to their several interests at the date of the sale, subject to the repayment of 425 rupees, and interest on that sum at the rate of 6 per cent. per annum from the date of the sale, and there should be a direction for a conveyance as decreed by the High Court on payment of that amount on or before a date to be fixed by the Subordinate Judge. With this variation the decree of the High Court should, in their Lordships' opinion, be affirmed, and they will humbly advise His Majesty to this effect.

J. V. W. *Decree varied.*

Solicitors for the appellant: *Watkins & Hunter.*

PRIVY COUNCIL.

SHASHI BHUSAN MISRA

v.

JYOTI PRASAD SINGH DEO.

*P.C.** 1916

Nov. 6, 7; *Dec.* 8.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Grant—Grant by zamindar of Talabi Brahmottar tenure antecedent to Permanent Settlement—Tenure, permanent, hereditary and transferable—Grantee, rights of, to minerals—Absence of express evidence that they formed part of the grant—Protraction of Indian litigation.

A "grant" in India has not the special and technical meaning attached to the same word in English law.

A Talabi Brahmottar grant of a zamindar's village at a fixed rent made before the Permanent Settlement by the then Raja of Pachete to the predecessors in title of the appellant, although found to be a permanent, hereditary and transferable tenure, was *held* (affirming the decision of the High Court) not to carry with it the mineral rights in the soil. Minerals

* *Present:* THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON, LORD WRENBURY AND MR. AMEER ALI.

1916

SHASHI BHUSAN MISRA v. JYOTI PRASAD SINGH DEO.

will not be held to have formed part of the grant, in the absence of express evidence to that effect.

Hari Narayan Singh Deo v. *Sriram Chakravarti* (1) and *Durga Prasad Singh* v. *Braja Nath Bose* (2) followed.

Protraction of Indian litigation deprecated.

APPEAL No. 26 of 1915 from a judgment and decree (11th July 1911) of the High Court at Calcutta, which reversed a judgment and decree (16th May 1906) of the Court of the Subordinate Judge of Burdwan.

Some of the defendants were the appellants to His Majesty in Council.

The question for determination in this appeal was whether the first respondent, Raja Jyoti Prasad Singh Deo, is the proprietor of the mineral rights appertaining to mauza Panchgachia, which is admittedly situate within the ambit of his proprietary zamindari estate known as the Pachete Estate and is a part thereof, in the absence of any evidence on the part of the appellants who are the permanent tenure-holders at a fixed rent of the said mauza, that the zamindar Raja or his predecessor ever parted with the mineral rights.

The case before the High Court (COXE and TEUNON JJ.) will be found reported under the name of *Jyoti Prasad Singh* v. *Lachipur Coal Company* in I. L. R. 38 Calc. 845, where the facts are sufficiently stated.

The High Court held that in the absence of evidence of the actual terms of the lease the mineral rights must be regarded as the property of the Raja.

On this appeal,

A. M. Dunne, for the appellant. The nature of the tenure which the appellants hold in this case is an ancient Moguli Brahmottar, having its origin in a

(1) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.

(2) (1912) I. L. R. 39 Calc. 696; L. R. 39 I. A. 133.

gift or grant to Brahmins, carried out by a conveyance of the village on certain terms. It is not strictly a tenancy of any description under a lease. Both Courts in India have found that the appellants are tenure-holders, paying a small rent, and that their tenure is permanent, hereditary and transferable. The suit is based on the village, being a rent-paying village and the appellants are called lessees in the plaint. But both Courts in India have found it is not a rent-paying village. It is a grant of the land itself, the only right left in the zamindar-grantor being the right to the rent: *Sonet Kooer* v. *Himmut Bahadoor* (1). For the definition of a Brahmottar grant reference was made to Wilson's Glossary; Field's Introduction to the Bengal Regulations; Glossary to the 5th Report, Vol. II; and Hunter's Statistical Abstract of Bengal, Vol. XVII, pages 322, 333 (Moguli) and 368 (Talabi). Bengal Regulation I of 1793 preamble and sections 1 and 3; and *Nil Madhab Sikdar* v. *Narattam Sikdar* (2) were also referred to. When the grant was made the zamindar was the proprietor of the land in the village, and possessed the minerals, which, it was submitted, passed to the defendants (appellants) under the grant made to them: *Megh Lal Pandey* v. *Rajkumar Thakur* (3). In *Hari Narayan Singh* v. *Sriram Chakravarti* (4), the tenure was not a permanent one, and the judgment proceeded on the footing that there was no permanent, transferable and hereditary tenure. In *Durga Prasad Singh* v. *Braja Nath Bose* (5), there was a service tenure. Those cases therefore do not determine the point now raised: *Kunja Behari Seal* v. *Durga Prasad*

