

(1951) 02 PAT CK 0011
In the Patna High Court
Case No : A.F.O.D. No. 166 of 1946

Radha Gobinda Roy and Others

APPELLANT

Vs

Sri Sri Nilkantha Narayan Singh and Others

RESPONDENT

Date of Decision : 27-02-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 7
Limitation Act, 1908 — Article 120, 142, 144
Specific Relief Act, 1877 — Section 42
Transfer of Property Act, 1882 — Section 8

Citation : AIR 1951 Patna 556

Hon'ble Judges : Jha, C.J.; Reuben, J

Bench : Division Bench

Advocate : P.R. Das and R.S. Chatterji, for the Appellant; Mahabir Prasad, Lala Atul Chandra, Jyotirmay Ghosh and Bhabananda Mukherji, for the Respondent

Final Decision : Dismissed

Judgement

Reuben, J.—The applts. whom I shall call the Roys, wore defts. 4 to 13 in the suit out of which this appeal arises.

2. The suit was brought by the pltf. resp. to recover arrears of way-leave rent for the year 1931 to 1942 from defts. 1 to 3 under the terms of an agreement dated 14-4-1925 & also for a declaration that the pltf. & not the Roys, is entitled to the way-leave rent under this agreement. The facts leading up to the suit are as follows. In the year 1908, Banwari Lal, the father of the pltf. granted a mining lease to one Debendra Nath Ghosh for a period of 999 years in respect of coal lying subjacent to a block mauza Dharmaband representing a share of fourteen annas in the mauza. In 1911, Ghosh in his turn made a sub-lease of his interest excluding coal seams Nos. 17 & 18 to Mr. H. A.; Pringle, whose widow is deft. 1. Pringle also possessed the mining rights in the coil lying under the block of Dharmaband mauza representing the two annas share of that mauza. For convenience of reference, I shall speak of his block as Block B & shall refer to the fourteen annas block as Block A. Defts. 2 & 3 have acquired an interest in both

these properties from Pringle by subsequent assignments. The way-leave agreement, on which this suit is based, was entered into between Pringle & Banwari Lal, while Pringle was still interested in both these properties, & gave him the right to bring coal from his workings in Block B to the surface through Block A, using the existing passages & making such fresh passages as might be necessary. For this permission, he was liable under the agreement to pay Banwari Lal one anna per ton of foreign coal so carried. The Roys derive their interest in the property from a sale-deed dated 4-7-1931 executed in their favour by the plaintiff. According to the plaintiff by this deed, he transferred to the Roys merely his interest in the coal subjacent to Block A, thus entitling them to realise from Debendra Nath Ghosh the royalty due under the lease of 1908 &, in case of surrender, to enter into direct possession of the coal & work the coal either themselves or through fresh lessees. Difficulty arose soon after the sale-deed, however, because the Roys claimed that, under the sale-deed, the right to the way-leave also passed to them. The plaintiff, therefore, brought this suit having failed to recover any way-leave rent after the execution of the sale deed. The suit having been decreed, the present appeal has been filed.

3. Three points have been pressed before us: (1) that the suit is barred under the proviso to P. 42, Specific Relief Act, 1877; (2) that the suit, as far as it is a suit for a declaration against the Roys, is barred by limitation, & (3) that, on a correct construction of the sale-deed, the right to way-leave passed to the Roys.

4. Point No. 2.--It is the admitted case of the plaintiff that, since 1931, he has not realised any way-leave rent from defendants 1 to 3--It appears from the record that way-leave rent due under the agreement of 1925 has been recovered by the Roys. This fact was asserted by the Roys in para. 8 of their written statement, which statement was supported by defendant 3 in para. 8 of its written statement, & the evidence of Shibram Mandal (D. W. I) regarding the realisation has not been challenged, the only suggestion in cross-examination being that the realisation was not made before the execution of an indemnity bond, which indemnity bond was executed by the Roys in favour of defendants 2 & 3 on 18-5-1935. It is contended that, on these facts, it must be held that, even supposing that the right in question did not pass to the Roys & remained vested in the plaintiff, the plaintiff was dispossessed by the interception of the way-leave rent & is, therefore, not entitled to sue for a mere declaration u/s 42, Specific Relief Act. It is pointed out that there were three different reliefs which, supposing the title to be in him, he was entitled to seek against the Roys, namely; (1) recovery of possession, (2) an injunction restraining them from interfering with his possession, & (3) compensation in the nature of mesne profits, whereas his sole prayer, as far as the Roys are concerned, is a prayer for a declaration of his title.

