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(1919) 02 BOM CK 0003

In the Bombay High Court

Raghunath Hoy Marwari — APPELLANT

Vs

Raja of Jheria — RESPONDENT

Date of Decision : 20-02-1919

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 2(12)

Citation : (1919) 21 BOMLR 895

Hon'ble Judges : Viscount Haldane, J;Viscount Cave, J;Phillimore, J;John Edge, J;Ameer Ali, J

Bench : Full Bench

Final Decision : Allowed

Judgement

John Edge, J.—This in an appeal by the plaintiffs from a decree, dated the 26th March, 1914, of the High Court at Calcutta, which set aside a decree, dated the 24th June, 1912, of the Additional Subordinate Judge of Purulia, and dismissed the suit.

2. The suit in which this appeal has arisen was brought on the 25th April, 1911, by the plaintiffs for a declaration that they were, under a pottah of the 15th May, 1908, entitled to work and get the coal underlying 450 bighas of land in Mouzah Chandkuia, and to use and occupy certain waste danga lands of the Mouzah as they might require them for the purposes of the colliery. They alleged that they had been dispossessed by the Raja of Jheria, the defendant No. 1, and as against him they further claimed a decree for mesne profits. The defendants Nos. 2 and 3 had granted the pottah under which the plaintiffs claimed title, and as against them the plaintiffs sought certain other relief?s to which they alleged that they were entitled. One of these other relief?s which the plaintiffs claimed as against the defendants Nos. 2 and 3 was an order that the defendants Nos. 2 and 3 should demarcate the 450 bighas of land, the coal underlying which had been leased to the plaintiffs by the pottah. The Subordinate Judge who tried the suit refused to make an order for demarcation on the ground that other persons interested had not been made parties to the suit. The other relief?s claimed by

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the plaintiffs were not investigated by either of the Courts below. The Raja of Jheria''s answer to the suit, so far as he was concerned, was a denial of the title of the plaintiffs to the coal, an assertion of title in himself to all the coal in Mouzah Chandkuia, and a denial that he had dispossessed the plaintiffs and of their right to a decree for mesne profits.

3. The Subordinate Judge found the issue as to title in favour of the plaintiffs, declared their title, and gave them a decree for Rs. 11,334-8-0 as mesne profits as against the Raja of Jheria. From that decree the Raja of Jheria appealed to the High Court at Calcutta. One of his grounds in his memorandum of appeal to the High Court distinctly alleged that the minerals were vested in him alone. The learned Judges who heard the appeal in the High Court did not express any opinion on the question of the title to the coal, but having come to the conclusion that the plaintiffs had failed to prove a dispossession by the Raja of Jheria or his servants, set aside the decree of the Subordinate Judge, and by their decree dismissed the suit. What these learned judges apparently considered was that the plaintiffs had failed to prove any facts which would make the Raja of Jheria liable to have a decree for mesne profits made against him as the expression "mesne profits" is defined in Section 2 (12) of the CPC 1908 (Act V of 1908), As the claim for mesne profits was not dismissed on the ground that the plaintiffs had failed to prove that the title to the coal was vested in them, the claim of the plaintiffs for a declaration of title should have been considered and disposed of by the High Court. From that decree dismissing the suit this appeal to His Majesty in Council has been brought.

4. It is alleged in the plaint that this Mouzah Chandkuia is included in the ancestral zamindary of the Raja of Jheria, and there is nothing on the record to suggest that that statement is not correct. In 1791 the Raja of Jheria''s ancestor, Sri Mohan Lal, who was then the Zemindar of Mouzah Chandkuia, granted to Sri Lakshan Chakravarti "rent-free Brahmottar land" in Mouzah Chandkuia by a pottah which, so far as is material, is as translated in the following terms:?

The 8th January?

pottah of agreement granted by the High in dignity, Maharaja Sri Sri Mohan Singh.

Respects to Sri Lakshan Chakravarti.

I hereby grant you rent-free Brahmottar land in mouzah Chandkuia in pergunnah Jheria. You should enjoy it comfortably by cultivating and getting the same cultivated by others and should bless me. Hence, this pottah is granted to you.

Dated at Garh Cutchery.

The 29th Chait Akhiri of the year 1197.

