

(1920) 03 PAT CK 0018
In the Patna High Court

Kumar Prematha Nath Malia

APPELLANT

Vs

A.J. Meik and Hargobind Goswamy and Others

RESPONDENT

Date of Decision : 23-03-1920

Acts Referred:

Citation : 56 Ind. Cas. 184

Hon'ble Judges : Dawson Miller, C.J.;Coutts, J

Bench : Division Bench

Judgement

1. This appeal arises out of a decision of the Additional Subordinate Judge of Manbhum in favour of the plaintiff in a suit brought in respect of the sub soil rights of a certain Mauza Kapasara. The plaintiff in the suit, Mr. Barton, is the manager of the Pandra encumbered estate, Kismats 2 and 4, which belong to Babu Sanker Narain Singh, Babu Bejoy Narain Singh, and Babu Gobinda Narain Singh who may conveniently be designated the Pandra Babus. These two Kismats make up 3 annas of the whole Perganna Pandra. The other 8 annas belong to the Raja of Pandra and consist of Kismats 1 and 3. Mr. Burton is the manager of the whole estate.

2. The plaintiff's case is that Mauza Kapasara is one of the Mauzas included in Kismats 2 and 4, the estate of the Pandra Babus. In the year 1736 the Raja of Pandra, who was at that time the proprietor of the whole of Perganna Pandra, granted a patta of Mauza Kapasara to Sri Kishori Das Mohant Goswami, the ancestor of the present Goswami defendants, The Goswamis remained in possession of the Mauza for a very long time, but from the year 1888 they began to grant leases both of the soil and the sab soil rights and some coal has been extracted. The plaintiff first knew of coal being extracted in the year 1912. He contends that under the patta which was granted to the Goswami in 1733, no sub soil rights passed and that neither they nor the person to whom they have transferred those rights were entitled to grant leases of the sub-soil or to extract coal. He accordingly brought this suit for a declaration that the right to the sub-soil coal in Mauza Kapasara is vested solely and exclusively in the proprietors of

Kismats 2 and 4, that the defendants be called upon to produce an account of coal raised, that damages for coal extracted during three years be allowed to the plaintiff and that he be granted a permanent injunction restraining the defendants from extracting coal from the sub-soil of Kapasara. The learned Subordinate Judge by his decree granted the relief claimed and on the defendants failing to produce accounts, awarded damages for three years amounting to Rs. 8,197-8-0. From this decree the defendant No. 3, heir to Srimati Bhaba Sundari Devi who was the transferee of an 8-annas share in the Mauza from the Goswami defendants, has appealed.

3. The points taken in appeal are (1) that by virtue of the patta of 1736 the Goswamis acquired a separate estate of which they have been in possession since the time of the Permanent Settlement; (2) that even if it be found that this is not so, the plaintiff has not established his title to Mauza Kapasara inasmuch as he has not shown that the Mauza is within Kismats 2 and 4; (3) that the grant of 1736 passed the sub-foil rights; (4) that the defendants have acquired a title by adverse possession and (5) that the plaintiff is not entitled to a declaration or an injunction nor to more than two years' damages, if any.

4. In support of his first contention Mr. Sen, the learned Counsel for the appellant, relied principally on the provisions of Bengal Regulations I of 1793 and XIX of 1793. By Article VIII, Sub-clause (3) of Regulation I of 1793 it is enacted that "The Governor General in Council will impose such assessment as he may deem equitable on all lands at present alienated and paying no public revenue which have been or may be proved to be held under illegal or invalid title." He then refers to Regulation XIX of 1793, which provides "" for trying the validity of the titles of persons holding or claiming a right to hold lands exempted from the payment of revenue to Government under grants not being of the description of those termed badshahi or royal; and for determining the amount of the annual assessment to be imposed on lands so held which may be adjudged or become liable to the payment of public revenue." Reliance is placed principally on clause 2 (1), which runs as follows: "All grants for holding land exempt from the payment of revenue made previous to the 12th August 1765, the date of the Company's accession to the Diwani, by whatever authority and whether by a writing or without a writing shall be deemed valid, provided the grantee actually and bona fide obtained possession of the land so granted previous to the date above mentioned, and the land shall not have been subsequently rendered subject to the payment of revenue by the officers or the orders of Government."

If it shall be proved to the satisfaction of the Court, that the grantee did not obtain possession of the land so granted previous to the 12th August 1765, or that he did obtain possession of it prior to that date but that it has been since subjected to the payment of revenue by the officers or the orders of Government, the grant shall not be deemed valid.

