
(1959) 12 PAT CK 0005

In the Patna High Court

Case No : A.F.A.D. No's. 1064 and 1291 of 1956

Sm. Kundan Bai Agarwala and Others

APPELLANT

Vs

Skh. Safdar Ali and Others

RESPONDENT

Date of Decision : 04-12-1959

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103, 104

Citation : AIR 1960 Patna 266

Hon'ble Judges : H. Mahapatra, J

Bench : Single Bench

Advocate : A.C. Roy and Karuna Nidhan Keshav, for the Appellant; R.S. Chatterjee, Sukumar Chatterjee and Bishwa Mohan Bahadur, for the Respondent

Final Decision : Dismissed

Judgement

H. Mahapatra, J.—Both these appeals arise out of a judgment and decree passed by the learned Additional District Judge of Manbhum-Singhbhum. In one (S. A. 1064 of 1956) the defendants are the appellants and in the others (S. A. 1291 of 1956) the plaintiffs are the appellants. The parties to this litigation are interested in coal mining rights in two adjoining blocks. The plaintiffs' block of coal-land comprises of 100 bighas and it is on the west, where" us, the defendants' block comprising of 50 bighas lies on the, east. The real dispute between the parties is about the common boundary line between these two blocks. The plaintiffs brought the suit for demarcation of the boundary line between these two blocks of coal-land and, furthermore, they claimed compensation, tentatively valued at one thousand rupees, from the defendants, on the allegation, that the defendants had extracted coal from under ground within the area, belonging to the plaintiffs. The trial Court decreed the suit, by determining the boundary line between the two blocks.

It further held that the exact amount of damage, caused to the plaintiffs by the removal of coal by the defendants from their area, would be determined in the proceeding for final decree, in the light of the findings arrived at by that Court, in

regard to the coal taken by way of removal of pillars, left during the working of the defendants' predecessor-in-interest, one Mr. B.C. Bhattacharji. Against the decree passed by the trial Court, the defendants preferred an appeal and the learned Additional District Judge, Manbhum-Singhbhum, has now passed a modified decree. He has confirmed the boundary line, as determined by the trial Court but he has set aside the portion of the trial Court's decree in regard to the plaintiffs' claim of damages, holding, that the plaintiffs have failed to prove that the encroachment was made by the defendants or that, they had suffered any loss or damage, on account of the removal of coal by the defendants from their area. That is why, both the plaintiffs and the defendants, have preferred two second appeals to this Court against the judgment.

2. The plaintiffs took the lease of their coal-lands, measuring 100 bighas, in May 1902. The defendants took their lease of 50 bighas in March 1937. To neither of these leases, was attached any plan. Before the defendants took their lease, one Mr. B.C. Bhattacharji was the lessee in respect of the said land but he had given his lease.

3. Learned counsel, appearing for the defendants-appellants, contends that, the determination of the boundary line, as made by the Courts below, on the basis of the report of the pleader-commissioner, has been completely vitiated, inasmuch as, the pleader-commissioner did not base his conclusions, with reference to the admitted joint survey map, prepared in February 1954, to which both the plaintiffs and the defendants were parties. This joint survey was conducted, as there arose some dispute between these two parties, in respect of their common boundary and both of them appointed one Mr. Paul to conduct a survey and to determine the respective areas of the parties. He made survey plans and drew certain maps at that time and both the parties signed those documents, as a token of their acceptance.

In the present litigation, a commissioner was appointed, by name Mr. Biswas, to conduct a local investigation and to determine the two areas, belonging to the two parties, with reference to this joint survey plan, prepared by Mr. Paul. The pleader-commissioner submitted a report to the Court saying that he could not determine, with reference to that joint survey plan the fixed points, from which he could start the measurements and as such he returned the writ. Subsequently, this gentleman, Mr. Biswas, was again appointed as a commissioner but, this time, he was asked to prepare the boundary line between the two blocks of land in question, with reference to the certified copies of the maps, that had been submitted by the previous lessee, Mr. B.C. Bhattacharji, to the mining department. He found that only one of those maps, which has been marked as exhibit 1 in the present case, was helpful to determine the starting point of measurement and as such, depending upon that, he prepared the boundary line of the two blocks.

The report and the map submitted by the commissioner second time, were objected to, by the defendant, but the trial Court, on a consideration of the

entire evidence on record, both oral and documentary, came to the conclusion, that, the boundary line indicated by the pleader-commissioner Mr. Biswas second time, was correct, and, accordingly, it decreed that part of the plaintiffs' claim, in terms of that report and map. Learned counsel, appearing for the defendants, now contends that, since the plaintiffs averred in their plaint that there was a joint survey map prepared in 1954, and that the parties were bound by the boundaries indicated therein, and that, they claimed the relief of the determination of the boundaries through Court, on the basis of that joint survey map, it was not open to the Courts below, to depart from that joint survey map and to adopt another line of boundary, with reference to the other map, which had been submitted by Mr. Bhattacharji.