5. It appears to me that the objection fails, first of all, on the ground that s. 42 has no application. Reading the plaint as a whole, I do not think it is right to split it in the manner indicated by this argument. I do not consider that it can be regarded as consisting of two parts, one directed against the Roys & asking for a

declaration against them & the second directed against defts. 1 to 3 & asking for a money decree against them. The two parts of the plaint are intimately connected with each other & the declaration asked for in one part of the plaint is the basis of the claim in the other part. The money decree is a relief consequential upon the declaration & as I have recently explained in *Phulkumari Devi v. Prahlad Prasad Arora*, F. A. Nos. 211 of 1946 and 35 of 1948, D/- 24-1 1951, a money decree of this kind, where a party setting up an adverse claim to the suit property is impleaded, is as much a decree against that party as it is a decree against the person directed to make the payment. On this view, the suit is not a suit for a mere declaration & does not come within the provisions of Section 42. It is true that there are other reliefs which the pltf. might have asked for against the Roys & which he has omitted to ask for. There is no provision, however, requiring a pltf. to seek all the remedies open to him. If he omits to sue for any particular relief arising out of his cause of action, he will at most forfeit his right to sue afterwards in respect of that relief (O. II, Rule 2, Civil P. C.).

6. Secondly, I do not think that in the circumstances of the present case, it can be said that the pltf. has been dispossessed. It is well settled that, where the owner of property has given that property to a lessee &, under the terms of the lease is entitled merely to realise rent from the leaseholder & not to direct possession of the property leased, his dispossession can only occur by a stranger, who claims adverse to him, intercepting his receipt of rent from the lease-holder (*Huronath Rai v. Indoo Bhoosun*, 8 W. Rule 135 ; *Lalu Sahu v. Ghunaria Uraon*, 2 IG 881 (Cal) ; *Omatul Mehdi v. Kulsum*, 8 CLJ 245 : 35 Cal 120; *Satish Chunder Bhattacharya and Another Vs. Satya Churn Majumdar and Uday Kumar Das v. Katyani Debi*, 49 Cal 948 : A. I. R. 1922 Cal. 87. Stated in this manner the proposition appears simple, but it is fraught with difficulty & a further examination is necessary to explain what constitutes dispossession.

7. The dictum in *Huronath Rai*'s case, 8 WR 135 was obiter :

"It would be otherwise if the reversioner during the time were deprived of his rent, or if rent was received adversely to him by a stranger, as for instance, if a stranger obtained a decree against him on an intervention under u/a. 77 of Act X [10] of 1859." With respect, I would suggest that, if his Lordship meant to say that receipt of rent by a stranger claiming adversely to the real owner is sufficient by itself to constitute dispossession, the proposition is incorrect. The position of no landowner would be safe, if he is to be regarded as dispossessed merely because his tenant, in collusion with a stranger, pays the rent to that stranger. Something more is surely necessary, & it seems to me that his Lordship implied that something by saying--"if rent was received adversely."

8. In the case of *Lalu Sahu*, 2 IC 381 (Cal), the contest was between the defts. claiming under *Ahila Koer*, the widow of one *Jadupat* & the pltf. claiming under the sons of *Madhupat*, brother of *Jadupat*. *Jadupat* predeceased *Madhupat*, who was in possession of the property in suit by the realization of rent therefore from the tenants at the time of his (*Madhupat*'s) death in 1893. The question was

whether Ahila Koer had dispossessed the sons of Madhupat. It was answered in the affirmative by Mookerjee J. on the ground that Ahila Koer successfully intervened in the rent suits instituted by the sons of Madhupat & defeated their attempt to realise the rent. She, thus, prevented them from exercising the only act of possession which they could exercise in respect of the property, namely, the realisation of rent.

9. In *Omatul Medhi's* case, 8 C. L. J. 245 : (35 Cal 120) Mookerjee J. stated the position in the terms which I reproduce below :

"In the case of Zamindaries where the proprietor can be in possession only by receipt of rent, he is in actual possession of his interest, if he is in receipt of rent. The zamindar's possession of the right to Collect rent from the tenants in occupation is actual possession of a tangible property *Sarbananda Basu v. Pran Sanker*, 15 Cal 527 ; *Surb Narain v. Birj Mohan*, 23 Cal 80. When a person has proprietary interest in land & as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor [See the observation of Lord Davey in *Secretary of State v. Krishnamoni Gupta*, 29 Cal. 518 : 29 I. A. 104 P. C.. If, therefore, a proprietor finds that the rent receivable by him is intercepted by some other persons, he is dispossessed of his interest in the land. He loses possession, because the only mode of enjoyment by which that possession can be held, ceases to be available by the act of the trespasser." (The italics are mine.)

