
(1940) 08 CAL CK 0008
In the Calcutta High Court

Midnapur Zemindari Co. Ltd.

APPELLANT

Vs

Bengal Nagpur Railway Co. Ltd.

RESPONDENT

Date of Decision : 02-08-1940

Acts Referred:

Land Acquisition (Mines) Act, 1885 — Section 3

Citation : AIR 1941 Cal 465

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—The fact that I have not reserved judgment does not imply any failure to appreciate the importance of the points involved in this case or the manner in which the case has been conducted by the leading counsel on both sides and prepared both as to law and facts by the juniors. Delay is undesirable. I shall, therefore, follow my usual method. As usual, I have no objection to the parties having copies of the shorthand note of this judgment. Should I make any alteration of importance I shall do so in the presence of counsel. With materials as voluminous as those in this case it is desirable to adopt some plan. I propose, therefore, first, to state as shortly as possible the manner in which this dispute has arisen. I shall then deal with the nature of the suit, the pleadings, the amendments sought, the issues and what I consider to be the real problem involved. I shall then attempt to deal with the law, and after that discuss the evidence, and lastly, my findings.

2. First therefore as to the dispute and the parties to the dispute. The Midnapur Zamindari Co., the plaintiff, is a putnidar of a wide area under a grant from the Raja of Narajole. The grant has an interesting origin which is immaterial to this case. The section of the Midnapur Zamindari Co., with which we are concerned, i. e., that under the administration of Mr. Woodgates alone comprises 372 square miles. The defendant, the Bengal Nagpur Railway, is not as yet a state railway. The undertaking is worked under an agreement with the Secretary of State, which is in evidence, but which it is not necessary to discuss. Under this

agreement the railway will ultimately vest in the Secretary of State. In 1896, the line from Calcutta to Madras still awaited for its completion, the length between Cuttack and Calcutta, and for this purpose the railway like other railways in India availed itself of the procedure for compulsory acquisition contained in the Acquisition Act of 1870 and the Land Acquisition (Mines) Act, 18 of 1885. The original Land Acquisition Act of 1870 is now replaced by the Land Acquisition Act of 1894. Under these statutes four acquisitions were made which are of importance in this case, although only one of them is directly in question. It is convenient to record them at the outset.

(1) A declaration of 7th January 1896 in connexion with the Main Line, Cuttack-Midnapur-Calcutta, a length of 309 miles. On this stretch is one of the sites in suit, that at Sardiah, the plaintiff company claiming in respect of materials excavated at this spot. This claim however appears to be based upon a misconception and may at once be excluded from the suit. The declaration was not subject to any exception. Moreover upon the evidence, it is clear that the materials taken by the railway at this point were taken from the cutting spoil. In these circumstances this acquisition is only relevant or useful for purposes of comparison.

(2) The acquisition with which we are concerned is that of 2nd January 1901. This was for a branch line, the Midnapur Jharia extension, a length of 117 miles and an area of several thousand acres. The notification contained the exception, that is to say, the exception of "mines of coal, iron stone, slate and other minerals" in terms of Section 3, Land Acquisition (Mines) Act. I shall refer to such acquisitions as "acquisitions with exception." Work began on this line in that year and was finished in or about 1904. The land acquisition proceedings for valuation took place in September and October 1901. Two sites are referred to, Kulapacharia and Godapiasal. They are adjoining and may be regarded as one, the Godapiasal quarries. During the period of construction the railway contractors took materials, that is laterite stone and laterite kankar or morum from the Godapiasal quarry among others, and so far as they took them from the acquired lands they were paid for under a separate agreement of 19th June 1901. These payments continued until 1904 or thereabouts and then ceased.

(3) The acquisition of 6th December 1920, acreage 78.72 acres, at Hariharpur, another district. The acquisition was subject to the exception. The purpose was stated as a "quarry for morum and laterite stone."

(4) Acquisition of 23rd November 1935, 17218 acres at Godapiasal, thus extending, the acquired area at the site in suit. The purpose "for excavation of morum and laterite stone for the use of the railway company." The declaration was without exception.

3. On the 10th October 1934 or thereabouts Mr. Woodgates, the manager of this section of the Midnapur Zamindari Co., addressed to the railway a demand for compensation for minerals removed from the Godapiasal quarries, and there

followed considerable correspondence, naturally relied upon by the plaintiff company, in which the morum and laterite stone were referred to as "minerals" and in which the railway admitted liability to pay for such laterite stone and morum as reserved minerals. On the 17th April 1936 the railway offered to pay at a certain rate, and this offer is relied upon by the plaintiff company as an agreement. The offer however was not accepted in terms, and on 1st March 1937 or thereabouts the railway, having received legal opinion withdrew the offer and claimed that the laterite and morum were included in the acquisition and not in the exception. On 31st March 1938 this suit was filed by the plaintiff company for compensation for the laterite rock and morum removed. It was transferred for trial to this Court.

4. I have referred to the nature of the suit. It differs from the proceedings normally ensuing in England under circumstances such as I have set out. Usually proceedings follow upon a notice by the proprietor under the Act corresponding to the Land Acquisition Mines Act of 1884, on the refusal of the railway to give the counter-notice, and the extraction or threat to extract minerals by the proprietor. I have not hit upon a case where the railway has commenced working upon the surface and the proprietor has complained. But no point has been made of this, and I proceed upon the assumption that the proprietor, if the materials remain vested in him by reason of the exception, can protect his right to them by a suit of this nature. With regard to the pleadings I do not propose to examine them in any detail. In connexion with specific points it may be necessary to refer to certain para-graphs. Amendments were sought during the hearing, first by the plaintiffs. The plain-tiffs sought to amend by including (a) additional relief by way of injunction; (b) a plea of estoppel; and (e) a plea to the effect that, even if included in the grant, the railway has used the materials for purposes outside the acquisition and should be restrained from so doing.

5. I will not quarrel with the additional relief. If the plaintiffs succeed there is no reason why they should not have the in-junction. With regard to estoppel I stated and now confirm that the plaintiffs might rely upon any document included in the agreed briefs, for the purpose of an estoppel; the estoppel alleged, i. e., to preclude the defendant from denying that the materials in suit were included in the exception. I do not say that the estoppel is either fully or properly pleaded or that adequate particulars were given. For that reason I confined it to the documents. The third amendment I did not allow. It is not pleaded. The plaintiffs' whole case is based upon the materials being excluded from the acquisition. The type of complaint sought to be introduced by the proposed amendment depends upon wholly different consideration. In point of fact no use by the railway of the laterite or morum is interfering with the proprietors' enjoyment of the land retained by him. The defendants sought to amend, to introduce a defence based upon the effect of the agreement of 9th June 1901, a point which at the time seemed to me on one reading of the agreement to have substance. This amendment, again, I have not allowed. In the circumstances it becomes unnecessary to consider what, if any, answers to