5. Their Lordships will presently consider the effect of that pottah, as upon the construction of it the question of the title to the coal underlying Mouzah

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Chandkuia at the time when the acts complained of by the Raja and his servants are alleged to have occurred depends. On the 21st April, 1908, the successors-in-title of the grantee of the pottah of 1791, who may be for brevity described as the Chakravarti defendants, granted to persons, who may for brevity be described as the Bhuttacharji defendants, a coal-mining pottah of the coal underlying Mouzah Chandkuia, with liberty to use such danga lands and tanks then in the grantor''s khas possession as would be required for working the colliery. On the 18th May, 1908, the Bhuttacharji defendants granted to the plaintiffs a coal-mining pottah of the coal underlying 450 bighas of the said Mouzah, with certain surface rights necessary for working the colliery. After the plaintiffs had obtained their pottah of the 18th May, 1908, they commenced to open up the colliery. The Raja of Jheria thereupon, through his servants, gave to the plaintiffs notice that the coal underlying Mouzah Chandkuia was vested in him, and insisted that the plaintiffs should not proceed with their workings. Ultimately the plaintiffs ceased to work, and brought this suit to have their rights declared and to obtain such relief as they might be entitled to as against the Raja of Jheria and their lessors respectively. Their Lordships will confine their advice to His Majesty to the question of the title to the coal underlying Mouzah Chandkuia, as that title was when the acts complained of by the Raja of Jheria and his servants are alleged to have occurred, and as it was when this suit was instituted, and will not express any opinion as to the rights, if any, which the plaintiffs may have against the defendants other than the Raja of Jheria.

6. The question of the title to the coal in question here must, as their Lordships have said, depend upon the construction of the pottah of 1791. On behalf of the plaintiffs, the appellants here, it has been contended that the pottah of 1791 was an absolute grant by the then Raja of all his rights and interest in Mouzah Chandkuia, including the minerals, to Sri Lakshan Chakravarti. On behalf of the Raja of Jheria, a respondent to this appeal, it has been contended that the minerals did not pass under that pottah, and remained vested in the grantor, of whom the present Raja of Jheria is the representative-in-title. The construction of the pottah of 1791 contended for on behalf of the plaintiffs would doubtless be the construction to be placed upon it if the pottah had been a grant of freehold lands in England by an owner in fee, but the pottah in question here was a grant by a Zamindar in India of a holding creating a tenure within his Zamindari, and must be construed as such grants by Zamindars have been construed by the Board.

7. In 14 CWN 746 (Privy Council) in which the Mouzah there in question was held of the Zamindar by Goshains on a permanent debottar tenure, subject to a rent of about Rs. 25 paid to the Zamindar, Lord Collins, in delivering the judgment of the Board, said :?

On the whole it seems to their Lordships that the title of the Zamindar Rajah to the village Patena as part of his Zamindari before the arrival of the Goswamis on the scene being established as it has been, he must be presumed to be the

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owner of the underground rights thereto appertaining in the absence of evidence that ho ever parted with them, and no such evidence has been produced.

8. In that judgment the view was referred to with approval that was expressed by Mr. Field in his Introduction to the " Bengal Regulations," (p. 46) that:?

The Zemindar can grant leases either for a, term or in perpetuity. He is entitled to rent for all land lying within the limits of his Zamindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship.

9. An explanation as to leases in perpetuity in India, given by Jenkins J. in Rally Dass Ahiri v. Monmohini Dassee I.L.R.(1897) Cal. 440is instructive. It was that;?

Because at the present day a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result The law of this country does undoubtedly allow of a lease in perpetuity....A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest. This result is to be inferred by the use of the word ''lease,'' which implies an interest still remaining in the lessor.

10. The statement was quoted with approval by the Board in (1909) L.R. 36 I.A. 148 (Privy Council) .

11. In Durga Prasad Singh v. Braja Nath Bose (1911) L.R. 39 IndAp 133; 14 Bom. L.R. 445 the present defendant-respondent in this appeal, as the Zamindar of Pergunnah Jheria, sued the defendants in that suit for a declaration of his rights to the minerals lying under two Mouzahs situate within his Zamindari, and for a permanent injunction restraining the defendants from working for coal. The first defendant in that suit was the Digwar of Tasra, and he had worked the coal in the Mouzahs, and had paid cesses in respect thereof to the Government under the Cess Act. The second defendant in that suit was the assignee of a lease granted by the Digwar of Tasra, which included a right to mine for coal in the Mouzahs. In the judgment of the Board it was stated that the two Mouzahs were held by the Digwar of Tasra on Digwari tenure at a fixed rent of Es. 64 per annum, payable to the Zamindar, and that the tenure was hereditary. The Board held that the two Mouzahs there in question were within the plaintiffs'' Zamindari, and that:?