5. It is contended that the grant in the present case is one of the kind contemplated by the first part of this clause and that consequently in 1793

Mauza Kapasara became a separate estate. The appellant also relies on certain certificate demands in respect of cess made direct to the Goswamis and certain receipts for payment of cesses which were paid direct by the Goswamis apparently pursuant to these demands. Now, by the patta at 1936 no rent is reserved, but this does not necessarily imply that by it a revenue free estate was granted and the circumstances seem to show that it did not grant such an estate. In order to obtain the benefit of Regulation XIX of 1793 even if the grant had been a revenue free grant, the holder would have had to register his claim u/s 24 of the Regulation and even that registration would not be proof of the right of the person registered to the property or of his title to hold the lands exempt from the payment of Government revenue (section 28). There is no affirmative evidence that Kapasara is a revenue free estate, but it is contended that the patta of 1735 entitled the Goswamis to have the estate separately assessed to revenue and that it must have been so registered as a revenue paying estate. In our opinion the grant to the Goswamis was, on the face of it, nothing more than a rent free grant which would not have entitled the Goswamis to have the Mauza registered as a separate revenue paying estate, and this view is supported by the fact that Kapasara never has been registered either as a revenue free or a revenue paying estate and that neither the Goswamis nor the appellant have ever paid revenue to Government. It is true that claims for cess have been made direct on account of Kapasara to the Goswamis, but there are many reasons why this may have been done. Kapasara is certainly a rent free tenure and under the provisions of the Cess Act, cess is ordinarily paid for rent free lands by the proprietor. By the Board's rules, however, it is provided that if "doubt exists as to the estate or tenure to which such lands appertain or if for any other valid reasons direct assessment appears desirable, the Collector may exercise his discretion in adopting the latter course," and various circumstances which may be considered valid reasons for direct assessment are enumerated. Direct payment of cess on account of rent free lands then is by no means conclusive that these rent free lands constitute a separate estate and if the Goswamis held a separate estate which paid revenue to Government, it would have been easy for them to have produced their receipts for such payments. Not a single receipt, however, has been produced. Admittedly Kapasara is not entered as a separate estate in the register of revenue paying estates and there is nothing to show that it is or ever has been a separate estate.

6. The next point is whether the plaintiff has proved that Kapasara is within the Pandra Babus" estate, that is, within Kismats 2 and 4 of Perganna Pandra. It appears that up to the time when argument in the case was being heard, Kapasara was entered in the register of revenue paying estates as within Kismats 1 and 3, which appertain to the Zemindari of the Raja of Pandra, At the time of argument this was apparently discovered and Mr. Burton made an application to the Deputy Collector to have the register corrected and the Mauza placed within Kismats 2 and 4, He apparently produced papers to show that there was a mistake in the register and notice was issued to him as manager of the Raja of

Pandra's estate to show cause why the correction should not be made. On behalf of the Raja he admitted the mistake and after the case had been gone into by the Deputy Collector and the Deputy Commissioner, the latter ordered that the change should be made. It is contended on behalf of the appellant that there was in fact no mistake and that the change was obtained by Mr. Burton for the purposes of the present case. It is abundantly clear, however, that there was a mistake. There is no dispute that the Pandra Babus are the proprietors of Kismats 2 and 4 and it is not in controversy that the predecessors-in-interest of the present Pandra Babus were Sib Narain Singh and Ananta Narain Singh. In the year 1861 Sib Narain Singh and Ananta Narain Singh, in obedience to a parwana issued by the Deputy Commissioner evidently for the purpose of preparing his registers of revenue paying and revenue free estates in accordance with Regulation VIII of 1860, filed a list of the Manzars in their Zemindari. In this list Mauza Kapasara appears. Again in 1877 apparently on account of certain disputes Sib Narain and Ananta Narain decided to divide their Zemindari and to have it recorded that each was entitled to a half, that is, that each was entitled to a 4 annas of the whole estate of Pandra. In pursuance of this agreement they prepared a list of all the Mauzas within their Kismats, and again in this list the name of Mauza Kapasara appears. It is clear then that since 1861 the proprietors of Kismats 2 and 4 have been claiming that Kapasara was within their Zemindari and there is nothing to show that it was claimed by anyone else. The Mauza was, however, not entered in the register as within Kismats 2 and 4 but it was entered within Kismats 1 and 3. This was not discovered until the trial of the present suit had almost come to an end and when it was discovered, Mr. Burton at once applied for a rectification of the register. On behalf of the Raja who was the only other interested person, he admitted the mistake and the Collector after a full enquiry made the correction asked for. It is true that Mr. Burton was manager of both the estates, but there is no reason to suppose that he was favouring the Pandra Babus at the expense of the Raja and in view of the lists of 1861 and 1877 and of the fact that the Collector after enquiry placed Kapasara within Kismats 2 and 4, we are satisfied that a genuine mistake had been made and that Kapasara is really within Kismats 2 and 4 of which the Pandra Babus are the proprietors.