that point might be raised. Proposed issues were handed to me by counsel on both sides. They were settled by me as follows: (1) Were "the materials" (laterite boulders, ballast and morum) removed by the defendant company from the areas in suit included or excluded from the acquisition of 1901? (2) If excluded, what, if any, portion of the said materials was the defendant company entitled to take as being "necessary to dig or carry away or use in the construction of the work for the purpose of which the land was being acquired?" (Note. - This has been pleaded generally by the defendant company. No particulars given. Counsel for the defendant company states that the defendant claims under the reservation to be able to use the materials on any portion of its works.). (3) What, if any, portion of the said materials was either dug or carried away or used in the construction? (i) Is the plaintiff entitled to damages and for what portion and at what rate or rates? (5) Limitation. (6) The additional issue raised by the plaintiff-Was there an agreement to pay compensation as alleged in the plaint? If so, what relief? (7) Is the defendant estopped from contending that the materials were included in the acquisition? (8) Is the plaintiff entitled to damages even if the materials are included in the acquisition on the ground that the materials or some portion were not utilized for the purposes for which land was acquired? If so, what damages? (Note. - The estoppel (issue 7) and the claim to damages on the alternative basis (issue 8) are not pleaded.) In the circumstances already mentioned issue 8 is eliminated. The alteration in the form of issue 1 was deliberate and intended to signify that the real question involved in this suit is not an academic inquiry into the meaning of the word "minerals" but whether or not in this particular transaction the materials were or were not included in the exception.

6. The vital questions seemed and still seem to me, capable of being stated very shortly : (1) Are the materials within the exception? (2) If so, are they within the exception to the exception? (3) If not, what damages? The second question relates to the clause "necessary...in the construction of the work. "In the course of argument I took the liberty of stating the problem in the shape of a formula. There is a sale of land. Land = A to z. Exception C I S (m). (M) is indeterminate; the question is whether laterite is included in (M). On the question, the law has laid down certain tests of construction. It has said that the answer will depend upon the answers to certain questions of fact. What are these questions of fact has to be ascertained from the English cases. In this case therefore we are called upon to discuss the law in order to discover what questions of fact have to be decided.

7. According to the defendant company the tests were finally laid down by the House of Lords in 1910. According to the plaintiff company the tests of 1910, such as they are, were subsequently modified. At first sight therefore I do not appear to be called upon to consider the history of the 1910 tests. It would appear sufficient to deal with the "common rock" of 1910, so to speak, at site. It exists. How it got there it may be said, is not at first sight our concern, any more than we are concerned with how the laterite in suit got there. But the common

rock test of 1910 has a history which in view especially of Dr. Gupta's argument, cannot wholly be avoided. It will, moreover, be of some convenience to practitioners to have set out in order of date the cases which have been referred to and discussed in the argument.

8. *Hext v. Gill* (1871) 7 Ch 699. The substance in question was china clay. The transaction was one of private grant. The actual decision was that the proprietor should be restrained from so working as to destroy the surface. It contains two definitions or tests the apparent conflict between which has been the subject of so much discussion : that of Mellish L.J.---"Minerals include every substance which can be got from underneath the surface of the earth for the purpose of profit" (subject to contrary intention) and that of James L. J. "What the words mean in the vernacular of the Mining World and Commercial World and land owners at the relevant time." *Lord Provost etc. of Glasgow v. Farie* (1888) 13 AC 657: The substance was brick clay: transaction : a grant but in terms of a certain Act analogous to the acquisition of Mines Act, that is to say, with the exception. Except for the surface soil capable of cultivation, the subsoil was clay. Lord Halsbury preferred the definition of James L. J., and harped back to the old decision in *Earl of Breadalbane v. Menzies* (1818) 1 Shaw App 225. The distinction between deed and statute was disregarded (p. 672). Lord Watson inclined to a construction on the principle of *eiusdem generis*. Lord Macnaghten laid stress on the word "mines" and evinced objection for surface working (p. 689). Lord Herschell who dissented, ignored consideration based upon differences of depth. The important point is, that running the judgments of Lord Halsbury, Watson and Lord Macnaghten is a particular vein based upon reason arising from the fact that in this case the clay formed part of the ordinary subsoil. (Lord Halsbury at p. 671, Lord Watson at p. 679, Lord Macnaghten at pp. 697 and 698). Incidentally it is pointed out, that this land or upper soil which is not reserved is paid for by the acquiring authority and made the subject of compensation at the time (pp. 679 and 697). At the latter page is the argument of Lord Macnaghten based upon reason which reappears with different phraseology in *N.B. Ry. v. Budhill Coal & Sandstone Co.* (1910) 1910 AC 116. *Jersey v. Guardians of Poor of Neath Poor Law Union* (1889) 22 QBD 555; substance-brick clay; transaction: conveyance in particular terms. Lord Mellish's definition in *Hext v. Gill* (1871) 7 Ch 699 followed. Decision based upon the distinction between compulsory sale and voluntary conveyance.

9. *Midland Railway Co. v. Robinson* (1890) 15 AC 19: substance-Iron stone and Lime stone; transaction in terms of Section 77, Railways Clauses Act of 1845, that is "with exception." The only question was whether the word "mines" excluded from the exception materials got by surface working. In this case, as in certain Indian cases hereafter to be referred to, the railway admitted that the materials were minerals within the meaning of the Act (p. 26); only decision therefore that minerals got by surface working remain minerals. Lord Macnaghten dissented on the basis of his ingrained aversion to surface working (p. 24).

10. *G.W. Ry. v. Blades* (1901) 2 Ch 624: Brick clay. Surface soil, six inches to a foot. I use the expression "surface soil" throughout as meaning the soil capable of cultivation or gardener's soil and nothing below it. Below this five feet of weathered clay and below this virgin clay. Buckley J., considered himself bound by the definition of Mellish L. J. notwithstanding a preference for the definition of James L. J. He held however on the facts of the case that "the clay was the soil" and following the particular bent of thought running through the judgments in *Farie's case* (1888) 13 AC 657, held that u/s 77 of the Act of 1845 the railway purchased not the surface soil only, but the land, and that the land included the ordinary soil of the district.

11. *Todd v. North Eastern Railway* (1903) 1 KB 603: Substance, clay to the depth of 100 feet. Lord Halsbury expressed himself strongly in the course of the argument at pp. 606 and 607, and very shortly in his judgment Lord Alverston approved of the decision in *G.W. Ry. v. Blades* (1901) 2 Ch 624, considered that the learned Judge had correctly appreciated the principle in *Farie's case* (1888) 13 AC 657, and, as I read it, this is a general decision excluding the ordinary surface of the earth from the category of minerals in the exception.