The very last sentence of this citation repeats my analysis of the position in *Lalu Sahu's* case, 2 IC 381 (Cal)

10. In *Satish Chunder Bhattacharya and Another Vs. Satya Churn Majumdar* the question before their Lordships was the very one which I am considering here, namely, whether the proviso to s. 42 operated to bar the suit. Answering this in the negative, their Lordships stated their reason in the following words :

"Now, his position is that he is still in possession of the three plots in suit, & that he has not yet failed to recover rent from the tenants on the land. He may possibly be defeated in an attempt to recover rent, but, in the present circumstances, he has come into Ct. in order to dispel the cloud cast upon his title by the action of the deft."

According to his pleading, the pltf. had not yet been prevented by the deft. from realising his rent & therefore, the suit lay. All that had happened was that a cloud had been cast upon his title. Referring to the case of *Chinnammal v. Varadarajulu*, 15 Mad. 307, their Lordships remarked that, in a case of this kind, the pltf. was unable to seek any relief other than a declaration. They also refd. to the case of *Loke Nath v. Keshab Ram*, 13 Cal 147, which I shall discuss later,

11. Finally, in the case of *Chandi Vs. Katyani Debi* , Mookherji J. stated the general position substantially in the same way as I have stated it above, namely,

that the lessor is in possession by receipt of rent from his lessee & so long as such rent is not intercepted by a trespasser, he cannot be said to have been dispossessed. It was not necessary for his Lordship to examine the question in detail, as the wrongful possession in that case was adverse against the lessee & not against the lessor, the rent due to the lessor having been realised by him throughout, although a portion of the holding was not in the possession of the lessee.

12. Let us now proceed to consider the facts of the present case. It is true that since 1931 the pltf. has not realised the way-leave rent & that some realisations of this rent have been made by the Roys. The period of limitation for the realisation of the rent by the pltf. has not yet expired & the suit with which we are now concerned has been instituted for realising that very rent. If the right to realise that rent is vested in the pltf. the fact that the Roys have made certain realisations on account of that rent will not stand in the way of the pltf. getting a decree for the rent & putting that decree into execution. Further, it appears from the record that even the payments that have been made by defts. 2 & 3 towards the way-leave rent have been made only after the execution of an indemnity bond by the Roys. Therefore, these defts. are not really denying the title of the pltf. & have provided against the possibility of the pltf. being found entitled & obtaining a decision to that effect. This also appears from para, 8 of the written statement of deft. 3 which states that the deft. is informed & believe it to be correct that by the deed of sale the pltf. parted with his right to realise the way-leave rent. In these circumstances, I do not think that it can be said that the Roys by their action have prevented the pltf. from realising the way-leave rent. Hence, there is no dispossession.

13. Another answer to this contention is furnished by Lokenath Surma's case, 13 cal. 147. The facts of that case are that the pltf. having obtained a decree for the possession of certain lands & having received formal possession thereof, brought a suit against 86 persons holding distinct & separate tenures in those lands on the allegation that there was a combination between the tenants as a result of which the defts.-tenants would not recognise them as the landlords & in various ways opposed acts of the pltf. in the capacity of landlords & in suits brought by the pltf. for the recovery of rent, denied the title of the pltf., hence, the pltf. withdrew the suits for rent & brought the present suit asking for a declaration of their proprietary right & of the relationship of landlord & tenant between them & the defts. Unlike the present suit, that suit came within the mischief of Section 42, Specific Relief Act, as it was a purely declaratory suit. This is how their Lordships met the objection u/s 42 :

"It is contended that the pltf., being out of possession, should have sued to recover possession, & not merely have sued for a declaration of their title. We think that this was unnecessary. The pltf. were not seeking for khas possession, but merely for possession by receipt of rent from the defts. Under these circumstances, even if the plts. had sued for & obtained a decree for possession

of the property, that possession could only have been delivered by notifying the declaration of the pltfs". title as Sprayed for. We think, therefore that the omission to sue for possession was immaterial, & that the suit was not liable to be dismissed on this ground."

Evidently, their Lordships consid. that the effect of a declaratory decree in the circumstances of the case would be the same as a decree for the recovery of rent. This is exactly the position here. What the pltf. has asked for is a declaration of his title & a decree for the recovery of the way-leave rent. The only way in which he can exercise his possession in respect of the property is by the recovery of the way-leave rent. The prayer for a decree for the recovery of way-leave rent is, therefore, in fact, a prayer for the recovery of possession. In the course of the argument, it was Suggested that, if the suit be regarded as one for the recovery of possession, a higher amount of C. F. than that paid on the plaint might be necessary on the value of the reversionary interest in the suit property. I do not think there is any substance in this suggestion. I have indicated above that this is really not a case of dispossession, but, even supposing it to be so, since, for the recovery of possession, it is sufficient that the pltf. should obtain the declaration asked for & also a decree for the way-leave rent claimed, the C.-F. paid by him on these two reliefs is sufficient.