7. The question of what rights passed by the patta of 1736 remains to be considered. The original patta by which the grant was made, if it is in existence at all, must be in the possession of the appellant. It has not been produced, however, and the only evidence as to the contents of the patta are two copies which were produced by the plaintiff. These were made under the following circumstances. In 1901 after Mr. Burton became manager, he called on the Goawamis, u/s 14 (a) of Act VI of 1676, to produce their title deeds. They produced a patta which was copied. This copy is Exhibit 1. Subsequently another patta was prepared for the Legal Remembrancer. This is Exhibit 1a. There are certain slight differences in the two copies but they are immaterial for the purposes of this case. Exhibit 1, which may be taken as more favourable to the

appellant and about which we have the evidence of Mr. Burton that he compared it with the original, runs as follows:

Sri Kishori Das Mahanta Goswami.

Patta in remembrance of an agreement granted by the most powerful Raja Sri Narendra Sinha and the most powerful Raja Sri Sri Bir Sinha.

This patta is executed in respect of a village. Village Kapasara in Perganna Tundi, Tappa Pandra, is given to you to perform the services of Sri Sri (sic). There is no difference of opinion as to this. We relinquish that which is customary to the country. You confer your blessing on me (us) and cultivate (jote abad) and enjoy (the same) in great felicity. To the above import the patta is granted. Dated the 17th of Asarh 1658 (Sakabda).

8. Considerable stress has been laid by Mr. Sen on the word "relinquish" in the patta, and he contends that the word indicates that not only surface but sub-soil rights were granted. We cannot accept this contention. The word "relinquish" has no special signification, and all that the sentence in which it occurs means is that the grant was of "that which is customary to the country." Now what passed by grants of this kind has been the subject of many decisions. The latest case on the point is that of Raghunath Roy Marwari v. Durga Prashad Singh 50 Ind. Cas. 849 : 23 C.W.N. 914 : 17 A.L.J. 597 : 36 M.L.J. 660 : 1 U.P.L.R. (P.C.) 43 : 26 M.L.T. 76 : 30 C.L.J. 160 : 21 Bom. L.R. 895 : 10 L.W. 347 . The case was one from the same district as the present ease, the grant was of very much the same character and the decision at which their Lordships of the Privy Council arrived was that where a Zemindar grants a tenure in lands within his Zemindari and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee. This appears to conclude the matter. In the present case it certainly does not appear by the terms of the grant that a right to the minerals is included and in our opinion no right to the sub-soil passed by the patta.

9. This brings us to the question of whether the defendants have acquired any right by adverse possession and, if so, what the extent of that right is. The evidence of adverse possession is that leases which included sub soil rights have been granted and that under some of these leases coal has been worked. The mere grant of leases which purport to grant sub-soil rights will not in itself give a title by adverse possession and what we must consider is the evidence of actual working. The evidence of working is of a very scanty description. It appears that in 18:8 half the Mauza was transferred by Hargobind Goswami to Srimati Bbaba Sundari Devi. In May 1899 the latter granted a sub-lease of the underground rights in 87 bighas to Nafar Chandra Kuer and in January 1900 a similar lease of 271/2| bighas to Hari Dass Gokuldas. She also granted small areas, varying from 5 to 25 bighas, to certain other persons between 1899 and 1905 There is no evidence that any of the latter were worked. There is evidence, however, that. Hargobind and Bhabi Sundari Devi used to dig some coal for their own use but