12. *G.W. Ry. v. Carpalla United China Clay Co. Ltd.* (1909) 1 Ch 218 & *G.W. Ry. v. Carpalla United China Clay Co. Ltd.* (1910) A C 83: Substance, china clay. Eve J. adopted the words of Buckley J. in *G.W. Ry. v. Blades* (1901) 2 Ch 624 "has a value of its own apart from the soil in which it is found"-p. 226. In the Court of appeal the Master of the Rolls supported the judgment on the basis that *Farie's case* (1888) 13 AC 657 had finally decided that "where a bed of clay underlies the surface and is the ordinary soil of the whole district such clay is not within the statutory reservation." The judgment of Lord Metcher-Moulton proceeds upon other lines, although agreeing with the decision upon the facts. In the House of Lords *G.W. Ry. v. Carpalla United China Clay Co. Ltd.* (1910) A C 83 the speech is that of Lord Macnaghten, and the material passage is:

The learned Judge viewed the evidence and came to the conclusion that china clay is not part of the ordinary composition of the soil of the district. Its presence was rare and exceptional.

13. *N.B. Ry. v. Budhill Coal & Sandstone Co.* (1910) 1910 AC 116: Substance, sandstone 3 feet of surface soil, 8 feet of clay and sandstone beds below that. Lord Loreburn referred to the conflict of authorities and stated that the matter was at large before the House of Lords. Founding upon considerations of reason and purpose which had already emerged in *Farie's case* (1888) 13 AC 657, Lord Loreburn formulated a double test (p. 127): (1) that "other minerals" denotes exceptional substances, not the ordinary rock of the district, and (2) that in deciding whether in any particular case exceptional substances are minerals the vernacular test has to be applied. Lord Gorell did not base his speech upon the common rock test, but came to the same conclusions on the ground that there was no evidence that in the vernacular "mines and minerals" were understood to include ordinary sandstone and that the onus to prove this was upon those

supporting the exception. Lord Shaw also was more concerned with the vernacular test, the remote issue of the old Scotch cases.

14. *Caledonian Railway Co. v. Glenboig Union Fireclay Co.* (1911) 1911 AC 290. Substance, seam of fire clay in ordinary clay. The ruling of the appellate Court in Scotland was that fire clay did not form part of the sub-soil. Lord Loreburna shortly restated the principle of the decisions in *N.B. Ry. v. Budhill Coal & Sandstone Co.* 1910 AC 116, *G.W. Ry. v. Carpalla United China Clay Co. Ltd.* (1909) 1 Ch 218 and *G.W. Ry. v. Carpalla United China Clay Co.*(No. 1) (1910) 1910 AC 83, He referred to it as a rule of construction based upon intention, and used the phrase relied upon in argument by the plaintiffs-"exceptional in use, character or value." The last four lines on p. 299 are important:

The seam now being worked...is certainly of an exceptional character as to its properties and value upon the evidence before us; and it is not established in the evidence before us that other material is present in such large proportions as to destroy this exceptional character.

15. *Symington v. Caledonian Railway Co.* (1912) 1912 AC 87 at page 92. The Court on appeal in Scotland had dismissed a suit relating to sandstone or free stone upon demurrer. The House of Lords (Lord Loreburn) pointed out that this was a question of fact that free stone could be a mineral within the meaning of the exception. The case was relied upon by Dr. Gupta, and I shall refer to it when dealing with his argument. But the pleadings and the speech of Lord Shaw do not indicate to me any limitation of the common rock test laid down by Lord Loreburn. According to Lord Shaw it is for the party relying upon the exception to establish that the material in suit is an exception to the general rock of the district.

16. *Waring v. Booth Crushed Gravel Co.* (1932)1 Ch 276. Substance, sand and gravel. Decision of the Court on appeal. A private conveyance for building purposes. The decision is undoubtedly based upon the common rock test, i. e., that the exception does not mean "the ordinary soil of the district which, if reserved, would practically swallow up the grant." In this case the top soil averaged one foot and the subsoil," sand and gravel, extended over a great area. In this case, and this is relied upon by counsel for the plaintiff, the evidence was to the effect that what Romer L. J. called the "relevant vernacular" did not consider sand and gravel to be a mineral. The Court held, however, that "this evidence was really unnecessary" as it would only become necessary if sand and gravel passed the common rock barrier.

17. *Attorney General for the Isle of Man v. Moore* (1938) 159 LT 425: ruling of the Privy Council. This was relied upon by Mr. Ghaudhuri and Dr. Gupta. The question was whether u/s 16 of the Act of 1703, which regulated the rights inter se of holders and the Crown shale was or was not excluded in the exception. The exception was in peculiar terms, which according to a previous ruling of the Judicial Committee limited the word "minerals" to minerals obtainable by

underground mining. The question, therefore, was whether shale could be included in stone. To this question the Board applied the vernacular test, and the vernacular test went against the Crown. The common rock test was not resorted to. Those are the English cases which have been discussed before me. I should perhaps mention one other English case in order to show the extent to which at one stage the meaning of "minerals" in the exception, was stretched and because, its language is appropriate to the view taken in the Indian cases. In *Midland Railway v. Checkley* (1867) LR 4 Eq 19 at p. 25, Lord Romilly in construing the exception contained in a particular Act, not distinguishable from the others, said:

Upon the first point I think there is no question. Stone is in my opinion clearly a mineral and in fact everything except the mere surface, which is used for agricultural purposes, anything beyond that which is useful for any purpose whatever, comes within the word "mineral" when there is a reservation of the mines and the minerals from a grant of land; every species of stone....

18. The English cases show a continuous attempt to find some limit to the exception, something to prevent the grant being eaten up by the exception. As will have been seen, various tests were from time to time adopted. While not mutually exclusive they may, I think, be logically grouped as follows : (1) There is the parlour game test, animal, vegetable and mineral. It appealed to Lord Romilly and has appealed to the Courts in India, (2) There is the value test of Lord Mellish "got for profit" to be compared with the phrase of Lord Fletcher Moulton in *G.W. Ry. v. Carpalla United China Clay Co. Ltd.* (1909) 1 Ch 218 "value in use." (3) The vernacular test. The speech of certain classes of people midway between, shall we say, children and scientists. (4) The negative test originating in *Farie's case* (1888) 13 AC 657 continuing through *G.W. Ry. v. Blades* (1901) 2 Ch 624 and *Todd v. North Eastern Railway* (1903) 1 KB 603 and finally crystallized in the *Budhill case* 1910 AC 116. We are left, therefore, with a double test: (1) The negative "common rock" test; (2) the positive "relevant vernacular" test. The two tests are not alternative, but cumulative. I shall discuss this point further in dealing with the courageous assault upon the common rock, made both by Mr. Chaudhuri and Dr. Gupta, an attack both direct and indirect, which deserves special treatment, and which therefore, I shall take the liberty of postponing until after I have considered the evidence.

19. I shall deal with the facts first, and having discussed the law, the questions of fact which I have to decide become more apparent. They are in my opinion the following: (1) Is Godapiasal laterite (in which I include stone and morum) "the common rock" of the district? (2) Is it a mineral according to the "vernacular"? (3) If both, is there anything in this case to exclude the common rock test? I shall discuss the evidence relating to questions (1) and (2) together, under the general heading of "laterite". I shall then go on to consider whether in this case upon any ground of fact or law the common rock test can be excluded. This portion of the judgment may, therefore, be regarded as lateritic. I shall deal with

the evidence under the following headings: (1) What is Godapiasal laterite? (2) Extent and relation to other rocks. (3) Use and value. (4) "Vernacular".

