

(1952) 09 CAL CK 0015
In the Calcutta High Court
Case No : A.F.O.D. No. 162 of 1949

Lodna Colliery Co. (1920) Ltd.	Vs	APPELLANT
Bholanath Rai and Others	 	Bholanath Rai and Others
Vs Lodna Colliery Co. (1920) Ltd.		RESPONDENT

Date of Decision : 11-09-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 7
Evidence Act, 1872 — Section 32, 32(2)
Limitation Act, 1908 — Article 144, 48

Citation : AIR 1954 Cal 233 : 58 CWN 227

Hon'ble Judges : R.P. Mookerjee, J; Lahiri, J

Bench : Division Bench

Advocate : Atul Chandra Gupta, Pannalal Chatterjee and Chandra Narayan Laik, for the Appellant; N.C. Sen Gupta, Jagadish Chandra Ghosh and Satya Priya Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Mookerjee, J.—The plaintiffs respondents filed the suit out of which this appeal arises for damages for coal wrongfully taken away by the defendant company from underneath the lands belonging to the plaintiffs and for coal rendered unworkable and for other reliefs.

The plaintiffs claim that they are the owners of certain plots which form Touzi No. 2597 of the Burdwan Collectorate. These plots are situate within Lot Sripur within which lands of different Touzis are included.

2. Lands covering an area of 6000 bighas appertaining to touzi No. 12 of the Burdwan Collectorate and situate within Lot Sripur were taken in Patni right in 1907 by one Pran Krishna Chatterjee. In 1911 Pran Krishna gave a prospecting lease in favour of the Lodna Colliery Co., Ltd., the predecessors of the present defendant the Lodna Colliery Co. (1920) Ltd. Shortly thereafter Pran Krishna also obtained from the Zemindar, the Maharaja of Burdwan, rights to the minerals

under the same property. Thus Frankrishna became the undisputed owner of the underground right in 6000 bighas in Lot Sripur appertaining to touzi No. 12. Pran Krishna subsequently leased out the underground rights to the defendant company an additional area of 541 bighas. Under subsequent transactions Pran Krishna sold his underground rights to the defendant company in respect of the entire 6541 bighas. The defendant company began working the mines in Lot Sripur.

3. The plaintiffs alleged that the different plots appertaining to touzi No. 2597 of which they were the owners had been trespassed upon by the defendant company without the knowledge of the plaintiffs by running the galleries from the defendants' lands into those owned by the plaintiffs. It was in the month of Sraban 1348 B. S., i. e. July-August 1941 that the plaintiffs came to know for the first time of such wrongful acts on the part of the defendants. Their attention was drawn by subsidences on the surface of their own land. Hence they claim damages for coal wrongfully taken away by the defendants from underneath the plaintiffs' plot and for having rendered unworkable a quantity of coal which had been left and for compensation under other heads. The suit was filed on the 22-7-1943 within three years of the alleged date of knowledge.

4. The defendant company contested the plaintiffs' claim on various grounds. It is not necessary to refer in detail to all of them as only three points have been urged before us on behalf of the defendant company who are the appellants before us.

5. It is contended that the plaintiffs must at the outset prove their title to the underground minerals. Lands claimed by the plaintiffs are situate within touzi No. 2597 which had been formed into a new touzi after an invalid Lakheraj had been resumed. The settlement of lands forming an invalid Lakheraj does not vest the settlement holders with the proprietary rights over the underground minerals as such lands were at the time of the decennial settlement excluded from settlement.

6. Secondly that even if the plaintiffs had any right to the underground minerals such right had been lost by adverse possession and the defendant company had obtained before the filing of the suit title to the properties in suit.

7. Lastly it is contended that even if the plaintiffs prove their title to the minerals the present claim of the plaintiffs is barred by limitation as the extraction of coal alleged by the plaintiffs as the cause of action for the suit had been done long before three years before the filing of the suit. Further, one of the plaintiffs was serving under the defendant company in a responsible position, for underground work in the mines of Lot Sripur and otherwise also the plaintiffs were fully cognisant of the fact that the defendant company had been extending the mines beyond the limits of the company's property and that they had trespassed into underneath the plaintiff's property,

8. The learned Subordinate Judge has found against the defendant company on

all the points and has decreed the plaintiffs' suit in a preliminary form. Accounts have been directed to be taken in accordance with the directions given in the judgment. The plaintiffs' claim in respect of some of the plots in suit has been disallowed on the ground that no coal had been proved to have been extracted within three years of the filing of the plaint or of the alleged date of knowledge.