His argument is, that, the dispute about the boundary, these two blocks, had been settled between the parties, by that joint survey map, and, therefore, what was open to the plaintiffs, as they had made out their case in the plaint itself, was that, they could demand the demarcation on the basis of that document alone. This contention has more than one infirmity in the first place, on a reading of the plaint, and particularly the prayer portion, it cannot be said that, the plaintiffs wanted the Court to determine the boundary of their area, with reference to that joint survey map. They simply asked that the boundary should be demarcated. While referring to the historical part of the case, they had mentioned that, a joint survey had been conducted sometime before, at the instance of both the parties. Secondly, it has not been shown by the defendants, either by cross-examination of the pleader-commissioner, Mr. Biswas or by bringing any other material on the record, that the present line indicated by Mr. Biswas and accepted by the Court, is different, in any way, from the line, that had been shown in the joint survey map. Therefore, the defendants cannot entertain any grievance at all, on this score.

4. Corning to the appeal preferred by the plaintiffs, against the decision of the lower appellate Court to the effect that the plaintiffs had failed to prove, that there had been any encroachment by the defendants. I have to observe that, here also, the plaintiffs have no ground to succeed. The main contention of Mr. Chatterji, appearing for the plaintiffs, is, that the trial Court had found, that the defendants had admitted in evidence, that they had removed certain amount of coal from the land belonging to the plaintiffs; and this was also supported by the testimony, given by the pleader-commissioner in Court. His evidence was, that, before him. the plaintiffs asserted that the defendants had taken away coals from their land, which, the defendants did not deny. On the basis of this evidence, the trial Court had found that, the plaintiffs were entitled to certain damages. The reasons given by the lower appellate Court, to dislodge that finding, according to Mr. Chatterji, are unsubstantial. The learned Additional Subordinate Judge has pointed out in his judgment, that, the admission of the defendants, as referred to by the trial Court, does not show what the trial Court thought it to be. I shall quote the portion from the deposition of D.W. 3, as embodied in the judgment of the trial Court:

"Coal had been extracted through that quarry by driving galleries within the time of B. C. Bhattacharji".

Added to this, the said defendant (D.W. 3) also stated, that he did not do any gallery working in the quarry. What appears from this statement is clear and it is this; Mr. Bhattacharji had worked certain galleries during his time of the lease. The defendants cut out all the pillars, that had been left by Mr. Bhattacharji, in the area of his working and that he (D.W. 3) did not extend any gallery work in the quarry. From this, it appears that the defendants did not remove coal, from an area, which was not within the working range of Mr. Bhattacharji. Unless the plaintiffs show that any portion of their area had also been worked by Mr. Bhattacharji, during his time of operation, it cannot be said, with reference to this part of the deposition of D.W. 3, that, the defendants attempted to remove any coal from the area of the plaintiffs. Secondly, the commissioner had deposed before the trial Court that, while he was taking measurement of the land, the plaintiffs' assertion of encroachment by the defendants, was not denied before him.

He has not made any reference to this fact, in his report and, what is more, any attitude, expressed by the defendants before him, will not be a conclusive indication that the defendants admitted to have encroached into the plaintiffs' area. The lower appellate Court, for these reasons, did not accept the statement, made by the pleader-commissioner, as sufficient proof of encroachment by the defendants. I do not see, how the plaintiffs can attack the findings of the lower appellate Court, in this respect, I am in agreement with the learned Additional District Judge that the plaintiffs have failed to prove any encroachment by the defendants so as to entitle them to any damage, whatsoever.

5. The next point urged by Mr. Chatterji is, that, the onus was heavy on the defendants to show that they had not removed any coal from the plaintiffs' area. If the plaintiff established that there had been some removal from their own area and if the defendants are lessees in respect of the neighbouring area, then, no further proof is necessary to be given by the plaintiffs to justify their claim of damages. I must confess, this appears to me to be an astounding proposition of law. The onus is always on the plaintiffs to establish, in a case of this nature, that the land alleged to be encroached upon belongs to them; secondly, there was encroachment on the land, and, thirdly the encroachment was done by the defendants. At the most, it can be said that, in this case, the plaintiffs have proved that the goaf area or the subsidence formed, is included within their boundaries, as now determined.