(1) What is Godapiasal laterite? The Court is indebted to the professional gentlemen who gave evidence. Although, as is natural, there were marked differences of opinion or outlook, there can be no question but that such opinions were genuine or of the ability and experience of the holders. Godapiasal laterite is one type of one of the most widely distributed rocks in India. Godapiasal laterite is a recent deposit of loose material, the result of alteration of older rocks. Whether or not actually brought to its present site by water, it is classed as an alluvial deposit. In the area in suit a glance at the small scale geological map will show its relation to the big mass of older rocks to the southwest, of which it forms the border. It is a shallow deposit of not more than 20 feet deep. It has special mineral characteristics, which combined with tropical conditions, in particular moisture, tend to make the loose substance cohere or coagulate first into a kind of small gravel called kankar or morum, and then, by further coagulation, into more solid rock. This takes place without the assistance of pressure from rocks above. In this, therefore, it contrasts with other sedimentary rocks which harden under pressure and which except in rare circumstances by weathering acquire a softer surface. With laterite the horizons are reversed except for the actual surface. The top layer tends to become the hardest, and under this comes the gravel layer. For the horizons in Godapiasal late-rite, see Dr. Coulson's evidence: Q. 11. It follows that the top soil in a laterite district, theoretically at any rate, consists of the original detrital deposit which has not yet become solidified. This is the view of Dr. Percival (Q. 29). Actually no doubt some of the top soil is due to a second weathering. But, however it is formed, opinion is unanimous to the effect that, the top soil, whatever be the admixture of humus, is thin, occasional and sterile. The surface of the ground, therefore, in this laterite district is either a thin, red lateritic soil or actual lateritic rock or morum. The lateritie habit of coagulating appears to continue after removal, and it is this which makes morum bind when used for flooring or surfacing roads. I infer that its binding power exceeds that of other kankars, but to what extent is a question which I meant but omitted to ask. It is common ground that it does possess this property.

20. As regards laterite stone, my inference from the evidence is as follows: It is not a good stone. It has the advantage that it is soft at site and can be easily quarried and that it hardens upon exposure. One witness, to whose evidence I shall again refer, considers it better than brick work. I should have thought, it depended upon the quality of the stone on the one hand and the brickwork on the other. It does not appear to be able to compete with other stones away from the actual district where it is found for instance, Pakur stone from the Rajmahal Hills. Secondly, with regard to the extent of Godapiasal laterite and its relation to other rocks. The first and perhaps the most important item in the evidence are the maps. Unfortunately the large, scale maps intended to show the area of laterite were not finally proved. There is a small scale map of 32 miles to the

inch, in which the laterite is included in other "older alluviums". Apparently, however, the part shown yellow is substantially laterite, if morum be included. This appears, apart from the oral evidence, from the map attached to the report on the District of Midnapur in the Memoir of the Geological Survey, vol. 1, scale 8 miles to the inch. This shows with some clearness the rocks traversed in proceeding from Midnapur northwards. The line of the road shown on this map is for practical purposes the same as that followed by the railway. On this journey one would proceed across laterite at Midnapur itself, say two miles, across a valley of alluvium, another mile or so of laterite, another valley of alluvium, then a bigger stretch of laterite, another valley and a yet bigger stretch of laterite, and so on.

21. As regards the oral evidence, there is really little difference of opinion except that Dr. Coulson states that between Midnapur and Godapiasal he saw just as much new alluvium as laterite. What I consider to be conclusive on this point are the records of the Midnapur Zamindari themselves and the answer to me of Mr. Woodgates which may or may not have been recorded. The records show some thousands of tons of laterite as extracted from his area, but no other stone. And in fact there is no other stone, at any rate, in this section of the Midnapur Zamindari. Whether the laterite is continuous under the alluvium in the valleys or hollows is not so certain. Dr. Coulson thought it might be continuous, Dr. Fox thought otherwise. The plaintiffs are entitled to the benefit of Dr. Fox's view that the streams have cut through the laterite and exposed the under-gravels and clays.

22. The general result of the evidence, in my opinion, is that the country consists of a plateau of laterite, intersected by hollows of other alluvium. The ground has a hard rocky or gravelly surface, covered for the most part with a very thin laterite surface soil. It is what is called in English "laterite country." If you advertised a house to let, you will say it was "on laterite." I now come to use and value. I have had the advantage of Dr. Gupta's note on this, but it is difficult to state the result of the evidence shortly. One must distinguish stone from morum. As regards the stone it has the advantage of accessibility, it is soft to quarry, it hardens. It is not a good stone. It has been used for building for a great many years before 1901. How far the stone is exported beyond the laterite area is a question which was not pursued. On this point we have only the evidence of the contractor who gave the rate F. O. R. Midnapur. He is the only witness the value of whose evidence is at all uncertain; it is therefore somewhat unfortunate for the plaintiffs who desired to recall him that owing to his leaving Calcutta his books were not available. In the circumstances I will take his evidence at its face value. It amounts to this that some stone is put on the railway for shipment. Generally, however, my inference is that its quality does not enable it to be used commercially at any material distance from laterite areas. There is no evidence that it is used by Municipalities beyond the laterite area, we do know that Calcutta, for instance, uses stone from much greater distances, in particular the Rajmahal stone. As regards the user of the stone we have various records,

including the contract of 19th June 1901 under which the railway undertook liability for the payment of royalty.

23. Secondly, as regards morum: that it has been used for roads in the laterite districts for a great many years is clear. It is a good binding gravel. In point of fact, there is nothing else which could be used. It is also used for roofs and floors. The railway uses it for various railway purposes which will appear from their records. It is transported by the railway to considerable distances along the line, even to Calcutta. But again there is little or no evidence that it is transported commercially to places at all distant from the laterite area. Dr. Percival's evidence is to the contrary: Q. 94. There is no doubt that the railway itself has created the main demand for morum. The use by the railway will appear from the morum register. Brief, G. 87, which shows the quantities used and the various purposes to which the railway itself puts this material. But in the case both of morum and stone, one of the main reasons for its use appears to be its proximity, its quantity and its cheapness. Its value at site is almost impossible to reckon and its market value appears therefore primarily to depend upon its nearness to the railway or rather its nearness to a railway siding. The one actual instance of sale at considerable distance from site is that to the Marine Club by the railway (Mr. Hill, Q. 112). As regards the oral evidence on its value and use, there is Mr. Murray, Q. 72, Dr. Percival, Q. 94, and some answers of Mr. Woodgates. The records are interesting. Taking the Midnapur Zamindari return of 1901, Rule 63, we find laterite, 11343 tons (as already indicated no other stone), and approximate value Rs. 583 this presumably being an estimate of the value at site. This works out to something less than three quarters of an anna a ton. Without taking this too literally, and merely as a matter of comparison it is some indication that the intrinsic value of the material is low as compared with other rocks. As compared with this, in favour of the stone is the payment under the contract of 1901 which did amount to several thousand rupees.