(1) (1876) I. L. R. 1 Calc. 391; L. R. 3 I. A. 92.
(2) (1890) I. L. R. 17 Calc. 826.
(3) (1906) I. L. R. 34 Calc. 358.
(4) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.
(5) (1912) I. L. R. 39 Calc. 696; L. R 39 I. A. 133.

1916

SHASHI BHUSAN MISRA v. JYOTI PRASAD SINGH DEO.

Singh (1) and *Nowaghur Coal Co.* v. *Sashi Bhusan Ray* (2), follow *Hari Narayan Singh* v. *Sriram Chakravarti* (3), and therefore are not authorities against the present contention. *Kally Dass Ahiri* v. *Monmohini Dassee* (4) is the only case which decides that a permanent lease is liable to forfeiture on the tenant's denial of his landlord's title. Under the circumstances of the case, it was submitted, it should be held that the right to the minerals was vested in the appellants. *Abhiram Goswami* v. *Shyama Charan Nandi* (5) was also referred to.

Sir R. Finlay, K.C., De Gruyther, K.C., J. M. Parikh and *Arfan Ali*, for the plaintiff respondent, contended that the appeal was concluded by the decisions of the Board in *Hari Narayan Singh* v. *Sriram Chakravarti* (3) and *Durga Prasad Singh* v. *Braja Nath Bose* (6). In the former case the High Court in *Sriram Chakravarti* v. *Hari Narayan Singh* (7) had decided that the debotter tenure, as it was there, was permanent, hereditary and transferable, and that where that was the nature of a tenure, the minerals passed to the tenure-holder, and this Board in reversing that decision dealt with both points, and held on the second point that even if the tenure were permanent, hereditary and transferable, the right to the minerals remained in the zamindar until it was clearly proved that he had parted with them. Lord Macnaghten was a party to that decision, and in delivering the judgment in the later case, *Durga Prasad Singh* v. *Brajanath Bose* (6), he took the same view, reversing the decision of the High Court

(1) (1914) I. L. R. 42 Calc. 346.
(2) (1914) 19 C. W. N. 375.
(3) (1910) I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136.
(4) (1897) I. L. R. 24 Calc. 440.
(5) (1909) I. L. R. 36 Calc. 1003 ; L. R. 36 I. A 148.
(6) (1912) I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133.
(7) (1905) I. L. R. 33 Calc. 54

in *Brajanath Bose* v. *Durga Prasad Singh* (1). Those two decisions of this Board have since been followed in the cases of *Kunja Behari Seal* v. *Durga Prasad Singh* (2) and *Nowaghur Coal Co.* v. *Sashi Bhusan Ray* (3). Even assuming that the two decisions of the Board above cited are distinguishable and do not cover the present appeal, the respondents, it was submitted, were entitled to succeed. The permanent settlement was made only with persons who were proprietors of the land, and those holding under them were lessees. Under the Bengal Tenancy Act (VIII of 1885) the respondent and the appellant were landlord and tenant respectively. If the appellant held an agricultural tenancy, he would be prevented from owning the minerals by section 5 of the Act. If the tenancy was a non-agricultural tenancy, he was excluded from the mines under section 108 (*o*) of the Transfer of Property Act, which incorporates the law as to minerals as it stood before the passing of that Act. Reference was made also to the Bengal Tenancy Act, sections 4, 6, 10, 11, 18, 19, 20, 65 and 73. A permanent tenure is not a conveyance in fee simple: see *Abhiram Goswami* v. *Shyama Charan Nandi* (4), where *Kally Dass Ahiri* v. *Monmohini Dassee* (5) is approved; from which it appears that a permanent tenure-holder has not all the rights of the proprietor subject only to the payment of rent. The predecessors of the appellants were lessees and in that character in 1808 obtained a decree in a suit brought by them under section 5 of Bengal Regulation VIII of 1793 against the predecessor of the respondent plaintiff.