how much or when is not stated, and it may safely be assumed that the quantity taken by them was merely surface coal required from time to time for domestic purposes. Nafar Chandra's son Hari Prasad Kuer was called and said that from 1899 coal was being raised off and on from Kapasara and that he had quarries and inclines and that one quarry was 100 feet square and about 25 feet deep. This is all the evidence about working the mines, except such as may be gathered from certain account books put in by the defendants showing the receipt of rent and royalties and cesses from Nafar Chandra Kuer between 1389 and 1904 and again in 1911 and 1912 and a payment of Rs. 267 from Hari Das Gokuldas in 1901. The rent payable by the latter was Rs. 412 per annum whether he raised coal or not, and the only evidence of any payment by him is that up to Chaitra 1808 B.S. a sum of Rs. 267 was received for rent and cesses. It is impossible from this to draw an inference as to how much, if any, coal was worked by him. The other receipts appearing in the account books show sums received from Nafar Chandra Kuer on the dates above mentioned. According to his lease he was to pay a royalty at the rate of 3 annas 9 pies per ton of a steam coal, 2 annas per ton of rubble, 1 anna per ton of dust and 4 annas 6 pies per ton of coke and burnt coal, with a stipulation that the minimum royalty should be Rs. 100 in the second year, Rs. 200 in the third, Rs. 300 in the fourth. Rs. 400 in the fifth and Rs. 800 from the 6th year. The lease is dated the 29th May 1899. The second year would, therefore, begin in 1803. The total receipts from this tenant, as far as can be gathered from the accounts which nobody has been called to explain, would appear to be between Rs. 600 and Rs. 700 up to the end of 1901. It would appear, therefore, that during these years a certain quantity of coal had been extracted. In 1902 and 1903 sums amounting to Rs. 586 were received from the same source which would point to the same conclusion, but between the latter date and 1911 there is nothing to show in the accounts that anything was paid. In 1911 a sum of Rs. 500 was received and again in 1912 a farther sum of Rs. 540 was credited. During the latter years the minimum royalty was Rs. 800, and it is very difficult from these accounts to arrive at any conclusion as to the actual quantity of coal raised. Nobody has been called to explain them, and it would be impossible on this evidence to accept the contention of the appellant that there had been extensive working of the coal under this lease. Since 1912 there is really nothing to show that any coal has been extracted at all and so far from the evidence indicating any extensive working over a long period up to the present day as we are asked to assume by the learned Counsel for the appellant, it seems to point to the conclusion that really only a small portion of the surface coal has been taken, It is impossible to find on this evidence that any right by adverse possession has been acquired by the holder of the sub soil rights of Mauza Kapasara which has an area of about 1,000 bighas. No Indian authorities have been called to our attention on the question of how far the rights to the underground minerals can be acquired by adverse possession, but it is settled law both in England and in India that although possession of a part is constructive possession of the whole, if the whole is otherwise vacant, this constructive possession is an incident of

ownership and results from title. The doctrine of constructive possession is not applicable to a case where the occupant defends himself on the ground of his possession only without proving any title. It is likewise recognised both in India and in England that a wrongdoer's rights by adverse possession must be confined to the land of which he is in actual possession. In *Mirza Shamsheer Bahadur v. Kunj Behari Lal* 7 C.L.J. 414 : 12 C.W.N. 273 : 3 M.L.T. 212 the question was elaborately discussed. That was a case of land but the principle applies equally to mines and the decision clearly supports the principle just enunciated. The effect of the English decisions dealing with the acquisition of title to minerals by adverse possession is to the effect that where an owner of land sells it reserving to himself the mineral?, he retains possession of the minerals in the same way as if he had not sold the surface. Non user is not an abandonment of possession. Consequently no matter how long mines remain unworked by the owner, his right is not barred so long as they are not worked by some one else. The case of *Rich v. Johnson* (1740) 2 Stra. 1142 : 93 E.R. 1088 was a suit for ejectment in the case of mines. The plaintiff as lord of the manor was entitled to the mines and had been in actual possession of the manor. The defendants had been in possession of the mines for over 20 years. It was held that there having been no entry within 20 years upon the mines which were a distinct possession and might be a distinct inheritance, the Statute of Limitations was not avoided. It thus appears that there may be cases in which a title by adverse possession can be made out in respect to minerals, but it does not follow that by working a part of the minerals or opening up particular quarries possession over a continuous field of minerals or of quarries of which the portion worked forms part can be obtained. See *M'Donnell v. W'Kinty* ILR (1817) 614. Again in the case of *Ashion v. Stock* (1877) 6 Ch. D. 719 : 25 W.R. 862, where the plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance made in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent charge of 7s. 8d. and which contained a proviso that the grantee and his heirs could not dig or get coal upon the lands for sale but only such as should be burned or employed thereon and the defendant who claimed title under a demise from the descendant of the grantor had for more than 20 years worked from mines of his own on adjacent lands into the coal fields under the plaintiffs' lands, it was held that the defendant had not acquired any title to the mine by possession under the Statute of Limitation and that the plaintiffs were entitled to an injunction with an account for 6 years. Hall, V. O., in the course of his judgment in that case remarked:

I can well understand that there might be cases in which from the manner of working coal a person who began to work it and was a mere wrongdoer and trespasser might have acquired title to a certain seam or area of coal, and that by the mode of driving the levels and opening a certain area of coal there might have been possession acquired to the whole thing as a mine or as a seam of coal, and not merely to the particular quantity of coal that was actually shown and gotten. That, however, is not this case and it is not necessary for me to say

more than that such a case might exist.

