

(1940) 08 PAT CK 0008
In the Patna High Court

Kusum Kamini Debya

APPELLANT

Vs

Raja Jagdish Chandra Deo Dhabal Deb and Another

RESPONDENT

Date of Decision : 16-08-1940

Acts Referred:

Transfer of Property Act, 1882 — Section 108, 108(o)

Citation : AIR 1941 Patna 13

Hon'ble Judges : Harries, C.J.; Fazl Ali, J

Bench : Full Bench

Judgement

Harries, C.J.—This is a Letters Patent appeal from a judgment of Wort J., reversing concurrent decrees of the Courts below dismissing the plaintiff's claim.

2. The plaintiff was a zamindar and proprietor of the Dhalbhum estate of which mauza Gopalpur forms a part. By a patta dated 3rd Ashar 1290, B.S., the plaintiff's predecessor-in-interest leased mauza Gopalpur to the father of defendant 2. The lease provided for the payment of rent and appears to have been a permanent one. According to the plaintiff, defendant 2 had permitted defendant 1 to dig quartz stone from the land in Gopalpur, and after breaking up the stone to sell the same as ballast.

3. The plaintiff contended that neither defendant 2 nor defendant 1 had any right to this stone, which was the property of the plaintiff. Accordingly he brought the suit out of which this appeal arises, claiming a declaration that the defendants were not entitled to the stone in question, an injunction restraining them from digging, collecting or disposing of the stone and damages in respect of the stone already disposed of. The defendants by their written statement claimed the right to dig, collect and dispose of this stone and contended that their acts were not in contravention of the terms of lease but were in accordance with the rights created thereby.

4. The learned Munsif came to the conclusion that no quartz had actually been quarried and that all that had been done was the collection of quartz lying on the

surface of the land and disposal, of the same. The learned Munsif also came to the conclusion that this quartz was not a mineral and that defendant 2 as the lessee had a right to collect all quartz lying on the surface and dispose of the same. He therefore dismissed the plaintiff's suit in its entirety. On appeal the learned Subordinate Judge did not think it necessary to decide whether quartz was or was not a mineral.

5. In his view, the defendants were entitled to collect the surface quartz and dispose of the same. In second appeal to this Court, Wort, J., held that the defendants were only entitled to the user of the surface of this land and that the lease gave the lessee no property whatsoever in the soil or in stones lying on the surface. He thought it unnecessary to find whether the quartz stones were minerals. He held that the defendants had no right whatsoever to dispose of these quartz stones even if they were not minerals and he accordingly reversed the decisions of the Courts below and decreed the plaintiff's claim.

6. It has been strongly urged before this Court in this Letters Patent appeal that the decision of Wort, J., is erroneous and contrary to authorities of this and other Courts. All the Courts below have held that the lease in question was not an agricultural lease but was a lease governed by the Transfer of Property Act. This was conceded by the plaintiff in the Court of the learned Munsif, but in the Court of the Subordinate Judge an attempt was made to show that the lease was a purely agricultural one. The learned Subordinate Judge appears to have thought "that the terms of the lease were somewhat ambiguous and therefore that he was entitled to look to the conduct of the parties to assist him in construing the lease.

7. He came to the same conclusion as the learned Munsif that the lease was not a purely agricultural one but one governed by the Transfer of Property Act. The same view was taken by Wort J., and having regard to the course of these proceedings in the Courts below I do not think that the decision of the three Courts can now be questioned in this appeal. The decisions on this point were never seriously challenged and therefore this case must be decided upon the assumption that the lease in question is one governed by the Transfer of Property Act.

8. At one time the Courts in India were inclined to hold that lessees under certain leases not governed by the Transfer of Property Act were entitled to minerals. In short, the view appears to have been that these lessees had some proprietary interest in the land actually leased to them. However, the matter has now been set at rest by two decisions of their Lordships of the Privy Council.