No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the permanent settlement if the lands were then held on Digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the Zamindar ever parted With his mineral rights to the Digwar.

12. And the Board advised His Majesty that the decree of the Subordinate Judge which had decreed the plaintiffs'' claim should be restored. That decree of the Subordinate Judge had been set aside by the High Court at Calcutta on appeal. In that suit it was either admitted or proved that the permanent settlement was

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made with the Zamindar of Jheria, and that no separate settlement was made with the Digwar of Tasra. In the present suit no evidence was produced as to what was done at the permanent settlement in respect of Mouzah Chandkuia, but the absence of such evidence does not lead to a presumption that the Zamindar had not then vested in him the mineral rights in Mouzah Chandkuia.

13. In 21 CWN 377 (Privy Council) the Raja of Pachete, who was the plaintiff, claimed a declaration that he was entitled to the mineral rights in the village in that suit. The defendants alleged in their written statement that the Mouzah was held by them and their predecessors under Talabi Brahmottar rights from a date before the permanent settlement, and they claimed that their rights were those of proprietors, subject to the payment of a fixed rent, and that they had full rights in the subsoil. The grant relied upon by the defendants was not produced, nor was any evidence as to its terms given at the trial, but there was evidence that in 1790 the predecessor of the plaintiff had referred to the Mouzah as Talabi Brahmottar with a jamma of sicca Rs. 25. In the judgment in that appeal, which was delivered by Lord Buckmaster L. C, the decisions of the Board in Hari Narayan Singh v. Sriram Chakravarti and Raja Durga Prasad Singh v. Braja Nath Bose were considered, and their Lordships said ?

These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They established that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

14. It has been contended on behalf of the appellants in the present appeal that in the judgment which Lord Buckmaster delivered the Board intended to limit the principle to be derived from the decisions which had been referred to to grants made by a Zamindar of tenures at fixed rents, and that the principle did not apply here, where the tenure was granted rent-free. It so happened that in that particular case the tenure was at a fixed rent, but it appears clear to their Lordships that the principle must equally apply when the tenure granted by the Zamindar is a rent-free tenure. Their Lordships do not know what was the vernacular term in the pottah of 1791 which has been translated as " rent-free, " but in the plaint it is alleged that the right granted was a " rent-free Brahmottar right, and the trial Judge, who was a native and presumably under-stood the vernacular states in his judgment that :?

The plaintitis case is that the whole Mouzah Chandkuia described in Schedule I of the plaint belongs to the defendants Nos. 3 to 25 as their rent-free Brahmottar property under a sanad dated 29th Chaitra 1107, from Raja Mohan Singh, the ancestor of the defendant No. 1, granted to Lakshan Chakravarti.

15. If the holding had been described, as on behalf of the plaintiffs it has been contended it was described in the vernacular pottah of 1791 as " revenue-free Brahmottar," it could make no difference, as the holding was one created or

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ratified by the Zamindar of land within his Zamindari, and no mineral rights were mentioned in the pottah.

16. In (1917) L.R. 44 I.A. 246 (Privy Council) in which a Mokarari lease of lands by a Zamindar contained the words mai hak hakuk (with all rights), the Board applied the principles which had been stated in Lord Buckmaster''s judgment in Sashi Bhushan Misra v. Jyoti Prashad Singh Deo.

17. The result at which their Lordships have arrived after a consideration of the decisions of the Board is that where a Zamindar grants a tenure in lands within his Zamindari, and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee, and their Lordships hold that the coal underlying Mouzah Chandkuia when the interferences complained of occurred, and on the 25th April, 1911, when this suit was instituted, was vested in the Raja of Jheria alone, and on that ground the suit against him should have been dismissed with costs in the Courts below, and that this appeal as against the Raja should be dismissed, and they will so humbly advise His Majesty. The appellants must pay the costs of the Raja of Jheria in this appeal.

18. Their Lordships will also humbly advise His Majesty that the suit as against the defendants other than the Raja of Jheria should be remanded to the Court of the Subordinate Judge, to be disposed of according to law. There will be no order as to the costs of this appeal aw between the appellants and the defendants other than the Raja of Jheria.

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