9. On the question of the plaintiffs' title Mr. Gupta appearing on behalf of the defendant company does not question that the plaintiffs had touzi No. 2597 of the Burdwan Collectorate settled with them. The only question raised, is that even on proof of a settlement from Government after resumption of an invalid Lakheraj the settlement holders did, not become entitled to the mineral rights as they were not proprietors of the soil as in the case of Zamindars obtaining permanent Settlement under the Decennial and Permanent Settlement Regulations.

10. The learned Subordinate Judge decided this issue in favour of the plaintiffs relying on an unreported Bench decision of this Court in --A. F. O. D. Nos. 181 and 253 of 1939, D/- 3-8-1942 (Cal) (A). The certified copy of that judgment was marked as Ex. 12 in this case. Mr. Gupta appearing on behalf of the defendant company argued that there was no proper consideration of this point in Ex. 12, and made an attempt to convince us with reference to the relevant provisions of the Regulations that the holders of invalid Lakheraj lands after resumption and on permanent settlement of those lands with them they do not become proprietors of lands like the Zemindars of mal lands under the Decennial Settlement Regulations.

11. The question whether any rights in favour of the Zemindars to the minerals were confirmed or conferred by the Permanent Settlement of 1793 has been considered in a long series of decisions by the Judicial Committee. The disputes were, however, between the Zemindars on the one hand and either the permanent tenure-holders holding under the Zemindar or the holders of Ghatwali, thanadari or lakheraj lands on the other. There is no decision in favour of the Zemindar in a direct contest between the State on the one hand and the Zemindars on the other.

12. Sarada Charan Mitter in his Tagore Law Lectures on the Land Laws of Bengal observed : "I think a person holding under a permanent lease in which there is no reversion to the landlord has right to open mines and if he does so, his act, unless there is a covenant to the contrary, does not amount to legal waste. When the lease is granted by a proprietor not for a specified purpose, and he reserves only the right to receive quit rent in perpetuity, such an use of the land cannot affect him.... prima facie, the owner of the service is entitled "ex jure naturae" to anything beneath or within it."

13. Field in his Introduction to the Bengal Regulations (p. 36) says :

"The Zemindar can grant lease either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his Zemindary, and the rights to mining,

fishing and other incorporeal rights are included in his proprietorship."

14. The Judicial Committee in -- "Hari Narayan Singh. v. Sriram Chakravarti 37 Ind App 136 (PC) (B) came to the conclusion that the zemindar must be presumed to be the owner of the underground rights in the absence of evidence that he ever parted with them. Lord Collins interpreted the views expressed by Pieid as supporting the contention that merely because a permanent lease had been granted by the Zemindar that would not "be a presumptive evidence of his having parted his property in the minerals. The opinion expressed by Sarada Charan Mitter was not accepted. It may however be pointed out that the property which was the subject-matter of that suit was a small plot of land and the learned Subordinate Judge had inferred from the smallness of the jama fixed that only the service rights and nothing more were intended to pass.

15. In the next case before the Judicial Committee -- "Durga Prasad Singh v. Braja Nath, Bose" 39 Ind App 133 (PC) (C) the Zemindar of a permanently settled estate was declared to be entitled to the minerals underlying the Mouzas within its ambit against the defendant who was in possession as a Digwari tenure holder. No attempt had been made in that case to prove that the mineral rights in dispute had been specifically vested in the Digwar before or at the time of the Permanent Settlement if the lands were then held on a Digwari tenure which seemed more than doubtful. Nor was there any evidence tending to show or to suggest that the Zemindar ever parted with his mineral rights to the Dig-wars. Following the reasons given by the Board in -- "37 Ind App 136 (PC) (B) it was repeated that in the absence of definite proof that the Zamindari had parted with the mineral rights it must be presumed that such rights continued to remain in the Zemindar. An objection had been raised in this case that the Government ought to have been made a party to the suit and that in the absence of Government the suit was defective. This objection was however overruled by the Judicial Committee with the observation that "the Government is not a necessary or proper party to the suit. Apparently the Government does not claim the minerals under permanent settled estates. However that may be, the Government has never claimed the minerals under the two Mouzas or either of them, or put forward any claim inconsistent with the rights now asserted by the Zemindar. The rights of the Government whatever they may be, will not be prejudiced or affected by the result of a suit to which it is not a party."