10. This decision indicates how title by adverse possession might be acquired in minerals but the case there supposed is certainly not the case now before us. In the present case the utmost that can be said to have been done is that a certain quantity of surface coal has been taken, the extent of which can be gauged from the fact that in one instance a quarry about 100 feet square by 25 feet deep was dug. This, in our opinion, is mere surface working and could not give any claim by adverse possession to the whole of the coal seam or to any portion of it beyond that which has already been taken. In the recent case of the Lodna Colliery Co, v. Bepin Behary Bose 55 Ind. Cas. 113 : 1 P.L.T. 84 decided by a Division Bench of this Court on the 30th January 1920, it was held that a trespasser wrongfully working a vein of coal from an adjacent mine acquires possession only of the coal worked but cannot be said to be in possession of the mine itself. We see no reason to differ from the opinion there expressed, which is supported by the authority of Ashton v. Stock (1877) 6 Ch. D. 719 : 25 W.R. 862 and Thompson v. Hickman (1807) 1 Ch. D. 550 : 76 L.J.Ch. 254 : 96 L.T. 454 : 23 T.L.R. 311. In our opinion the defendants have acquired no right by adverse possession to anything, more than the coal already extracted.

11. The last question for consideration is to what relief the plaintiff is entitled. He has asked for 3 reliefs, (1) that it be declared that the right to the sub soil coal in Mauza Kapasara is vested solely and exclusively in the proprietors of the Pandra encumbered estate.

(2) That the defendants may be called upon to produce accurate accounts of their raisings and despatches of coal out of the sub soil of the said Mouza, during the last three years and a decree may be given to the plaintiff for the value thereof.

(3) That a permanent injunction may be issued against the defendants restraining them from working or winning or appropriating the coal from and out of the sub soil of Mauza Kapasara.

12. The plaintiff has been granted both the reliefs (1) and (3) and he has been granted a sum of Rs. 2,732-8-0 a year for three years as damages.

13. In regard to the first prayer it was contended by the appellant that a suit for a declaration is barred after six years from the time when the right to sue accrued under Article 120 of the Limitation Act and that the right to sue accrued more than six years before the institution of the suit. In our opinion this contention cannot prevail, as the appellant acquired no prescriptive right to the minerals beyond the quantity actually removed at any particular time. It follows that a fresh cause of action arose when any particular portion of the coal was removed. The defendants according to the evidence were working the coal up to within nearly three years of the institution of the suit, and it does not appear to us that the right to claim a declaration is barred. We think, however, that an injunction should not be granted. According to the findings come to the title to

the minerals of Mauza Kapasara is in the plaintiff. The defendants appear to have been under a bona fide belief that they were entitled to the sub-soil, but there is nothing to show, now that it has been established that they have no right to the sub-soil, that there is any fear that they will infringe the plaintiff's right, nor indeed is there anything to show that they have worked the coal from the estate during the last three years. If in future they continue to do so, a fresh cause of action will arise.

14. The last question is one of damages. The learned Judge awarded damages for the three years preceding the suit and on the defendants failing to produce any accounts he assessed the damages at Rs. 2,732-8-0 a year, on the ground that this sum was realised by the defendant No. 3, the heir of Bhaba Sundari Devi, under the subleases granted by that lady. This, however, does not appear to us to be any criterion of the actual damage suffered by the plaintiff. It is for him to show that coal has been raised during the period for which he claims damages. The only evidence on this point is that since 1889 coal has been raised from Kapasara off and on but as already pointed out. there is nothing to show that during the three years preceding the "suit any coal at all has been taken. The plaint was filed on the 27th September 1915. The last payment of rent or royalty according to the accounts produced was on the 21st March 1912 and as the plaintiff has failed to show that any coal has been appropriated by the defendants since that date, in our opinion he has failed to establish his right to damages. It is, therefore, unnecessary for us to determine the question whether the limitation period is three years under Article 48 or Article 49 as the respondents contend or two years under Article 36 according to the contention of the appellant.

15. In the result the decree of the learned Subordinate Judge must be varied and in lieu thereof it will be decreed and declared that the right to the sub-soil in Mauza Kapasara is vested solely and exclusively in the proprietors of the Pandra encumbered estate, Kismats 2 and 4, Collectorate Tauzi Nos. 22 and 24, and at present in the duly notified manager thereof and that the defendants have no right to work or appropriate the coal lying in the sub-soil of the said Mauza. The plaintiff is entitled to half his costs in the Court below and each party will bear their own costs of this appeal.