24. Passing now to the literature and vernacular of laterite, I again select the following classes of evidence on this point. Books, letters, leases, judgment, oral evidence, and lastly acquisitions. I omit for the time being books. As regards letters, there is the 1904 correspondence g/80 to 84. This has not, I think, much value as an indication of the vernacular. On the other hand, the correspondence between the railway and the plaintiffs of 1934-87 contains many indications that the railway regarded laterite as a mineral. The whole correspondence is under the heading of "minerals from Godapiasal," until early in 1937, the railway received legal advice. Next, leases and petitions. In my opinion these are not of great value. There are two classes of lease, those in which the tenant agrees that he has no sub-soil rights, the Bengali expression is as follows: "nimna satwa" (see examples, pp. 48, 59. 62). These appear to be essentially agricultural tenancies. There are other leases, one in which "metal, coal, stones or other minerals if discovered" are granted; and others in which such metals, coal, stone or other minerals if in future discovered" are reserved. There are petitions whereby tenants under agricultural tenures asked for permission to use

stone. In all these cases it is said that "minerals" must refer to morum and laterite because there is no other stone or mineral. As regards judgments, I shall assume they are admissible as transactions in which rights have been challenged or asserted. There is one judgment of this Court which although not used as binding upon me and which is not inter partes, yet lays down definitely that morum is a mineral. It is a judgment to which I shall refer again.

25. There is the oral evidence: Mr. Coulson to whom everything other than the surface soil is a mineral. Anything non-vegetable or non-animal which has a value or rather a potential value, locality, or demand makes no difference. Clay is a mineral in Bengal, sand is a mineral in Rajputana. It cannot be a mineral in one place and not in another. Mr. Woodgate has always called laterite a mineral. Mr. Murray the same. Again, there can be no change in the status of a substance by reason of its situation or quantity. Mr. Murray is a practical mining expert, Mr. "Woodgate is undoubtedly an experienced Manager of a Zamindari, and Dr. Coulson a practical geologist. Dr. Percival was, I think, not specifically asked as to the vernacular, but to him it was a "waste matter," Dr. Percival being interested in more important and valuable substances. Dr. Fox confined himself to the technical and scientific connotation of mineral. He agreed that laterite or any other stone could be described as a "mineral substance." The plaintiffs, therefore, have a certain volume of evidence on the point of vernacular and so far as bona fides of the witnesses are concerned, I have already expressed my opinion. The only question and one upon which I feel considerable difficulty, is whether their vernacular is really the vernacular we are seeking and which the English law contemplates, a matter to which I shall again refer.

26. Lastly, as a class of evidence on this question of vernacular, are the acquisitions themselves and the contract of 1901. The plaintiff relies upon the four acquisitions to which I have referred, that of 1901 in particular, to establish a particular construction of "minerals" in the 1901 reservation. This is a delicate process. It is to some extent construing a thing by itself. At the same time, the plaintiffs are entitled to rely upon anything which amounts to conduct indicating an understanding of the word "minerals," that is, anything to indicate the fact that laterite was a vernacular mineral, the parties being as already noted, both landowners and both commercial concerns. I shall have to deal with the acquisitions in considerable detail in connexion with the other branch of the matter, namely, the exclusion of the common rock test, and shall, therefore, deal with the acquisitions in relation to both questions, the common rock test and their bearing, if any, on the vernacular.

27. I now come to the acquisitions and will deal first with the acquisitions generally, before dealing specifically with the acquisition of 1901. I give the important data in a tabular form.

1. Acquisition of 1896. Purpose-Construction of Cuttack-Midnapur-Calcutta Extension. No exception. Quarries valued.

2. 1901. Purpose-Construction of Midnapur Jheria Extension. Exception. Quarries not valued.

3. 1920 Acquisition. Purpose-"Excavation and removal of morum and laterite stone for the use of the railway company." Exception. Quarries valued.

4. 1935 Acquisition. Purpose - Morum quarries. No exception. Quarries valued.

28. Acquisitions Nos. 1 and 4 fall into the same category, and the plaintiffs seek to draw the inference that the quarry valuation is the valuation of reserved minerals, on the following argument (1) minerals are included in the grant, (2) stone has been separately valued, (3) therefore stone has been valued as a reserved mineral. It is not an unnatural inference. But for reasons which I shall try and explain it is not the only inference. With regard to the 1896 acquisition, I doubt whether it is the correct inference. The form of the proceedings in connection with the 1896 acquisition at G. 11-12 indicates to my mind rather that the quarries were being valued not qua reserved minerals but qua part of the land. The same with the acquisition of 1934 (see B. 98).

29. Next is the 1920 acquisition. Here, there is an exception, and it was specifically, a quarry that was purchased. The Land Acquisition Collector speaks (see B. 81, 82, 83, 89 and 92) of "compensation for mineral rights." He was valuing the land subject to the exception. He had no right to value excepted minerals nor was he, in fact, doing so. This indicates that there are two processes. Process (a) where there is an acquisition without exception. In such a case, the Collector will have to value the minerals which might have been the subject of exception but were in fact included in the grant. Process (b) where there is an acquisition with exception. In such a case the Land Acquisition Collector has to value the land, and will do so according to its quality or composition, either as agricultural land, water, stone or sand. Not only does process (b) appear from the acquisitions in suit, but it is also, I think clear from the decided cases, e. g., the case in *Mohini Mohan Banerjee and Others Vs. Secretary of State for India In Council and Others*, where "the Land Acquisition Collector valued the land qua clay. *Govt. of Bombay v. N. H. Moos* ("22) 9 AIR 1922 Bom 254, land was being valued qua quarry and not qua reserved minerals. It was the same in a case, for which I am grateful to Dr. Gupta for citing and which I shall discuss further, in *Secy. of State Vs. Gyanendra Chandra Pande*, where a quarry was acquired with exception and the quarry was valued according to the cubic contents of stone which it was commercially capable of producing. I shall deal with this case again.

