

(1942) 05 PAT CK 0005
In the Patna High Court

Purnendu Narayan Singh

APPELLANT

Vs

Narendra Nath Chakravarty and Others

RESPONDENT

Date of Decision : 04-05-1942

Acts Referred:

Citation : AIR 1943 Patna 31

Hon'ble Judges : Rowland, J; Manohar Lall, J

Bench : Full Bench

Judgement

Rowland, J.—This second appeal was remanded to the Subordinate Judge for findings on issues 6 and 7 of the trial Court. Issue 6: Have the defendants right of subsoil? Issue 7: Have the defendants exercised rights of sub-soil for more than 12 years? The lower appellate Court was also required to find what would be the extent of the damages in case the decision should go in favour of the plaintiff. The Subordinate Judge has devoted a part of his judgment to arguing that the issues remanded to him for trial were not correctly framed. This was unnecessary. He was asked to return findings on the issues as framed. He has, however, observed that no right of sub-soil was claimed. The grant dated 7th May 1884, has been brought on the record and is Ex. 2. The operative portion is that malmokorra patta has been granted in respect of two muris of land to Kangal Chakravarti who should pay Rs. 9 rent annually and enter into possession of and enjoy the same generation to generation, and hence the patta has been granted. It is nowhere stated that any subsoil rights are granted this disposes of Issue 6. The Subordinate Judge has also said that there is no question here of the defendant acquiring a right to sub-soil by long user because bricks were taken from the disputed land for the first time on the occasion which gave rise to the suit. That finding answers issue 7. He finds that in the event of the plaintiff succeeding, the amount of damages would be Rs. 35-4-0.

2. The legal position with respect to sub-soil rights in a tenure is that these will be assumed not to have been granted unless an express grant is made. But the Subordinate Judge thinks the making of bricks is a use of the surface to which a

tenant is ordinarily entitled unless the right is expressly excluded: he relies on a decision in *Barada Prasad Banerjee and Another Vs. Bhupendra Nath Mukherjee*, , but that cannot now be considered good law in face of the Privy Council decision in *Bejoy Singh v. Surendra Narayan Singh* AIR 1928 P.C. 234 . Of course, the right of a tenant to make bricks for his own domestic or agricultural purposes, i.e., for his own use on his tenure or holding, is not questioned; and a right of quarrying, it seems, can be acquired by adverse possession: AIR 1931 162 (Privy Council) . But unless the tenant has acquired by grant or by adverse possession a right of ownership in the sub-soil, the digging of earth for bricks to be taken away from the area of the tenure and disposed of to strangers is an appropriation of the corpus of the grant which in India a tenure-holder is not entitled to make. The authorities bearing on this subject were closely considered in *Kusum Kamini Deya v. Jagdish Chandra Deo* AIR 1941 Pat. 13. The decision in that case turned on the distinction between user and the exercise of rights of ownership. The subject-matter of dispute was surface stones which the defendant had collected and disposed of. It was held that the distinction was not between what lay on the surface and what had to be excavated; removal of stones from the surface was on the same footing as excavation of the soil for the purpose of making bricks. The stones, it was said,

form part of the property leased and unless the lease gives the tenant proprietary rights in the subject-matter of the lease the property in the surface stones cannot possibly pass to him.... The lessee could use these stones or the soil on the surface as a person of ordinary prudence would use them; but collecting them and selling them to others is something more than user. It is an act which can only be done by a person who has rights greater than mere rights of user. Collecting and selling these stones is an act of a person entitled to the property in the stones. In my judgment the present lessees had no such property in these stones and, therefore, had no right to sell them... At most his only right in these stones was a right of user. He had no right to sell them as an owner.

3. The learned lower appellate Court has referred to a decision of the Privy Council in *Attorney-General for the Isle of Man v. Emily Moore* AIR 1938 P.C. 238, in which the grantee of a certain property in the Isle of Man was held entitled to rights not expressly reserved. But the nature of the grant has not been noticed by the Subordinate Judge. It was the grant of an estate in fee simple, that is to say, of ownership analogous to the estate of a proprietor in India. The decision does not apply to a tenure-holder in India.

4. In the result, the appeal must be allowed and the suit decreed for a declaration that the defendants have no right to cut earth for brick-making on the lands of the tenure in suit for purposes other than the purposes of the j tenure including domestic purposes of the lessee. The plaintiff will get the damages, Rs. 35-4-0 as assessed by the lower Appellate Court, and will get proportionate costs of all Courts.

Manohar Lall, J.

I agree.