14. Point No. 2 :--It is argued that, so far as the Roys are concerned, the suit is a suit for a declaration, the period of limitation for which is six years from the moment when the right to sue accrued (Article 120 of the Schedule to the Limitation Act, 1903). The right accrued, it is contended, in the year 1931, whereas the suit was instituted in the year 1943. It is not clear from the record when, for the first time, the pltf. came to know of the adverse claim set up by the Roys. That point of time, however, is not important because the claim by itself would not give a start to the period of limitation. The question of instituting a suit for a declaration would hardly arise until there was an actual disturbance of the possession of the pltf. Conceivably, the actual realisation by the Roys of money on account of way-leave rent might give a start to limitation; but it is not clear that the pltf. came to know of the realisation of the way-leave rent at any time prior to the filing of the written statements in Ct. Apart from this, however, the objection is, in my opinion, sufficiently answered on the position which I have taken in dealing with the first point, namely, that this is not a purely declaratory suit. It is a suit for the recovery of rent. As a preliminary to the decree for rent, it was necessary for the Ct. to come to a finding as to title. It is not suggested that the recovery of the rent claimed was barred by time. Hence, the prayer for the determination of the title was equally unaffected.

15. Point No. 3 :--The operative words in the sale deed (Ex. 3) are :

"Today I sell you the underground coal comprised in the demarcated fourteen annas share of mauza Dharmabandh & c."

The contention on behalf of the appls. is that on a proper construction of the

sale deed the Roys acquired not merely the mineral coal lying within the limits indicated in the schedule to the sale deed but the pltf"s. entire rights in the "coal mine", an expression which includes, in addition to the actual mineral, the chamber containing that mineral & the vacuum created by the removal of the whole or part of that mineral; therefore, u/s. 8 of the T. P. Act, there also passed to the Roys the right to collect way-leave rent in respect of foreign coal passing through this chamber. It is further contended that even if the grant was intended to be confined to the mineral coal the grant necessarily included the containing chambers &, therefore, the Roys would nevertheless be entitled to the way-leave rent. Reliance was placed on certain English decisions which I analyse below.

16. The connotation of the word "mine" is thus defined by MacSwinney in Edn. 5 of his book on the Law of Mines, Quarries, & Minerals :

"The word "mine" does not necessarily mean a cubical layer of earth, during & so long only as it contains minerals. The word is generally wide enough, if not in its primary sense, at all events according to the meaning given to it by the authorities, to include the space which is created according as the minerals are being worked, & the vacuum which is left after they have been worked out. In other words, a person who has an interest in a mine has, as such, prima facie, an interest in the Chamber which contains the minerals; & his interest in that chamber is precisely the same when it is in its natural state & filled with minerals; or when its natural state is altered by workings, & it consists partly or wholly of empty space." [Vide also Article 173 at P. 53

17. In Proud v. Bates, 1865 34 LJ (Ch) 406: 13 LT 61, Wood V. C. was concerned with the construction of a lease of certain lands which contained a reservation of the "mines & quarries" lying & being within the limits of the property leased ;

"With free way leave & passage to, from & along the same, on foot or on horseback, with all manner of carriages."

The question that arose was the right of the lessee of the mines to use a driftway under the property for the purpose of working mines not lying under the property in question. The Vice-Chancellor held that the exception extended to "the whole containing chamber which has the minerals" & that this containing Chamber was altogether out of the demise: the grantors, therefore, never demised at all or parted with any right of using this containing chamber & were at liberty to use it as they thought fit. There was a further point which arose in this case & it is necessary to refer to it for the proper understanding of the judgment of Lord Chelmsford in Duke of Hamilton v. Graham, (1871) LRHL Sc 166. It related to a headway of a foot & a half for the use of horses & carriages which headway was not confined to the seam of coal but was cut in the rock above the coal to afford a sufficient height for horses to pass along the way. It was pointed out by the Vice-Chancellor that so far as the use of this headway was concerned it was not a case of a portion of a property being demised & the remainder being reserved or excepted; it was a grant of property with a regrant of certain rights in respect

of that property. Stressing the fact that the exception of the mines would be sufficient by itself to give the grantors the right of working the mines & for that purpose to use the demised property, he held that the general provision for the right of winning, working & so fourth showed that the regrant was not intended to be restricted to that purpose alone & therefore, extended to the carriage of foreign coal.