30. I now come to the 1901 acquisition in connection with which I agree that there is a good deal which is equivocal. There is the exception. On 23rd September 1901 the zemindar-proprietor claimed compensation for trees and stone quarries. This is clearly process (b). The Land Acquisition Collector did two things. He first told the Raja to file a joint petition with the patnidar. If the quarry was a reserved mineral he should have said, "The minerals are reserved and I

have nothing to do with them". He went on to reject the claim of the zemindar for the value of the quarry on two grounds first because the patnidars did not join in making the claim and they were the persons to do so, a correct ground and secondly-I use his own words-"and as we have not acquired the quarry". This latter statement has been much relied upon by the plaintiffs, and in the circumstances, there being no evidence that the agreement of 19th June 1931 was known to him, it undoubtedly indicates a belief that the quarries were outside the acquisition and therefore within the exception. This statement is analogous to that to be found in *Secy. of State Vs. Gyanendra Chandra Pande*, , where again the Land Acquisition Collector or Judge made a precisely similar statement notwithstanding that it was the quarry itself which was being acquired. The reason why the patnidars did not claim for the laterite was not because the laterite was reserved, but because they had already entered into a separate agreement with regard to it, that of 19th June 1901. That agreement is really the key to the transaction. The plaintiffs contend that it is an agreement supplemental to the acquisition proceedings providing for the acquisition by another process of "reserved minerals." The other view is that it is a merely substituted method of paying compensation for quarry land, the exception remaining intact -a method of payment by royalty in the place of a capital payment with the result that it could not be shared with the zemindar. At this distance of time it is impossible to conclude that that was its real or sole object. That was its result. The agreement, as Dr. Gupta has pointed out, was for three years only and renewable at the option of the railway. I construe Clauses (8), and (9), as follows. Clause (8), is in respect of land not acquired, the company paying royalty on materials taken at the rates given in the schedule. Clause (9), is in respect of land acquired, the company paying royalty for three years for building stone and in consideration therefor "the proprietor waives all claims to compensation for quarry rights." I have little doubt that this agreement was not intended so far as the lands acquired are concerned to deal with reserved minerals. In the first place, it would substitute another process for that laid down in the Land Acquisition Act. It does not mention the reservation. It carefully avoids the use of the word "minerals". It is throughout "materials", and the materials are clay, stone and rubble. It refers to "quarry rights" and "compensation." It points to my mind to process (b). The result was that Government did not have to pay for the land, qua quarry.

31. There are other considerations which arise upon this agreement. If it relates to excepted minerals the plaintiffs have parted with their right to compensation. This was the subject-matter of the amendment sought by the defendants. No doubt the agreement was for three years, and if the waiver of right to compensation was limited to that period, that is an answer. Mr. Chaudhuri pointed out the absurdity of waiving a right to compensation for reserved minerals in return for royalty for three years. I am inclined to agree, and for this reason among others, prefer the alternative view that it is not an agreement with regard to reserved minerals but an agreement relating to the valuation of the

quarry, or compensation for the quarry qua part of the land. Again, if it covers, as the plaintiffs contend, reserved minerals, it should be noted that the agreement only values laterite stone. There is no mention of morum, an indication that morum of that date was not regarded as a mineral. My view, therefore, of the 1901 acquisitions is as follows:

32. The fact that the Land Acquisition Collector has not paid for the laterite quarry and has moreover stated that the laterite quarry was not acquired in this case, cannot control the construction of the terms of the acquisition. I am not now on the question whether the statement can amount to an admission, or whether it is admissible only as conduct from which an inference can be drawn. I am not concerned for the moment, with the question whether any such admission could in law affect the construction of the exception. My view is that even considered as an admission by the Crown it is of little value on the facts. I do not, however, at the moment see how any conduct or statement of the Crown can exclude the common rock test. The result is that we are still left with the rules of construction formulated by the English law. It may be otherwise with regard to the "vernacular." The Crown is a land owner. Therefore, the fact that the Crown has in this or in any other case treated stone as an excepted mineral is relevant to the question of vernacular. I have expressed the view that even if so used this statement of the Collector and other statements of a similar nature are not decisive.

33. The statement of the Land Acquisition Collector in the 1901 proceedings is the one with which I am immediately concerned. But there is the statement of the railway in the correspondence, the letter of April 1935, there is the admission of the Secretary of State in the pleadings in the suit in Secy. of State Vs. Gyanendra Chandra Pande, and the admission of counsel for the Crown in that suit, to the effect that all stone is a reserved mineral, From these admissions it follows that acquisition, subject to the exception contained in Section 3, Mines Act, amounts to an acquisition of only surface rights. It has to be remembered that the Crown is in India the largest land owner, and therefore the Crown is interested to assert, to maintain and enlarge underground rights. I desire to point out where I think lies the fallacy. I do so with diffidence. I hope that there are some advantages in a fresh mind. If so I can only say that with regard to land acquisition proceedings no mind could be fresher. In construing a declaration of acquisition, it seems to me that the following features should be noticed: (1) the purpose, (2) the exception, (3) the exception to the exception, which relates back to the purpose, (4) the proceedings before the Land Acquisition authorities, in particular the ascertainment of price. Take first this matter of purpose. It is not without importance because upon the statement of the purpose will depend the scope of the exception to the exception "necessary in the construction of the work for the purpose of which the land is being acquired." This language is not identical with that of the English statutes. It might be clearer to omit " for the purpose of which" " the purpose " in the last line is not the public purpose. Speaking generally "the work" is identical with the

"public purpose." It seems to me that there has been some misunderstanding in stating the public purpose in declarations. In the 1920 and 1934 acquisitions the public purpose has been stated respectively "to excavate morum" and for "morum quarries." The difficulty at once becomes apparent when you seek to apply the exception to the exception. The "public purpose" I should have imagined to be the railway. The case in Secy. of State Vs. Gyanendra Chandra Pande, illustrates the point. One might paraphrase the result of this case in the following terms: " We need stone for a quarry, the public purpose being stated to be the quarry. We except the stone, except so much stone as is necessary to take in constructing the quarry." I shall return to this case which presents the spectacle of the grant immediately and completely devoured by the exception, except for such portion as could be saved by the exception to the exception.

34. I come next to the reservation. My suggestion is as follows: The land acquisition authorities appear to have suffered from a confusion arising from the following assumptions: (a) that all stone is a mineral and (b) (which follows from (a)) that acquisition with exception is acquisition only of surface rights. Where the declaration is free of exception, it is of course open to the Collector to value stone as an excepted mineral. Whether he is clear that he is doing this is more than doubtful. Secondly, where there is a declaration with exception, as in the 1920 acquisition and the Pakur stone acquisition in Secy. of State Vs. Gyanendra Chandra Pande, the Collector is precluded from valuing anything as a reserved mineral. What is he doing in such a case? The answer, I think, is that in certain cases he does not himself know. Hence the confusion in Secy. of State Vs. Gyanendra Chandra Pande, acquisition in this case. What he ought to be doing, is valuing the land. The absurdity of the situation is disclosed by the decision in Secy. of State Vs. Gyanendra Chandra Pande, . The learned Judges were at the outset faced with the admission of the Secretary of State. The declaration contained the exception. In the acquisition proceedings, the quarry was valued according to the stone commercially available; some millions of cubic feet; and this was paid for by the Crown. I should have mentioned that the purpose was stated to be "quarries in connexion with the construction of the Lower Ganges bridge at Sara." When the bridge was finished, the proprietor turned round and claimed compensation for all further stone removed by the railway. That was the suit. The Secretary of State first in his pleadings and then through his counsel admitted that the stone was within the exception and fell back upon estoppel arising from the fact of payment for the stone as a quarry. The learned Judges bound by the admission of the Secretary of State, had therefore only to decide upon the issue of estoppel. In rejecting the plea of estoppel they relied, as I have already indicated, upon a statement or ruling by the land acquisition authorities, that the stone had not been acquired, a statement analogous to that in the 1901 acquisition in this case. They, therefore, in the end held that the meaning of this acquisition was that the Secretary of State had only acquired the amount of stone to which he was entitled under the exception to the exception.