16. In -- "Shashi Bhusan Misra v. Jyoti Pra-sad Singh Deo AIR 1916 PC 191 (D) the Pachet Zemindar claimed rights to the minerals in a village held under talabi brahmattar rights from a date before the Permanent Settlement. On a consideration of the provisions of the Regulations Buckmaster L. C., came to the conclusion that

"By the Permanent Settlement of 1793 all the mineral rights were confirmed to the zemindars, and the first respondent to this appeal represents their interest in the estate. If such rights were already possessed and recognised at the date of the settlement this confirmation would hardly have been needed and this

suggests that up to that date the rights enjoyed and granted in the lands were not considered as including the minerals; if this were so, as the grant in question could have created no rights in the property which the grantor did not possess, no right to the minerals could have been confirmed".

17. The observations in the two earlier cases as regards the test to be applied for determining whether the Zemindar has conveyed to the tenure holders the rights to the minerals were repeated, and it was again held that in the absence of express evidence conveying rights to the minerals proof of a grant by the Zemindar of a permanent heritable and transferable tenure at a fixed rent the minerals would not be held to form a part of the grant.

18. In -- "Giridhari Singh v. Meghlal Pandey" AIR 1917 PC 163 (E) the additional facts which were considered by the Court were that in a mo-krari lease of lands the use of the expression "Mai hak hakuk" (with all rights) was held not to carry a right to the subjacent minerals. The Judicial Committee insisted on clear and direct reference to the minerals being necessary in the engagement by the Zemindar to prove transfer of rights to minerals to a permanent tenure holder.

19. In -- AIR 1926 41 (Privy Council) (F) the Zemindar sued claiming three villages as being included in his permanently settled estate and though they were in the occupation of Digwars since before the Permanent Settlement he was the owner of the subjacent minerals.

20. In this case the Crown was one of the party defendants. The District Judge who had tried the case initially had held that the lands in suit did not form part of the Zemindary and that further the right to the minerals remained in the Crown. The High Court reversed the decision and found on the evidence that the Digwari tenures had been created by the Patchet Raj, the lands were either thanadari land within the meaning of Clause 4 of Section 8 of Bengal Regulations No. 1 of 1793 or "other chakran lands" within Section 41 of Bengal Regulations 8 of 1793. The lands being Thanadari ones, the Zemindar was entitled to possession, of the same on their resumption by Government, subject to payment of separate revenue, but so long such mouzas are not resumed the plaintiff is not entitled to any rent or compensation for use and occupation. With regard to the minerals the conclusion arrived at was that at the Permanent Settlement the right of the Crown in minerals was parted, with and that the Digwars holding as Chakran. could not have a right to the minerals; the right to the minerals is in the Zemindar. On appeal to the Judicial Committee the decision of the High Court was reversed and it was held that the lands were not included in the permanently settled estate.

An attempt was made to argue before the Judicial Committee that the Regulations recognised a preexisting title in the Zemindar and did not confer new rights by the settlement, and that the villages even if not thanadari lands, might be the Zemindar's property though not included in the permanent Settlement. This was not allowed to be canvassed as such an argument had not been

presented before or sifted by the Courts in India. No decision was given whether the title to the minerals underlying a permanently settled estate is in the Zemindar.

21. The prevailing view therefore may be stated to be that as a result of the settlement made by the East India Company under the Decennial Settlement Regulations the rights to the subjacent minerals under such lands were in the Zemindars. Though there is no direct decision on this point in a dispute as between the Government on the one hand and the Zemindar on the other, the fact remains that during the long period of over a century and a half Government did not attempt to claim such rights or force a direct issue about this as against the Zemindars, although they were fully cognisant about the claims by the Zemindars and the recognition thereof by the Courts.

22. We shall now examine the relevant provisions of the Regulations to ascertain whether the Zemindars were, when the Decennial Settlement, were effected, given any rights over the lands claimed as Lakherajes though situate within the geographical ambit of their Zamindaries.