Dunne replied.

(1) (1907) I. L. R. 34 Calc. 753.
(2) (1914) I. L. R. 42 Calc. 346.
(3) (1914) 19 C. W. N. 375.
(4) (1909) I. L. R. 36 Calc. 1003, 1015; L. R. 36 I. A. 148 156.
(5) (1897) I. L. R. 24 Calc. 440.

1916

SHASHI BHUSAN MISRA v. JYOTI PRASAD SINGH DEO.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. The appellants in this case are the descendants and representatives of certain Brahmins to whom, at a date uncertain, but antecedent to 1790, the then Raja of Pachete made a *mokurari* grant of the village known as Mauza Panchgachia; the question raised in this appeal is whether this grant carried with it the mineral rights in the soil.

In considering the question, it is important to avoid giving the words used in connection with legal transactions in India the special and technical meaning that they possess in this country. According to our law, the word "grant" is strictly applicable to the conveyance at common law of remainders, reversions, and incorporeal hereditaments, which do not lie in livery, or of which livery could not be given. But in connection with the present dispute, the word has no such meaning, and it is important at the outset to bear this in mind.

The grant under which the appellants claim cannot be found, nor is there any copy in existence, nor any record of its literal contents. It is, however, admitted that the grant was a Talabi Brahmottar grant.

Such a grant is defined in Wilson's Glossary as "land granted rent-free to Brahmins for their support and that of their descendants, probably as a reward for their sanctity of living or to enable them to devote themselves to religious duties and education."

If after the words "rent free" be added the words "or at a fixed rent," this statement may be accepted as an accurate description of the origin of the grant, but in itself it contains no definition of the characteristics of the tenure. It has, however, been found in the present case that the tenure of the lands in dispute is permanent and heritable, and confers upon the holder for the time being full rights of

alienation ; but even these findings, though they invest the tenure with attributes of absolute ownership, afford little assistance in determining what it was that the grant passed.

Now, by the permanent settlement of 1793, all the mineral rights were confirmed to the zemindars, and the first respondent to this appeal represents their interest in the estate. If such rights were already possessed and recognised at the date of the settlement this confirmation would hardly have been needed, and this suggests that up to that date the rights enjoyed and granted in the lands were not considered as including the minerals ; if this were so, as the grant in question could have created no rights in the property which the grantor did not possess, no right to the minerals could have been conferred. However that may be, there is certainly nothing in the permanent settlement to which the appellants can turn in support of their contention. Indeed, apart from the evidence furnished from the Sarsikal Jumma, and the facts that have been stated as to the well-recognised attributes of a Brahmottar grant, the appellants have been unable to furnish any evidence at all in support of the view that the grant conveyed the minerals ; their case really depends upon the assumption that the character of the grant itself is sufficient to establish their claim.

This question has been the subject of much controversy in the Indian Courts, and the appellants can certainly point to some powerful and well-reasoned judgments in support of their view. But, in their Lordships' opinion, the matter has been set at rest by the decision of the Judicial Committee. In the case of *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1), a question arose as to the ownership of the minerals underlying a certain village called Petena which had

(1) (1910) I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136.

1916

SHASHI BHUSAN MISRA v. JYOTI PRASAD SINGH DEO.

been granted to an idol of whom the Goswamis were the priests. In that case, as in this, the grant was not forthcoming, but it was held in the High Court that the tenure of the Goswamis gave them permanent, heritable and transferable rights and, upon this finding, the High Court decided that the minerals had passed under the original gift. Upon appeal to the Privy Council this judgment was questioned upon two grounds. *First*, that there was no evidence that the tenure carried with it permanent, heritable and transferable rights; and *secondly*, that, even if this contention were wrong, in the absence of express evidence that the creation of the tenure was accompanied with the grant of the minerals, the minerals did not pass. The Judicial Committtee decided in favour of the appellants' contention, and the material part of the judgment is to be found on p. 145 of the report. The two points are there dealt with, and upon the first Lord Collins, in delivering the judgment of the Board, made this statement :—

> "On this meagre foundation of fact the two Judges who constituted the High Court, have built up the theory that the Goswamis were tenure-holders having permanent, heritable and transferable rights."