35. It is therefore, I think, fair to give as a result of this case the following: The

Secretary of State bought and paid for stone, with the exception of stone, except such stone as might be necessary to construct the work. The real question was whether the quarry stone could possibly be included in the reservation. No more clearer case of absurdity could, in my opinion, arise than a railway company purchasing a quarry and leaving out the stone. It is my view, therefore, that the statement of the Land Acquisition Collector in the proceedings of September 1901 amounts at most to conduct from which an inference may be drawn as to the construction of the word "minerals" and that at best such inference is of doubtful value. It cannot in my opinion control or exclude the legal test, and it does not in my opinion amount to a variation of the declaration by in fact excluding stone.

36. We are left therefore with the test laid down in *Budhill's case* 1910 AC 116 and I return to deal with the assault made generally by Mr. Chaudhuri, and in detail by Dr. Gupta on "the common rock." Dr. Gupta's attack was from various directions. Dr. Gupta contended first that as a matter of law the common rock test had been narrowed down. He contended that the speech in the *Glenboig case* (1911) 1911 AC 290 indicates that Lord Loreburn himself has modified the common rock test or subordinated it to the vernacular test; that provided it was something "exceptional in use, character or value," the circumstances of its extent, of its being the surface of the land, is immaterial. I have been a little puzzled by the word "other" in the last but one line at p. 299. But I do not read anything in this case either to amalgamate the two tests or to render them alternative. It still seems to me that the common rock negative test has first to be passed. Dr. Gupta pointed out that in a case such as the present, the argument of absurdity should not apply since under the Mines Act, the proprietor must work so as not to endanger the line. This argument applies equally in England, That Mr. Woodgate, whom I have seen, is personally too much of a gentleman to tunnel under the railway line at Godapiasal, I am quite sure. The argument on principle remains.

37. Secondly, Dr. Gupta contended that the common rock test must logically give way to the vernacular test. If coal or iron stone or slate is in fact the common rock, they will remain within the exception. Suppose, therefore, there is a substance, china clay, for instance, established to be a mineral in the vernacular, suppose this to be the common rock, will it then cease to be a mineral or be removed from the exception? Hence, if a mineral according to the vernacular is the common rock, the common rock test must give way. Clearly the position which upon the common rock test may be reached, presents difficulties. At the same time I shall, notwithstanding the doubts which I have expressed and will again indicate, decide] this case on the basis that laterite is a "vernacular mineral" but that on authorities the ratio decidendi of which seems so much in accordance with reason the common rock test excludes Godapiasal laterite from the exception. I did not fully appreciate Dr. Gupta's argument in this connexion based upon what was said in *Symington v. Caledonian Railway Co.* (1912) 1912 AC 87. There is a difference between "a common rock" and what the House of

Lords meant by "the common rock of the district."

38. Lastly on the facts. Can the plaintiffs surmount the common rock? Mr. Chaudhuri's point was to the effect that laterite in this district was not continuous. He contended that in order to be excluded from the exception by the common rock test, there should be an uninterrupted expanse of laterite extending the whole length of the railway. I do not accept that view. He contended further that there was nothing to prevent the railway, under the exception to the exception, from constructing its line. The purpose of railway, however, is sometimes to run trains. Its function does not cease when the railway is constructed. The phrase "permanent way" should have some significance and if Mr. Chaudhuri's theory holds good, the way become exceedingly impermanent; the very result which from Farie's case (1888) 13 AC 657 downwards has exercised the minds of the English Judges. I agree that the common rock test is one which in certain circumstance may be very difficult to apply. In this case, on the evidence, there is in my opinion no difficulty.

39. Dr. Gupta's attack on the common rock on facts took a different and more insidious form. The morum, he says, is not "common rock" because it is exceptional. It is exceptional not by way of regional scarcity but exceptional in contrast to upper and lower strata. Again I agree that if within the land acquired there were substances however extensive, distinct and distinguishable from the other strata or horizons, this might well exclude such substances from the common rock category. But the mere fact of the ground being in different horizons, distinct as against each other, is not decisive. Depth might, I agree, be extremely important. For instance, if in Bengal stone could be discovered at a depth of 1000 feet, one could hardly call that "the common rock," even if it extended for a great distance. But this is not such a case. In the Budhill's case 1910 AC 116 the sand-stone in question was below 8 feet of soil and 12 feet of clay. In this case the substances in question are, with the exception of the sparse laterite surface soil, the surface. The distinction between surface soil and the rock below it cannot, I think, be relied upon to make it exceptional. Surface soil always varies or should vary from the rock immediately beneath it.

40. Lastly, Dr. Gupta returned via exceptional properties of use and value to the vernacular. If vernaculars differ, the commercial vernacular should succeed. If a substance is a mineral in the vernacular its quantity or frequency of occurrence cannot detract from its status. As already indicated, I do not thus understand the Bud-hill test. Indeed, based as the common rock test is upon common sense, it seems to me that the very extension of the vernacular which according to Dr. Gupta includes everything below the ground not animal or vegetable indicates the need for its retention. This reminds me of Mr. Chaudhuri's initial attempt to exclude the common rock test upon an argument that it was one inappropriate to India where the areas covered by one rock are likely to be very much larger than those in England. Assuming this to be very much larger than those in England. Assuming this to be the case, to me it provides no logical reason for the

exclusion of the test; if anything, the contrary. On the other hand, it does seem to me that the vernacular test is more difficult to apply in India.

(2nd August 1940)

41. Before I continue from the point where I left off yesterday it may be desirable to add to the discussion of the law on two points. The law has been discussed before me on the basis that there is no material distinction between the various statutes in England such as those relating to canals, waterworks, railways, and so forth, under which the English cases were decided and the Land Acquisition Act read with Mines Acquisition Act of 1885. Under the Indian system no doubt the land under the declaration immediately vests in the Crown, and the process of valuation is conducted by quasi-judicial officers of the Crown. So far as I have considered the system in England it partakes rather of the nature of compulsory transactions between the parties, the conveyances being in terms of or referable to the particular statutes. The process of valuation is different. I have proceeded on the basis that there is no material distinction between a statutory acquisition and a compulsory bargain between the parties. Indeed the law now goes further and has decided that there is no fundamental or initial difference between a private free bargain and a statutory bargain.

