being refused none appeared for the defendant. The enquiry was finished on 19th January 1935 and arguments were heard. On 20th January 1935 all that remained to be done was the writing of the report and that was taken up, continued on the 21st and finished : on the 22nd though even then it is noted that the Commissioner was prepared to consider any accounts which might be produced by the defendants. It appears that meanwhile on 21st January, a rule was issued by, the High Court in C.E. No. 948, of 1935 ordering ad interim stay of the enquiry into accounts. This was not produced before the Commissioner. But a telegram was received by the defendant's pleader on the 21st and a petition was made to the Subordinate Judge on the 22nd, By that time the Commissioner had submitted his report and there was nothing more for him to do. As a fact the enquiry had been practically completed by him on 19th January and the defendant had given no help. The High Court rule was therefore discharged on 25th February 1935, it being remarked that the proceedings had already been completed and there was nothing to stay. In these circumstances it seems to me that it cannot be said that the Commissioner's report was contrary to the rule issued by the High Court and no question of want of jurisdiction

arises. The point was in fact, not taken in the lower Court as the judgment appealed against indicates.

10. The last point is about the merits of the final decree. The Subordinate Judge has accepted the Commissioner's report except that he has allowed to the defendant on account of boiler consumption 340 tons of slack coal more than what was allowed by the Commissioner. There is a question that the Commissioner wrongly assumed that out of the total raisings 88 per cent, should be steam coal and 12 per cent, slack coal. The Subordinate Judge has pointed out that this proportion is laid down in the lease Ex. 1 and is moreover supported by the deposition of plaintiff's officer P.W. 2. There is really no ground for disbelieving this evidence and if it was ex parte it was the defendants' own fault. Another objection was as to the coal deducted for boiler consumption. The Subordinate Judge points out that the calculations are based on statements submitted by the defendants to the Chief Inspector of Mines. Once it is held that there is no case made for as remand for further investigation the evidence before the lower Court stands and that Court's findings should not be disturbed. This is the conclusion that we come to. This appeal fails and it must be dismissed with costs and. hearing fee five gold mohurs.

Patterson, J.

11. I agree.