18. The question again arose before his Lordship as Lord Chancellor in *Duke of Hamilton v. Graham*, (1871 1 LR H L SC 166 in relation to a grant of land by the Duke of Hamilton reserving to himself, his heirs & successors "all & sundry the coal & limestone" within the bounds of the land demised. His Lordship observed that he saw no reason to withdraw from his decision in the case of *Proud v. Bates*, (1865 34 L J Ch 406: 13 LT 61 that by the law of England, when you demise a property excepting a certain part of it, there is no demise of the part excepted & therefore, the minerals excepted remained with the lessor; on the other hand, if you reserve certain rights & interests parting with the property, the rights & interests reserved must enure by way of regrant from the person to whom you make the disposition. Holding the reservation in question to be a reservation of property, his Lordship came to the conclusion that the Duke of Hamilton was entitled to carry foreign minerals through the reserved property. Lord Westbury & Lord Colonsay concurred in this view on the same reasoning. Lord Chelmsford in coming to the opposite conclusion distgd. the case of *Proud v. Bates*, 1865 34 LJCh 406: 13 LT 61 on the ground that it proceeded upon special grounds. His analysis of that decision shows that he had in his mind the discussion about the headway of one & a half feet. That, as I have mentioned above, was a case of regrant but there was also the reservation of the mine which was held by the Vice-Chancellor to be an exception from the demise & in respect of which the grantor was held to have "plenum dominium. The doable aspect of that case was explained by the Lord Chancellor during the speech of Lord Chelmaford.

19. Much stress has been laid before us on the decision in *Duke of Hamilton v. Graham*, 1871 LR H L Sc 166) because the reservation in that case was of "the coal & limestone" & it has been sought to rely on the decision as an authority for the proposition that a grant of coal is equivalent to a grant of a mine. In my opinion the contention is not borne out by the other cases which have been examined by us.

20. In *Ramsay v. Blair*, 1876) I A.C 701, three grants came under consideration made in 1825, 1927 & 1857 respectively, & the reservation in these documents were "the coal & coal-heughs" the whole coal, stone quarries, & all other metals & minerals" & "the coal"--it appears from the judgment of Lord Selborne that the expression "coal-heughs" was interpreted to mean coal pita. The dispute as in the two previous decisions was about the right of the grantor to carry foreign coal along passages under the demised property. With reference to the first & the third grants, the Lord Chancellor observed that there could be no doubt at all

that the only reservation was of the coal under the surface, & the grantor would have no power whatever to carry under those lands any coal or minerals won or worked from other lands; under the grant of 1827, however, "the whole of the land under the surface, all the coals & all the metals & minerals, were reserved to the grantor & it gave him a right of course as upon his own property to make any way for any coals or other minerals that he might have in any other part of his lands." Lord Hatherly concurred in this view. According to him, by the grant in 1857,

"the right which has been reserved ... is only a right to the coals under the lands which have been parted with; that is to say, a right to the portion of the coal situated under the surface demised to the resp. & nothing can be done beyond the purpose of working the coal under the resp." s lands & no other coal." The grant of 1927, however, being of "the whole coal, stone quarries, & all other metals & minerals within"; the lands demised, "with power to search for, work, & carry away the same," was, in his opinion, so extensive as to amount to a reservation of a portion of the property demised. In spite of his success in relation to the grant of 1927, the grantor could get no relief as his failure in respect of the other two grants created barriers preventing access to the property reserved in the grant of 1827. Lord Selborne, who concurred in this decision proceeded on entirely different reasoning, namely that the reservation in the grants of 1825 & 1857 was as to coal whereas the level cross-cut sought to be used for the passage of foreign minerals passed chiefly through strata consisting of shale & sandstone. The reason given by him, therefore, is not relevant to the present discussion.

21. In *Eardley v. Granville*, (1876) 3 Ch 826: (45 LJ Ch 669) Jessel M. R. was concerned with the peculiar rights of a copyholder in respect of minerals lying below his copyhold, namely that the estate of the copyholder is in the soil throughout except as regards trees, & minerals, the property in which remains in the lord; when the lord has removed minerals the space left belongs to the copyholder, & when the tree is cut down the copyholder has a right to the soil of the copyhold where the tree stood including the stratum of air left vacant by the removal of the tree. The decision, therefore, is not directly applicable, but it is relevant to reproduce an important distinction which the Master of the Rolls makes between a reservation of "mines" & a reservation of "minerals" :

"I take it that the law is clearly settled, & I am surprised to hear it disputed. In the first place, the law is laid down, perhaps not as accurately as might be wished as regards the words used, by Lord Campbell in *Bowser v. Maclean*, (1860) 2 D F J 415 : 30 LJ Ch 273 " I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, & freehold land least d with a reservation of the minerals"--he should have said "of the mines," but he has used the words "reservation of the minerals," meaning an exception of the mines -- "or freehold land where the surface belongs to one owner & the subsoil, containing minerals, belongs to

another, as separate tenements divided from each other vertically, instead of laterally." That is quite intelligible; what he means is this--he does not say it, but he means it --If a freeholder grants lands excepting mines he severs his estate vertically, i. e., he grants out his estate in parallel horizontal layers, & the grantee only gets the parallel layer granted to him, & does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; & whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says in the case of a copyholder, that is not so, because the copy-holder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property & possession in this sense, that the moment the minerals are taken away the space is in his possession, & he only can interfere with it, the lord having no right to do so."