9. In *Bejoy Singh v. Surendra Narain* AIR 1928 P.C. 234 a zamindar granted a patni lease of his zamindari lands including all interest therein, and jalkar, bankar, falkar, beels and jhils at an annual jama The document; was described therein as a "mofussil patni taluk lease according to Reg. 8 of 1819," and contained stipulations that the grantee should not cut trees or excavate a tank.

Their Lordships held, reversing the decision of the Calcutta High Court, that the terms of the grant showed that there was no transfer of the property in the soil, the intention being that that patnidar should be a leaseholder only; consequently that he and those claiming under him were not entitled to excavate the soil for the purpose of making bricks.

10. A similar decision is the case in AIR 1931 162 (Privy Council) . In that case a zamindar sued for a declaration of his subsoil rights in land held from him under patni grants and for damages; the patni grants did not convey the subsoil rights. Beneath a stratum of stones and gravel used for road making the land contained a fairly well defined stratum of valuable ochre. For over twelve years before suit, the defendant darpatnidars had been removing the stones and gravel by pits sunk all over the land; some ochreous earth was removed with the stones and gravel but merely as a waste product. The ochre had first been worked within twelve years under leases granted by the darpatnidars, the right to the stones and gravel being thereby reserved.

11. It was held that patni tenures, generally, were on the same footing as regards subsoil rights as other permanent, heritable and transferable tenures created by a zamindar, that is to say, the subsoil rights pass to the patnidar only when granted in express terms; general vernacular words signifying "with all rights" were insufficient for that purpose.

12. From these two cases it is clear that apart from statute a lease which does not in terms give to the lessee rights in the subsoil gives the latter no proprietary right in the soil. The present lease however is governed by the Transfer of Property Act, but in my view that Act does not give the tenant any proprietary right in the subsoil. The rights of the tenant under a lease governed by the Transfer of Property Act are laid down in Section 108(o) of that Act, which is in these terms:

The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.

13. This Sub-section makes it clear that the lessee can use the property and its products as a person of ordinary prudence would use them if they were his own; but he cannot use or permit any other person to use the property for a purpose other than that for which it was leased. The Sub-section then goes on to provide that he cannot cut down or sell timber, work mines or quarries not open when the lease was granted, pull down buildings or do any act which would be destructive or permanently injurious to the property. He has no rights in minerals underlying the soil and his rights are confined to a reasonable user of the soil for the purposes for which the property was leased.

14. It has been held in the present case that the property was leased for the purposes of cultivation and settling tenants thereon. Is the digging of quartz or the collection of surface stones, whether minerals or not, and disposal thereof a purpose other than that for which the property was leased? In my view it is unnecessary to decide whether surface quartz is a mineral.

15. In my view there is nothing in the present lease to suggest that the lessee was to have any proprietary right in the soil. He could use the soil for the purposes of cultivation or for settling tenants thereon. If the lease gave him no proprietary interest in the soil, then in my view he could not dispose of the soil or anything which could be legitimately considered as part of the soil. Clearly he could not dig or quarry these quartz stones, because no quarries or mines were opened on this land when it was originally leased. The defendants have claimed such a right in their written statements, and in my view they can have no such right.

16. The two Courts of fact, however, have held that no quartz were quarried or dug on the soil but only quartz lying on the surface was collected and sold. Does the lease give the tenant such rights? The surface stones really form part of the surface soil. Stones lying loose on the surface have either been turned up by ploughing or other agricultural activities or have been left exposed as the result of the elements. When they are left loose and exposed on the surface they must still, in my view, be regarded as part of the subsoil. They form part of the property leased and unless the lease gives the tenant proprietary rights in the subject-matter of the lease the property in the surface stones cannot possibly pass to him.