42. The second point is as regards the period at which the principles of construction whatever they be, are to be applied. Are the statutory words to be construed as at the date of the statute or at the date of the transaction? It has not been contended in this case that the result would be different, and I have therefore assumed, having regard to the language in the Glenboig case 1911 AC 290 and other cases that the statutory language has to be construed by tests applied in relation to the particular transaction or as at the date of the particular transaction. In this case, as I have already said, it makes no difference. When I broke off yesterday I had ventured to suggest that of the two tests, that of the "relevant vernacular" was actually the more difficult to apply to Indian conditions. The geological structure is not so different; the social structure, using that word in a wide sense, is in my opinion more so. As already indicated I propose to decide the case on the basis that the plaintiffs have established by their evidence the vernacular title of laterite to be a mineral. I have enumerated the classes of evidence which the plaintiffs adduced. I omitted to refer, if I remember rightly, to one class in detail. That is the books of reference. Mr. Murray was good enough to leave several text books in which will appear references to all kinds of stone or clay as minerals or under the heading "mineral" in some form or other, for instance, the Imperial Institute of Mineral Resources Department's Index to Royalties in the British Empire (certain pages in his book) will show that for the purpose of royalties all stones including laterite are regarded as minerals. The Crown claims and receives royalty upon them. One other book is an American book on non-metallic minerals published in 1925. In this again everything of any commercial use is included under the general term "minerals" or "mineral resources." The same with the book "Practical Stone

Quarrying" which includes for instance the quarrying of clay.

43. The vernacular test, as I understand it, is not really whether laterite or any other substance can be conveniently or properly dealt with, under the heading of "mineral substances" or resources, or, "minerals" for short. The test, as I understood it, is "if you ask anyone" whether he will say that laterite comes under the description "mines of coal and other minerals"; "anyone" being afterwards limited to certain classes. I am not at present on the question of date. The classes of persons, whose evidence has been adduced in this case, are (1) tenantry, (2) landowners, in particular the Midnapur Zamindari Co., (3) the Crown, and (4) the railway. Now, all these in India are permeated with ideas of surface and under surface rights. Apart from the lands affected by permanent settlement, the Crown is the biggest holder of underground rights. Its whole outlook is tinged with considerations which do not arise in England, though they may arise in the Isle of Man: see *Khushal Singh and Others Vs. Secy. of State*. Lastly, there are the mining and geological professional witnesses. As already stated, with regard to Mr. Murray's and Dr. Coulson's evidence I have not the least doubt of its freedom from partiality or its sincerity. I have rarely listened to testimony more worthy of attention. But were they not in this case rather expressing their point of view than indicating an existing vernacular? The vernacular, as I understand it, is something in the nature of a spontaneous answer to a simple question. The evidence before me was naturally more conscious and considered. Both gentlemen are devoting their lives to the development of the mineral resources of India. That is their point of view. They are not leaving out from the category of minerals any mineral resource. As an indication, take Dr. Coulson's attitude towards clay, the biggest industry in India. India is in the clay age.

44. The result, at any rate, would be that the relevant vernacular in India would differ very materially from the relevant vernacular in England. I do not mean that the vernacular cannot differ in different countries or in different places. I do not mean that at all. But it does not lessen the doubt which I feel, whether this evidence, however sincere and impartial, is exactly what the Court ought to be looking for and which in India will, I think, be extremely difficult to find. In point of fact the evidence of these witnesses brings us back not merely to Lord Mellish, but actually to Lord Romilly of 1865. It is upon considerations such as these that I have a philosophic doubt upon this particular point. I should have gone over the matter again with greater care had the result of this case depended wholly or primarily upon the vernacular test. As it is, I proceed upon the basis that the evidence which the plaintiffs have adduced sufficiently establishes that at present Godapiasal stone and morum are regarded as minerals and that there is no sufficient evidence to show that the vernacular has changed since 1901. But since it is the common rock of the district the plaintiffs are defeated by the first Budhill test. The answer therefore to the first essential question, is that the materials in suit do not fall within the exception. With regard to the second essential question as formulated it is not necessary to decide whether the

materials in suit fall within the exception to the exception. But the matter has been argued, and in deference to that argument and for completeness, I will deal with it shortly. The actual words are

except only such parts as it may be necessary to dig ... in the construction of the work, for the purpose of which the land is being acquired.

45. I have already commented upon the language. It might be clearer to leave out the words following "work," and that, if I recollect rightly, is the case in the English statutes. There is no material distinction between "the work" and the notified "purpose," the former being the physical embodiment of the latter. "The work" is the actual canal, reservoir or railway, which has to be constructed in order to carry out "the purpose."

46. The points to be noted are these: (1) It is an exception and therefore the onus is upon those who rely on it. (2) It is an exception to an exception in order to meet a particular difficulty or class of difficulties, i. e., in the course of construction cutting through a hill or something of that nature. (3) Lastly there is the wording. In my opinion it is not proper to resort to the exception to the exception to save the grant from being devoured by the exception as was done in *Secy. of State Vs. Gyanendra Chandra Pande*, In my view the narrow construction of the exception to the exception is the correct one. I have already taken the liberty of indicating the desirability of stating with care the purpose for which the land is acquired. The answer therefore to the second question is that if the materials in suit are within the exception, they are not within the exception to the exception, except of course in so far as they were actually dug in constructing the work, for instance, the Surdia spoil heaps. This disposes of the case except for minor issues.

47. With regard to estoppel, I have not been able to find that by any statement to be found in any document or by act of the defendants, the plaintiff company was led so to alter its position as to preclude the defendants from contending that the materials in suit are not within the exception. With regard to the contract, it is pleaded, I think in para. 6 of the plaint, that by a particular letter of 17th April 1936 the railway agreed to pay for Godapiasal laterite, and I allowed upon this an issue. The suit, however, is not based upon such an agreement, and in my view the letter is really pleaded by way of an acknowledgment or for the purpose of limitation. Acceptance is not pleaded. In fact the correspondence does not disclose any complete acceptance. Breach is not pleaded, nor does it appear that any cause of action is founded upon breach. It has not therefore been necessary for me to consider questions relating to damages, either as to quantum or principle. If I have not already acknowledged my debt to counsel, both senior and junior, and to those who prepared the case on both sides, let me do so now. The result, however, is that for reasons explained the suit must be dismissed. I am ready to hear any argument on costs.

48. I have heard Mr. A.N. Chaudhuri. He has reminded me of the defendant's

offer to pay for the materials in suit as minerals. He has also referred me to the proceedings for transfer, in particular to certain passages in affidavits by officers of the railway, which indicates that the result of this case is of importance to the railway, not so much on account of the claim, but in order to obtain a decision on principle which will be of value to the railway generally. This appears to be the fact. Mr. Chaudhuri relies on the fact that there is no Indian decision directly on the point, and that such as exists are in his favour. He also referred to the care which the plaintiffs' attorney had taken to limit the issues and which counsel had taken to shorten the trial, especially as regards cross-examination. In the respects last mentioned, the parties are undoubtedly indebted to their legal advisers. Although I regret that costs which must be heavy should fall upon the plaintiff company, I do not feel myself justified in departing from the general rule. In point of fact, however, the attorney and client costs will, I imagine, far exceed those as between party and party.