The importance of the distinction made by the Master of the Rolls is stressed by Warrington J. in *Batten Pooll v. Kennedy*, (1907) 1 Ch 256 : (76 LJCh 162.

22. It is also relevant to mention that the Master of the Rolls repelled the suggestion that the Duke of Hamilton v. Graham, (1871 LRH SC 166) had somehow or other altered the law & observed :

" "It exactly concurs, therefore, in the reasoning with the decision of Vice-Chancellor Wood in the case of *Proud v. Bates*, (1865 34 LJCh 406 : 13 L. T. 61 the decision of Lord Campbell in *Bowser v. Maclean*, (1860) 2 D FJ 415, that where a free-holder grants lands excepting the miner, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton v. Graham*, (1871LRHL SC 166) decided."

The italics are mine.

23. The last case I shall consider is *Batten Pooll v. Kennedy*, (1907) 1 Ch 256 : 76 L J Ch 162 where Warrington J. had to consider the effect of a reservation "all mines and veins of coal." His Lordship followed the decision in the *Duke of Hamilton v. Graham*, 1871 L. R. 2 H. L. S. C. 166 pointing out that the terms used in that case were less favourable to the grantor than in the case before his Lordship. He cited with approval the opinion of the Master of the Rolls in *Eardley v. Granville*, 1876 3 Ch 826 : 45 LJCh 669) as to the real point decided in *Duke of Hamilton v. Graham*, 1871 L. R. 2 H. L. s. C. 166 and, adverting to the speech of Lord Selborne in *Ramsay v. Blair*, 1876 IAC 70I he expressed the view that the dictum of his Lordship-was not

"strong enough to outweigh the carefully consider judgment of the Master of the Rolls in the case of *Eardley v. Granville*, 1876 8 Ch 826 : 45 L JCh 669.

His Lordship finally concluded that

"Inasmuch as "mines" unquestionably include not merely the bed of coal, but the workings of the coal, & the cavity after the coal has been removed," the right in question was part of the mine &, therefore, was comprised in the reservation.

24. I think that from the above analysis it is clear that there is a distinction between a grantor a reservation of "coal" & a grant or a reservation, as the case may be, of a "mine," a view which is borne out by *Mao Swinney* (Article 43 at. P. 15 & Article 176 at P. 55 & the last para of Article 1159 at p. 531 of Halsbury's Laws of England,. Edn. 2, vol. 22, Hailsham Edn.) It is not possible to lay down as a general rule what connotation, the word "coal" will bear, that is a matter to be decided with reference to the document in which the word has been used. It is sufficient that the discussion of these cases shows that the word "coal" does not bear a definite meaning, & its-meaning must be gathered from the document under construction.

25. It is agreed that under the lease of 1908-all that Ghosh got was the right to win & take the coal & for that purpose . to sink pits, drive shafts & do such other work as might be necessary for winning & carrying away the coal. This view is expressed in Para. 2 of the plaint, which speaks-of the lease as a lease of the coal & the coal mining rights in the fourteen annas plot of mauza-Dharmabandh, the correctness of which pleading is not denied in the written statement. It also finds expression in the sub-lease (Ex. 5) executed by Ghosh in favour of Pringle & in the wayleave agreement (Ex. 2) executed between Pringle & the-pltf. Under the lease Ghosh had no right to carry foreign coal to the surface through the mine in, Dharmabandh. After the lease, the predecessor of the pltf. remained the owner of the surface subject. to the right of Ghosh to use it for the purposes of the mining lease on the conditions set out in that lease. The ownership of the passages made for the-working of the mine & in the vacuum created by the removal of the coal from the mine remained in the predecessor of the pltf. Hence, when Pringle by his sub-lease got the rights of Ghosh & wished to work by outstroke, he entered into the way-leave agreement with the predecessor of the pltf. This agreement, it is stressed, was executed by the pltf."s predecessor as the owner of the reversion in this property. After this agreement, it is said, there were three rights vested in him; (1) the right to realise rent & royalty under the lease of 1908. (2) the right in reversion to re-enter on the demised property on the expiry of the period of the lease or on an earlier surrender by the lessee, & (3) the right to realise way-leave rent, this last right being appurtenant to his right to the reversion.