17. All that Section 108(o), T.P. Act, gives to the lessee is a right to use the soil and its products as a person of ordinary prudence would use them if they were his own. The lessee could use these stones or the soil on the surface as a person of ordinary prudence would use them; but collecting them and selling them to others is something more than user. It is an act which can only be done by a person who has rights greater than mere rights of user. Collecting and selling these stones is an act of a person entitled to the property in the stones.

18. In my judgment the present lessees had no such property in these stones and therefore had no right to sell them. They could, however, use the stones and use the property for the purpose for which the property was left. If the presence of these stones interfered with good husbandry, the tenant could, in my view, collect the stones and remove them to some place on the land where they did not so interfere with agricultural operations. He could use the stones for purposes for which the land was leased; but he could not use them for any purpose other than that for which the land was leased. At most his only right in these stones was a right of user. He had no right to sell them as an owner. This was the view of Wort J., and in my judgment it is the correct view.

19. A different view was taken by the Calcutta High Court in *Gandoo Mahata v.*

Nilmonee Singh 1 C.L.J. 526. It is to be observed, however, that this was a decision given previous to the Privy Council cases to which I have referred. Further, the point now under consideration was not the main point in the case. It was only incidentally that the question of the right to the ghooting or inferior lime stone found on the surface came to be considered. In that case it appears to have been admitted that this ghooting or inferior lime stone could not be regarded as a mineral within the reservation of mines etc., and that the reservation did not prevent the tenant from removing this material from the surface of the land. In fact, the point which now falls for decision was practically conceded in that case.

20. There is also a Single Judge decision of this Court in *Ras Behari v. Jagadish Chandra Deb* AIR 1936 Pat. 111 to the same effect. In that case it was held that a lessee is entitled to use the surface and to take what he finds on the surface. It was a case of an agricultural lease, and, Rowland J., held that the lessee was entitled to collect and remove ghooting stone found on the surface although he was not entitled to dig and quarry for it. Rowland J., appears to have thought that this ghooting and lime stone lying on the surface could not properly be regarded as a mineral and therefore the property in it passed to the tenant under the lease. He, however, did not consider the general question whether a proprietary interest of any kind in the property leased passed to the tenant unless the terms of the lease so provided. In my view the decision of Rowland J., cannot be reconciled with the principles laid down by their Lordships of the Privy Council in the earlier cases to which I have referred. Those cases were not referred to or considered by the learned Judge.

21. The rights of a tenant in England under a lease in which mines and minerals have been excepted admit of no doubt. The tenant has the right to use the subsoil, but he has no right to dig and dispose of it. This has been the law from early times, and in Co. Lit. 53 (b) it is laid down:

Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is wast; but the tenant may dig for gravell or clay of the reparation of the house, as well as he may take convenient timber trees.

22. In *In re Purmanandas Jeewandas* 7 Bom. 109. Latham J. held that the rule as enunciated in Co. Lit. 53(b) was also the law in India. In that case a lease did not expressly give the tenant the right to remove the soil, and the learned Judge held that the tenant had no right to remove soil and stones from the land.

23. In *Tucker v. Linger* (1882) 21 Ch. D 18 a point very similar to the one now under consideration fell to be decided by the English Courts. In that case a tenant by an agreement for a lease agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brick-earth and gravel pits." The farm was in a district where

large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases. It was held by Kay J., that such a custom was reasonable and good and that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of the right of collecting and selling these flints.

24. The decision of Kay J., was upheld by the Court of Appeal and by the House of Lords in *Tucker v. Linger* (1883) 8 A.C. 508. The decision of that case turned upon whether a custom entitling the tenants to collect and sell these flints was a reasonable one and whether it conflicted with the express terms of the agreement to lease. All the Courts were of opinion that the custom was a reasonable one, and that it was not in any way in conflict with the term "reserved to the landlord all mines and minerals, sand quarries of stone, etc." It is to be observed that in this case the tenant's right was based entirely on custom and nowhere in the judgments of the trial Court, Court of Appeal or the House of Lords is it even faintly suggested that quite apart from custom a tenant had a proprietary right in surface stones and could dispose of the same.