It may be argued, and perhaps with justification, that this subsidence or depression was caused on account of the removal of coal from below. But the most important thing, viz., who is the author of the removal, if any, has not been made out by the plaintiffs, as correctly held by the lower appellate Court. In absence of proof of such ingredients, the plaintiffs cannot claim any damage, for the alleged removal of coal, from the defendants. In support of his contention on

the point of onus, Mr. Chatterji referred me to some decisions, which I shall presently deal with.

6. The first case referred was that of *Lodna Colliery Co. Ltd. v. Bepin Behary Bose* AIR 1920 Pat 383. In that case, the question, that was mooted before the Court was, whether Article 48 or 49 of the Limitation Act will apply to a case, where the plaintiff brings a suit to recover the value of the coal wrongfully cut and appropriated by the defendant from the plaintiff's mine. There, it has been held that Article 48 would be applicable and the time will run when the plaintiff first learns in whose possession the coal removed is, as that was a case of conversion. I fail to understand how the learned counsel can draw any assistance from this decision for his case. Even on facts, that case was different. There, the leases for the two adjoining blocks were accompanied by two maps, showing the boundaries and also on the surface boundaries pillars had been put to demarcate the respective areas of the plaintiff and the defendant.

In such circumstances, when there was a removal by the defendant from the area, clearly demarcated as belonging to the plaintiff, it was held that it was an action in trover and, therefore, the defendant was liable to the plaintiff. In the instant case before me, the lessees were not given any map, at the time, when the leases were granted nor was there any line on the surface, between the two blocks. The defendants or, for the matter of that, their predecessor-in-inte-rest Mr. Bhattacharji, cannot be said to have been aware of the definite boundaries of the land. Furthermore, it has not been proved that the defendants have, as a matter of fact, extracted any coal out of the area belonging to the plaintiffs.

7. Another case referred is that of *Srish Chandra Nandy Vs. Ramji Bechar Das and Others*, . Learned counsel wanted to draw support from this case for the point that the onus remains on the defendant. I am afraid, that is not so. In that case also, the plaintiff was a raising contractor on behalf of the defendant. The plaintiff also had taken lease of the adjoining block of land. While the work was going on, on behalf of the defendant, certain amount of coal had been taken from the area belonging to the plaintiff. He, therefore, instituted a suit to recover the damages. It was held that, where, a person knew of the encroachment and of the removal of coal from his land, by another person, long before three years from the date of institution of the suit against such person, the fact, that the person did not know that the area from which coal was being removed was his, will be of no advantage to him and will not save the suit from the bar of limitation.

A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation, unless of course the knowledge of that fact, was kept back from him, by the fraudulent conduct of the defendant. It was further observed that the onus was on the defendant, who pleaded the bar of limitation, and the defendant was to prove that the plaintiff knew prior to three years of the institution of the suit, that the coal was being taken away. This onus of proof in regard to the date of knowledge of the plaintiff of the removal or

of the conversion, is entirely different from the onus, that the learned counsel wants to lay, in the present case, on the defendants. From this case, it can, in no way, be inferred that the defendants are to show that the coal, if any, removed from the plaintiffs' land was not removed by them but by some other person.

8. The next case referred is AIR 1930 113 (Privy Council) . This is a case, again, on the question of limitation and is in no way helpful to the plaintiffs. Similarly, an unreported case decided by this Court on 23-4-1953 (First Appeal No. 162 of 1946), cited by the plaintiffs, lends no support whatsoever to them. There also it was held that the onus lies on the defendant, who pleaded the bar of limitation, to show that the plaintiff had knowledge of the conversion, more than three years before the institution of the suit. It is, therefore, clear that the onus was heavy on the plaintiffs to show that there was an encroachment and that it was by the defendants, and they having failed to discharge that, cannot succeed to recover any damage from the defendants.

9. One more point was raised by the learned counsel. The real fact in issue, according to him, has not been gone into, by the Courts below and this Court, at this stage, should look into it. The real fact is who had removed the coal; and if there is no finding by the Courts below to show that any person, other than the defendants, had removed it, then a further enquiry should be made into the matter. This again is a proposition, which has no substance, whatsoever. In support of this, the learned counsel had referred to the case of AIR 1943 208 (Privy Council) .

There, the High Court, in Second appeal, had interfered with the decision of the Courts below and had given certain findings about a question of fact, which, in that case, was the real question of fact, that was to be tried by the Court of first instance and which had been omitted from consideration. Their Lordships of the Judicial Committee held that, there is no difference on principle, between the real question of fact to be tried and a question of fact which vitally affects the issue in the case, and they held that the decision of the High Court was justified, with reference to Section 100 and Section 103 of the Code of Civil Procedure. I fail to understand, how the learned counsel can make any use of this decision to support his contention.

10. In the result, both the appeals fail and the judgment and decree passed by lower appellate Court are affirmed. There will be no order for costs in both the appeals.