PRIVY COUNCIL.

RAGHUNATH ROY MARWARI
v.
DURGA PRASHAD SINGH.

P. C.*
1919

Jan. 27, 28, 30 ;
Feb. 20.

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

Mineral Rights—Grant by zamindar of part of his zamindari land—Lease in perpetuity—In absence of evidence that zamindar expressly granted right to dig coal no such right passes by grant.

Where a zamindar grants a tenure of lands within his zamindari, and it does not clearly appear by the terms of the grant that a right to the minerals beneath the soil is included, the minerals do not pass to the grantee.

Hari Narayan Singh v. *Sriram Chakravarti* (1). *Durga Prasad Singh* v. *Brajanath Bose* (2) and *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (3) followed.

This principle applies as well as to rent-free grants, as to grants of tenures at fixed rents. A grant by the Raja of Jheria of rent-free Brahmottar land part of his Raj property of which the terms were : "You should enjoy it comfortably by cultivating, and getting the same cultivated by others : hence this *pottah* is granted to you ", was held not to pass the underground minerals to the grantee.

Appeal 21 of 1917 from the judgment and decree (26th March, 1914) of the High Court at Calcutta which reversed a decree (24th June, 1913) of the Subordinate Judge of Purulia.

The plaintiffs were the appellants to His Majesty in Council.

* *Present :* Viscount Haldane, Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

(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.
(3) (1916) I. L. R. 44 Calc. 585 ; L. R. 44 I. A. 46.

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The suit giving rise to this appeal was brought by the present appellants for a declaration of their title to certain lands as holders of a mining *pottah*, dated 18th May, 1908, and for possession thereof with mesne profits; or, in the alternative, for a declaration that the *pottah* was invalid as against them and for consequential relief, including damages, on the allegation that they had been dispossessed by the first respondent, and claiming that the *pottah* was an absolute transfer of the whole mouzah with all rights, including the right to minerals.

The defendants (respondents) were (*i*) the Rajah of Jheria, (*ii*) persons described as the Bhuttacharji defendants, and (*iii*) others referred to as the Chakravarti defendants.

In 1791 the then Raja of Jheria made a Brahmottar rent-free grant of mouzah Chandkuia to the predecessor in title of the Chakravarti defendants in perpetuity. On 21st April, 1908, those defendants granted to the Bhuttacharji defendants a coal-mining *pottah* of mouzah Chandkuia for 999 years; and on 18th May, 1908, the Bhuttacharji defendants granted a similar *pottah* of 450 bighas out of a total of 551 bighas to the appellants (described as the Marwaris) who agreed to pay Rs. 15,000 as *salami* or premium, and 3¼ annas per ton of coal raised, a minimum royalty of Rs. 2,225 being stipulated for.

The only defence now material was that of the Raja of Jheria who claimed that the mineral rights in all the mouzahs in his zamindari, and that the grant of 1791, did not pass any right to minerals.

The Subordinate Judge held that all subsoil and mineral rights passed under the Brahmottar grant; and that the plaintiffs had been dispossessed by the Raja of Jheria and gave the plaintiff a decree for possession, and for Rs. 11,334 against the Raja as mesne profits.

The Raja alone appealed to the High Court (FLETCHER and RICHARDSON, JJ.) who, without deciding as to the rights to the minerals, held that the dispossession was not proved and dismissed the suit against all the defendants.

On this appeal,

De Gruyther, *K. C.*, and *Kenworthy Brown*, for the appellants, contended that they were entitled to have as against the Raja possession of the land in suit, and had on the construction of the *pottah* a right to the minerals beneath the soil; and that they had established their title to a declaration to the above effect. The High Court, it was submitted, should therefore not have reversed the decree of the Subordinate Judge so far as it gave them such a declaration. They also had a right to damages against the Raja for disturbing their possession and the exercise of their rights which had been established by the evidence.

Upjohn, *K. C*, *A. M. Dunne*, *K. C.*, and *Sir William Garth*, for the first respondent, contended that the Raja was, at all material times, the owner of the minerals beneath the soil, the Chakravarti's having obtained no title thereto either under the Brahmottar grant or by adverse possession; and that the Raja had never parted with the right to such minerals. Reference was made to the decisions of the Board in *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1), *Durga Prasad Singh* v. *Brajanath Bose* (2), *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (3) and *Giridhari Singh* v. *Megh Lal Pandey* (4), which lay down the principle that the Raja has a right to all the minerals underground unless it is clearly established on the

(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.
(3) (1916) I. L. R. 44 Calc. 585; L. R. 44 I. A. 46.
(4) (1917) I. L. R. 45 Calc. 87; L. R. 44 I. A. 246.