25. The decisions of all the Courts proceed upon the basis that proof of a custom was necessary to entitle the tenant to sell these stones. From this case it is clear that in England at least, apart from custom, a tenant who is not entitled to mines, minerals, quarries, etc., has no proprietary right in surface stones and is not entitled to sell them.

26. Another English case was referred to in argument, *Elwes v. Brigg Gas Co.* (1886) 33 Ch. D 562, and it was suggested that certain observations of Chitty J. in that case suggested that a lessee did have a proprietary interest in the soil. In that case a small plot of land was demised to a gas company for ninety-nine years, with a reservation to the lessor of all mines and minerals, and covenants under which the lessees were authorized, under the inspection of the lessor's surveyor and according to plans to be previously approved, to erect a gas-holder and other buildings. In the course of excavation a pre-historic boat was discovered embedded in the soil six feet below the surface, and the lessors claimed this boat.

27. It was held that whether the boat was regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, it did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease. In that case Chitty J., was of opinion that the lessees had certain rights to remove and dispose of the soil, though he does not hold that the lessees had any right to sell the soil. He so held because to give effect to the terms of the lease some such permission had to be implied. At p. 569 he observed:

The defendants discovered the boat in making these excavations pursuant to the plans. The lease did not give any license to make the excavations, but the approval of the plans was equivalent in law to a license to make the excavations. The plans however are silent as to what is to be done with the soil excavated. In the circumstances some permission ought to be implied as to the removal and disposal of what might be excavated. The question is as to the extent of this implied permission. As against the lessors the permission ought not to be carried beyond what may be reasonably inferred to have been the intention of the parties. The excavations were to be made to a depth of fifteen feet; obviously it was not the intention of the parties that the soil excavated should be piled up on other parts of the small plot of ground comprised in the lease. The implied permission to remove and dispose ought then to extend to what the parties might fairly deemed to have contemplated would be found in making the excavations; but beyond this point it ought not to be carried.

28. It has been urged that this case is authority for the proposition that a tenant has an interest in the soil; but it appears to me that Chitty J.'s observations are authority to the contrary. On the particular facts of that case the learned Judge held that some permission to remove and dispose of the soil should be implied. If a tenant had a common law right to dispose of soil, it would have been wholly unnecessary for the learned Judge to consider the terms of the lease in order to ascertain whether some permission to remove and dispose of the soil could be inferred. The rights and obligations of the lessor and lessee created by Section 108, T.P. Act, are in many ways similar to those of a lessor and lessee under the usual form of English lease, and it is for that reason and that reason only that I have referred to these English cases. They can in no way be regarded as authorities, but they are of some assistance in arriving at a conclusion as to the rights of a tenant in India in the soil of land leased to him.

29. In my judgment having regard to the decisions of their Lordships of the Privy Council and the provisions of Section 108, T.P. Act, I am bound to hold that the lessee under a lease such as the one existing in this case, has only a reasonable right of user in the soil and has no proprietary interest therein or in anything which forms part of the soil. These surface stones did, in my view, form part of the soil, and that being so, they could not be sold to third parties. It may be that a right of collection and disposal of surface stones can be established by custom. Custom however was not pleaded in this case, and therefore the point does not arise. If tenants could show that for a long period of time they had been accustomed to collect and sell surface stones for ballast, it might well be that they could establish a right so to do.

30. For the reasons which I have given, I am satisfied that the decision of Wort J., was right and must be upheld. As the defendants in their written statement had asserted that they had a right not only to collect and sell surface stones but also to dig and dispose of quartz embedded in the ground the plaintiff was in my view entitled to the declaration, injunction and damages as claimed. His suit was

decreed by Wort J., in its entirety and, in my view, rightly.

31. This appeal therefore fails and I would dismiss it with costs.

Fazl Ali J.

I agree.