26. There has been some discussion before us as to whether the way-leave rent is payable on account of the carriage of foreign materials only through the underground passages of the mine to the pit-mouth or whether it overs carriage over the surface of the property as well, the surface being vested in the pltf. Also, a suggestion has been made, although it is not supported by any evidence, that some of the passages along which the foreign coal is being brought pass through

strata lying outside the coal-bearing strata &, therefore, outside the property transferred to the Roys. Neither of these two possibilities was mentioned before the Subordinate Judge, & the suit proceeded on the basis that the way-leave rent was for the carriage of foreign minerals through the coal mine. Hence, we may deal with the matter on this basis. The case of the applts. is that the pltf. sold to the Roys his right of reversion in the coal mine &, since the right to way-leave rent cannot exist in vacuo, the right to realise way-leave rent passed to the Roys. It is, therefore, necessary to consider what exactly the pltf. sold by this document.

27. This brings me to the sale deed (Ex. 3). It commences by mentioning the mining lease in favour of Ghosh, describing it as a settlement of "the underground coal," & recites that after this there remained to the grantor the right to the fixed minimum royalty & other dues arising out of the lease. It continues by referring to certain financial transactions between the parties & says:

"As there is no other means (to repay the same I announced to sell the underground coal land (koila pathar bhumi) of the demarcated 14 annas share of mauza Dharmabandh mentioned in schedule Ka below & you agreed to purchase the same."

Much stress has been laid on this passage as indicating that the pltf. was selling not merely the right to the coal but also the land within which the coal was comprised, that is to say, the containing chamber. In the very next sentence, however, the kebala continues:

"Today I sell you the underground coal paihuria koila pazhar comprised in the demarcated 14 annas share of mouza Dharmabandh mentioned in schedule Ka below,"

The kebala goes on:

"From today you shall become fully entitled to & enter into possession of the demarcated property in my right &c."

The words placed in italics by me are evidently used loosely, as the demarcated property on a strict interpretation would mean the entire 14 annas-share of the mauza. The words, therefore, refer merely to the portion out of this 14 annas property which is being transferred by the sale deed, & what this is the point which we are investigating. 80, the words used do not help us to a solution. Equally unhelpful is the next passage to which our attention has been drawn:

"from this day I become fully divested of all my rights in the vended property & all the rights which I had therein shall devolve on you."

It has been emphasised that by these words the vendor was placing the Roys in hit. position as regards the disputed property. The transfer, however, is confined to "the vended property" & as these words do not define what the vended property is they do not help the applts. The next passage again confines itself to

the coal & states :

"Be it stated that as long as the settlement in respect of the demarcated 14 annas underground coal (koila pathar) of the said mouza Dharmabandh.....remains in force, you . . . shall continue to realise hereafter all dues according to the terms of the said settlement from the said Debendra Nath Ghosh & his heirs & successors in-interest."

28. The opening portion of this passage indicates that the vendor is thinking of the lease made in favour of Ghosh as a lease of the underground coal. The sale deed next recites :

"Whatever right & title I had by virtue of the aforesaid patta & kabuliat (that is the transaction with Ghosh) shall all from this day devolve on you."

This passage again seems to help the pltf. rather than the Roys. Under the mining lease the grantor had in respect of the coal only the right to realise the royalty & other dues in accordance with the lease & in the event of the expiry of the lease or its earlier surrender, to enter into possession of the coal. This was all that, according to this passage, the vendor was parting with. Much stress, however, has been laid on the right of reversion which is mentioned in the next following sentence :

"Should the said settlement be surrendered on any ground or the vended underground coal (bikrita nimnastha koila) comes to your khas possession you shall be competent to take khas possession thereof or settle the same with others as you like to which I or my. heirs or successors-in-interests shall not be competent to make any plea or raise any objection."

This right of reversion, it is urged, was of the entire interest which the grantor had in the mine in addition to the right to realise royalty & other dues under the lease of 1908. Again, however, it is important to see to what exactly was the right of reversion which was being transferred. The right, as I have indicated by the italics, was confined to the coal; all that the Roys were given was the right to enter into possession of so much mineral & work it themselves or permit someone else to work it, there was no parting with the ownership of the containing chamber. There is a mistake in the official translation of the passage which follows the passage just cited & both parties are agreed that the correct translation is :

"You shall have no concern with the surface land & o. above the demarcated coal land (chihinta koila bhumiruparistha jaminadi) or with other underground minerals & c. excepting coal (pathuria koila pathar)."