23. Section 36 of the Regulation 8 of 1793 provides :

"the assessment is also to be fixed exclusive, and independent of all existing lakheraj lands, whether exempted from the Khiraj or public revenue with or without the authority".

24. The clear and unambiguous language used, in this section unmistakably excludes lands in the possession of all lakherajdars irrespective of the fact whether such lakherajes were to be subsequently found to be valid or invalid lakherajes. In the words of the Judicial Committee in --"Ranjit Singh v. Sm. Kalidasi Debi" AIR 1917 PC 8 (G) :

"Such lands are therefore in effect withdrawn from the settlement, and the Zemindar, though these lands might be locally situate within his district, could claim no title therein by virtue of the settlement".

25. The provisions in Section 35 of Regulation 8 of 1793 therefore only excludes lands which were claimed at the time of the Decennial Settlement as lakheraj from the Decennial Settlement. The right of the holders of such lakherajes are not described or enunciated in this Regulation.

26. Reference has next to be made to the provisions contained in Regulation 19 of 1793 generally known as the Lakheraj Regulation. The preamble to this Regulation describes the circumstances under which the various holders of alleged lakherajes obtained possession of tenures claimed to be exempt from payment of revenue. The narration in the preamble attempts to justify the differentiation made in the provisions which follow between-

(1) grants made previous to 12-3-1765, the date of the Company's accession to the Diwani by whatever authority, and whether by writing or otherwise which are

to be recognised as valid lakherajes subject to certain conditions (Section 2), and, (2) grants exempted from payment of revenue made after 12-8-1765 but previous to 1-12-1790 which had not been confirmed by Government or by any officer empowered to confirm them which are declared invalid (Section 3(1)).

27. Section 4 of the Regulation lays down that the proprietary rights in lands settled before the 1-12-1790 but adjudged liable to the payment of revenue as being invalid Lakherajes, proprietary rights are to be determined by the Sadar Diwani Adalat.

28. For a proper appreciation of the nature of the rights of those who claimed to be lakherajdars and the effect of resumption we have to refer to the provisions contained in Regulations 19 of 1793 and 37 of 1793 as they originally stood when passed. Some of the provisions which were rescinded later on as by Regulation 8 of 1800 and Regulation 2 of 1819 throw some light as to what was intended in 1793.

29. A careful examination of these two Regulations leave no room for doubt that holders of the Lakherajes were treated as proprietors of the lands, held by them, subject to assessment of revenue if the claim to hold free of revenue was not sustained. Reference may in this connection be made to Ss. 2, 4, 5, 8, 14 and 26 of the Regulation 19 of 1793.

30. Section 4 of Regulation 37 of 1793 makes a clear enunciation of the restricted nature of the rights of the Government as retained by this Regulation.

"4. It is to be understood that this regulation respects only this Government proportion of the revenue arising from lands held or claimed to be held under bashahee grants and whether Government is entitled to resume or retain such revenue, or otherwise".

31. In the case of escheated grants Section 5 makes it clear that the Collector "is immediately to attach the revenue of the lands" in the following terms : "5. When a jaghire or other life grant shall escheat to Government, the Collector is immediately to attach the revenue of the lands, and report the circumstances to the Board of Revenue, who are to obtain the orders of the Governor General in Council, regarding the resumption of the grant."

32. Section 8 of the same Regulation, as it stood before being rescinded by Clause 2 of Section 2 of Regulation 2 of 1819 provided for the commission to be received by the Collector on the permanent jama of lands included in the grants resumed in consequence of suits prosecuted by them to a final decision.

33. u/s 14 of the same Regulation, as it stood before it was rescinded by CL 2 of Section 2 of Regulation 2 of 1819, it was provided that even "where a grant might be adjudged invalid" the lands would be--,

"subjected to the payment of revenue, the former holder of the grant shall not be required to refund any part of the collections which he might have made from

the lands previous to the date". Adjudging the lands to be subject to the payment of revenue the holders of the resumed grant are considered to be proprietors of the land subject to the payment of revenue only.

34. The provisions contained in Section 20 of Regulation 37 of 1793, referring to the registers to be maintained, also furnish some clue as to what the intention then was.