He then proceeds to deal with the judgment of Mr. Justice Pargiter, who took the view that the creation of such a grant carried with it the mineral rights; and he expresses disagreement with this view of the law, stating that it appeared to ignore the distinction between the mere tenure-holder and the zemindar; the judgment concludes by saying that the zemindar must be presumed to be the owner of the ground rights in the absence of evidence that he ever parted with them. The counsel for the appellants has strongly urged that the whole of this judgment depends upon their Lordships refusing to accept the view that the tenure in that case was permanent,

transferable and heritable, and that the judgment only applies to an estate lacking those qualities. Their Lordships realise that the judgment, in the absence of the argument, might be open to this construction ; but, read in the light of the then appellants' contention, they think that the two passages referred to dealt with the two separate points which were raised by the appellants, and that the latter part of the judgment was really independent of the statement which expressed dissatisfaction with the conclusion drawn as to the character of the tenure. Their Lordships would have felt more uncertainty about this view had it not been for a second judgment in a subsequent case, *Durga Prasad Singh* v. *Braja Nath Bose* (1).

In that case also the nature of the grant was not identical with that of the grant in the present case. It was the grant to the holders of an office—the office of Digwar, and it was permanent only in the sense that, so long as that office continued to be held by members of the same family, the rights created by the grant would be assured to the holders for the time being of the office. In that case the High Court followed the decision of the High Court in the former case, which had not then been reversed, and Lord Macnaghten, in giving the judgment reversing the High Court, referred to that fact in the following terms :—

"The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (2) which was afterwards reversed by this Board. There certain persons, called Goswamis or Gossains, priests of a Hindu idol to which a certain village had been assigned on a permanent *debottar* tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it must be presumed that the

(1) (1912) I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133.

(2) (1910) I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136.

1916

SHASHI BHUSAN MISRA v. JYOTI PRASAD SINGH DEO.

mineral rights remained in the zemindar in the absence of proof that he had parted with them."

It is plain from this statement by Lord Macnaghten, who was one of the members of the Board in the former case, that the earlier decision was intended to apply to a permanent *debottar* tenure. In other words, that the doubt that was thrown in the former case as to the sufficiency of the evidence on which the tenure had been held to be permanent, heritable, and transferable, did not affect the main judgment in the case, which was based upon the hypothesis that these attributes of the tenures had been established.

These decisions, therefore, have laid down a principle, which applies to and concludes the present dispute. They establish that when a grant is made by a zemindar 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.

It is admitted in the present instance that the only evidence that can be relied on arises from the characteristics of the tenure and the statement as to the object and purpose for which the grant was made as stated in Wilson's Glossary. For reasons that have already been given, this affords no evidence necessary for the purpose, and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In conclusion their Lordships desire once more to call attention to the tedious protraction of Indian litigation. It can only be a misfortune that a dispute such as the present, which affects a matter so important as the right of mining—a right of great value for the development and prosperity of any country—should have been in abeyance for a period which, from the

commencement of the present dispute until the day of hearing of this appeal, has exceeded twelve years.

Appeal dismissed.

Solicitors for the appellants: *Watkins & Hunter.*

Solicitor for the plaintiff-respondent: *Edward Dalgado.*

J. V. W.

FULL BENCH.

Before Sanderson C.J., Woodroffe, Mookerjee, Chaudhuri and Newbould JJ.

CHARU CHANDRA MAJUMDAR

v.

EMPEROR.*

1916

Dec. 4.

Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), ss. 185, 527, scope of—"Doubt," meaning of—Transfer—Questions of convenience and expediency—Power of the High Court over Courts outside its territorial limits—Form of order.

Held by the majority (WOODROFFE J. dissenting). The High Court has power under section 185 of the Criminal Procedure Code to make an order in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits.

Hiran Kumar Chowdhury v. *Mangal Sen* (1) *Emperor* v. *Chaichal Singh* (2) approved.

Section 185 is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question within the local limits of whose Appellate Criminal Jurisdiction the offender actually is.

* Reference to Full Bench in Criminal Revision No. 848 and Miscellaneous No. 92 of 1916.

(1) (1912) 17 C. W. N. 761. (2) (1909) 9 Cr. L. J. 581.