Here again the vendor confines to the coal the right which he is transferring to the Roys. There is some doubt about the correct reading of this passage. I have reproduced it as it was read to us in Ct. The persons responsible for preparing a transliteration of the document, as directed by us at the hearing, have read "bikrita" instead of "chihnita", & the translation should be "the vended coal land"

instead of the "demarcated coal land". This reading supports the contention of the applts. but taking this passage along with . the other passages refd. to before us the proper conclusion would be that the expression "koila" & "koila bhumi" have been used loosely & it is only by reading the document as a whole that we can determine what exactly was the property sold. The next passage accords to the Roys certain facilities covered by the mining lease in the winning & removal of the coal. It runs :

"Should you for the purpose of running the coal business in the leasehold coal land (koila bhumi) require any surface land &c. of the said coal land (koila bhumi) I as well as my heirs & successors in interest shall always remain bound to give such land according to the terms of the Patta A kabuliat &c"

It is true the words used are "koila bhumi" but in this passage the vendor is not describing the property which is being transferred but merely the space within which the working of the coal is to take place. The vendor then mentions that he is making over to the vendees " the mining lease of 4-1-1908 executed by Gosh in respect of the vended property". I have mentioned above that the vendor regarded this lease as a grant of mining rights in respect of so much coal. His description of the mining lease as being in respect of "the vended property", therefore, seems to confine the transaction of sale to the coal. In the next relevant passage the vendor makes himself responsible for paying all the Govt. revenue "in respect of this vended zamindari property." It all that the pltf. was selling was the coal the term "zamindari property" is loosely used. The fact that the pltf. was retaining the liability to pay the Govt. revenue shows that he was not divesting himself of his ownership of the property. A similar looseness in the use of language appears in the next sentence:

"Should you suffer any loss on account of any neglect on my part to pay the Govt. revenue in respect of the vended land (bikrita bhumi) or the Zamindai appertaining thereto I shall be liable for the loss."

The next sentence is again relevant & supports the contention of the pltf.

"I shall inform Debendra Nath Ghosh, the tenant in respect of the vended property mentioned in the schedule about this matter & I shall write to pay all the dues, royalty &c. in respect of the said property to you."

It is significant that, while the vendor was particular to mention the lease in favour of Ghosh & to make over the kabuliat executed by Ghose & undertook to inform Ghosh that in the future he should pay the dues under the mining lease to the Roys, he made no mention of the way-leave agreement & did not make over the relevant document. Evidently, he contemplated that by the sale deed the Roys would get only the right to realise the dues under the mining lease of 1908 & not the dues under the way leave agreement. It has been urged that these facts are irrelevant & that, if the effect of the sale deed was to pass to the Roys the right to the way-leave rent, the failure of the vendor to mention this in the sale deed & to hand over the relevant documents would not affect the right of

the Roys to realise the way-leave rent. The contention is correct, but I am dealing with these facts for the purpose of construing the deed. If the deed was clear in itself & had the effect of passing the title to the way-leave rent, the omission of the vendor to mention this fact & to hand over the way-leave agreement would be irrelevant. Here, however, the effect of the document is not clear & in ascertaining what it was that the vendor was really giving it is necessary to construe the document as a whole. This is my answer also to the contention that the passages which immediately follow the dispositive part of the sale deed are irrelevant, & that they represent merely the vendor's conception of the legal effect of the disposition made by him. This is the way in which I understand these passages. To me it appears that in these passages the vendor is trying to make it clear exactly what the property is which he is transferring. He was conscious that the words "the under-ground coal (Pathuria koila pathat)" in the dispositive portion were open to misconstruction, & the passages which follow are, in my opinion, intended to show what meaning the vendor placed on these words. There follows another passage in which, considering the sale deed as a whole, the words "vended land (bikrita bhumi)" seem to have been loosely used.

"Should Debendra Nath Ghosh the tenant of the vended land or his heir or successors in interest surrender the vended land you shall have not to pay any rent in respect of the surface land held by him or the tenant."

This passage should be read in the light of the previous passages which seems to regard Ghosh as a settlee merely of the mining rights. Finally, we come to the schedule which is headed: "Boundaries of the vended property (bikrita sampatti)" words which do not help either party. The words that follow are:

"Boundaries of underground coal land (Koila Pathar Bhumi) comprised in the 14 annas demarcated share of mauza Dharmabandh &c."

These words do not help either party. The boundaries of the coal would necessarily coincide with the boundaries of the coal land, & the words "coal land" used in this passage do not indicate that the sale deed was a sale deed of the coal land. To sum up, on a consideration of the sale deed as a whole, I am satisfied that the right that was being transferred to the Roys under the sale deed was confined to the coal regarded as so much mineral, lying below the surface of the 14 anna block of mauza Dharmabandh. There was no intention to transfer to the Roys the pltf's title in the cubical space within which that coal was comprised & therefore, the right of the pltf. under the way-leave agreement to realise way-leave rent did not pass to the Roys.

29. For the reasons given above, the appeal fails & I would accordingly dismiss it with costs.

Jha, C.J.

I agree.