35. It must, therefore, be held that the lands claimed as Lakheraj at the time of the Permanent Settlement were excluded from such settlement and the Zemindars within the ambit of whose zemindary such lands were situate were not vested with any proprietary right over such lands. The holders of Lakheraj lands, even though they were resumed subsequently as invalid Lakherajes, were proprietors of the soil from before and continued to be such proprietors in the same right as the Zemindar were over Mal lands included under the Decennial Settlement. Settlement of revenue after resumption confirm the proprietary right of the quandum Lakherajdars over the resumed lakherajes and they become entitled to both the surface and the subsoil rights. The settlement of revenue did not affect their rights which were presumed to be in them from before resumption.

35. The plaintiff therefore must be held to be entitled to the surface and subsoil rights on the basis of the permanent settlement of the lands with them after resumption.

37. Before we deal with the question of limitation or adverse possession it is necessary to refer to certain other facts. Touzi No. 2597 claimed by the plaintiff is included within three Khatians. 18 plots (Nos. 569 to 590) are within Khatian 611 and lie to the west of Mouza Sripur and would be described hereafter as the western plot Two C.S. plots are included within the sub-khatian 612 and is situate on the south of the said Mouza. This would be described hereafter as the southern block. Six C. S. plots are within sub-khatian 613 and lie in the north eastern corner of the Mouza and will be described as the eastern block.

38. The working plan produced by the defendant company and accepted, by the plaintiff taken along with the evidence of the officers examined on behalf of the company proved that extraction of coal from the eastern block began in 1934 and the entire quantity was completely extracted by 1939. Work in the southern block began in 1932 and is admittedly still continuing. So far as the north eastern block is concerned extraction of coal was abandoned by 1929.

39. The cause of action for the damages done in all the cases took place except in the case of the southern block long before three years before the suit was filed in July 1943. The plaintiff claims the right to sue for damages for conversion of coal extracted from coal field -- AIR 1929 69 (Privy Council) (H) and -- " AIR 1930 113 (Privy Council) and the suit for damages or conversion of such specific moveable property is governed by Article 48, Limitation Act irrespective of the consideration whether such conversion was dishonest or acci-dental. The

limitation of 3 years provided under Article 48 begins to run when the person having the right to possession of the property first learnt in whose possession it is. The onus is upon the plaintiff to prove that their knowledge of conversion was within three years of the suit -- "Kalyani Prasad Singh v. Borrea Coal Co. Ltd." AIR 1946 Cal 123 (J).

40. It is for the plaintiff to discharge that onus. It was alleged in the plaint that in the month of Sravan 1348 B. S. a portion of the lands in suit subsided and this led the plaintiff to enquire into the matter and on enquiry they came to know for the first time that the defendant company had stealthily gone beyond its boundary and without the knowledge and consent of the plaintiff cut away a large quantity of coal from the underground of the lands in suit and wrongfully converted the same. This averment was contradicted by the defendant in the written statement.

It was claimed that no portion of the lands in suit had subsided. It was not true that the plaintiffs came to know for the first time in Sraban 1348 that the defendant had cut and raised coal from the said lands. They as a matter of fact knew of it more than 12 years ago. No steps were taken by either of the parties for holding any local investigation.

41. About six years after the filing of the suit and two days before the actual hearing commenced the defendant company filed a petition on 15-3-1949 for holding a local inspection by the Court to see whether certain boundary pillars had been removed from the lands in question. The defendant alleged that there had been certain boundary pillars on the site and they had just before the application had been made come to know that such pillars had been removed. The learned Subordinate Judge refused the prayer as the existence of the pillars and their alleged removal could be proved by evidence in Court. Three days later when the hearing was proceeding another application was filed by the defendant for local inspection by the Court. This prayer also was refused. The defendant claimed that there were pillars on the boundary between Mouza Sripur and another contiguous Mouza Hariharpur and on another side of the said Mouza Sripur and Chak Brindabanpur. He rightly held that it was not a matter for local inspection under Order 39, Rule 7, Civil P. C. but was a matter for local investigation under Rule 9 of Order 26 of the Code.

42. Before the actual site of the pillars could be located and the facts ascertained whether they were on the boundary lines of the Mouzas above mentioned, one must be satisfied as to the boundary lines of the different mouzas. This could be done only after a relay of the cadastral survey and/ or of the Revenue survey maps. Reference was made in this subsequent petition by the defendants to the allegations made by the plaintiffs about subsidence or their plots. No reference however was made in the Court's order to the plots which had subsided for the simple reason that when ascertaining the correct boundaries of the mouzas it could not be definitely stated whether subsidence if at all, was within the defendant's boundary or beyond it. In any case the application for local

inspection was made too late and the Court rightly proceeded to discuss the evidence as adduced to determine the issues in the case.

43. We shall therefore proceed now to consider the evidence as to whether the plaintiffs discharged the onus which lies heavily upon them to show that they had no knowledge of the extraction of the coal earlier than as alleged in the plaint. This point has to be decided wholly upon oral evidence. We shall first consider the evidence adduced on behalf of the plaintiffs.

44-49. (His Lordship then referred to the oral evidence and proceeded as under :) Defendants' possession of the underground could not be detected until there appeared on the surface the effects of extraction of coal from underground. The learned Subordinate Judge rightly placed reliance on the plaintiffs' evidence and relied upon the admission by the defendant's own witnesses. The defendant company also anticipated this position and therefore attempted to make out a case that Purna, one of the plaintiffs who worked under the company, had or should have knowledge of the defendant pushing their galleries into defendant's lands. The duties assigned to Purna did not require a critical examination of the implications of the underground plans of the colliery. Further as frankly conceded by the experts examined on behalf of the defendant without relaying the underground plan on the surface plan it is almost impossible to find out whether the galleries are proceeding beyond the mouza boundaries -- such boundaries being ascertainable only on the surface after relaying the survey plans and other documents. Purna had not further that technical knowledge to appreciate the significance of the lines shown in the underground plans with reference to the proprietorship of the mouzas.

50. The case attempted by the defendant to prove the existence of brick pillars on the surface to indicate the mouza boundaries had failed. The defendant failed to produce the surface plan without any explanation why it had been withheld. It must be presumed that if such plan had been produced it would have disproved the defendant's case. The importance of the positions of the alleged pillars may arise only if it were possible to compare the position of such pillars with reference to the actual mouza boundary. Were those alleged pillars within the area which had subsided or beyond? These are points which could have been more satisfactorily proved. That such pillars had been put up could have been proved by the company producing their relevant books of accounts or sanctions for undertaking such work. In a Limited Company like the defendant books and papers kept in the usual course of business were the best evidence, and they were in the possession of the party. Why should those be not filed -- but the court is asked to place reliance only on doubtful oral evidence as produced which is also not wholly dependable. The witnesses cannot for obvious reasons place before the Court a correct idea of the actual relative positions occupied by the pillars about which they were speaking.

The learned Subordinate Judge had rightly declined to accept the defendant's case that they had put up brick pillars on the surface to indicate the delimitation

of the lease-hold lands and that the galleries which had been run underground were within the pillared area. The reference made by him to the absence of a local investigation and the circumstances under which the late application as filed by the defendant was rejected by the lower court has already been dealt with.

51. On the evidence therefore it must also be held that the defendants' possession by extracting coal by driving galleries underground was not for the full period of 12 years and the plaintiffs cannot be regarded to have any knowledge of such illegal acts on the part of the company until the subsidence appeared on the surface. On the finding reached that the knowledge of the plaintiffs was as from the date of the subsidence which was well within three years of the filing of the suit the plaintiffs' claim for damages cannot be assailed.

52. It is not necessary for us to consider separate the plea of adverse possession as had been attempted to be put forward by Mr. Gupta on behalf of the defendant company. The nature of the possession by the defendants to be adverse as against the plaintiffs must be open and with sufficient publicity so as to attract the notice or the knowledge of the plaintiffs. Only if such acts of possession be public ones which would attract the notice of the plaintiffs but that the plaintiffs had failed to take note of the same, time would continue to run against the plaintiffs. As we have found already that the acts of possession exercised by the defendants in the underground galleries were secretly done and the plaintiffs had no means of knowledge and as a matter of fact had no knowledge of such illegal trespasses the plea of adverse possession as had been attempted to be made out must be rejected.

53. The result therefore is that this appeal stands dismissed with costs.

Lahiri, J.

54. I agree.