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evidence that he has parted with them. There was here no such evidence. In the last cited case the grant was made "with all rights", but even these words were held not to exclude the applications of the principle laid down in *Sashi Bhusan Misra's Case* (1), which applied to a rent-free grant equally as to one at a fixed rent. The *pottah* in the present case quite clearly does not include the minerals.

B. Dube, for the second respondents, contended that the appellants not having appealed against the decree of the Subordinate Judge were bound by it, and could not succeed in the appeal against this respondent.

De Gruyther, K. C., replied contending that the decisions of the Board cited for the first respondent did not apply to the *pottah* or grant in the present case, which was a revenue-free grant and therefore of land which did not form part of the permanently settled property of the Raja; and referring to Bengal Regulation VIII of 1793, section 36; Bengal Regulation XIX of 1793, section 1; and the case of *Rangit Singh* v. *Kali Dasi Devi* (2).

Feb. 20

The judgment of their Lordships was delivered by SIR JOHN EDGE. This is 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.

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

(1) (1916) I. L. R. 44 Calc. 585.

(2) (1917) I. L. R. 44 Calc. 841; L. R. 44 I. A. 117.

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 reliefs to which they alleged that they were entitled. One of these other reliefs 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 reliefs claimed by 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.

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 plantiffs had failed to prove a dispossesion by the Raja of

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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 Code of Civil Procedure, 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.

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 Sri Mohan Lal, who was then the zamindar 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."

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 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 grantors' *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.

The question of the title to the coal in question here must, as their Lordships have said, depend upon

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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.

In *Hari Narayan Singh* v. *Sriram Chakravarti* (1), 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 Raja to the village Patanga as part of his zamindari before the arrival of the Goshains on the scene being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced."

In that judgment the view was referred to with approval that was expressed by Mr. Field in his Introduction to the "Bengal Regulations," that :—

The zamindar 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,

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

and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship."

An explanation as to leases in perpetuity in India, given by Jenkins J. in *Kally Dass Ahiri* v. *Monmohini Dassee* (1) is instructive. It was that :—

"Because at the present day a conveyance in fee simple leaves nothing to 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 grantor."

That statement was quoted with approval by the Board in *Abhiram Goswami* v. *Shyama Charan Nandi* (2).

In *Durga Prasad Singh* v. *Braja Nath Bose* (3), 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 Rs. 64 per annum, payable to the zamindar, and that the tenure was hereditary. The Board held that the two

(1) (1897) I. L. R 24 Calc 440, 447. (2) (1909) I. L. R. 36 Calc. 1003, 1015 ; L. R. 36 I. A. 148, 167.

(3) (1912) I. L. R. 39 Calc. 696 : L R. 39 I. A. 133.

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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."

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 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.

In *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (1), 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

(1) (1916) I. L. R. 44 Calc. 585 ; L. R. 44 I. A. 46.

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* (1) and *Durga Prasad Singh* v. *Braja Nath Bose* (2) 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."

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 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 understood the vernacular, states in his judgment that:—

"The plaintiffs' case is that the whole Mouzah Chandkuia described in the 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

(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.

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1197, from Raja Mohan Singh, the ancestor of the defendant No. 1, granted to Lakshan Chakravarti."

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 ratified by the zamindar of land within his zamindari, and no mineral rights were mentioned in the *pottah*.

In *Giridhari Singh* v. *Megh Lal Panday* (1) 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 Bhusan Misra* v. *Jyoti Prasad Singh Deo* (2).

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.

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

(1) (1917) I. L. R. 45 Calc. 87; L. R. 44 I. A. 246.

(2) (1916) I. L. R. 44 Calc. 585; L. R. 44 I. A. 46.

Court of the Subordinate Judge, to be disposed of according to law. There will be no order as to the costs of this appeal as between the appellants and the defendants other than the Raja of Jheria.

Appeal dismissed as against respondent 1.

Solicitors for the appellants: *T. L. Wilson & Co.*
Solicitors for respondent No. 1: *Pugh & Co.*
Solicitors for respondent No. 2: *W. W. Box & Co.*

J. V. W.

PRIVY COUNCIL.

DAMUSA

v.

ABDUL SAMAD.

*P. C.**

1919
Feb. 14, 17, 27.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

Second Appeal—Power of Judicial Commissioner on second appeal to interfere with concurrent findings of fact of the lower Courts—Omission to decide real question in case or frame issue on it—Wrong decision on evidence—Civil Procedure Code (Act V of 1908), s. 100.

In this case the Judicial Commissioner in a second appeal set aside the concurrent findings of fact of the Courts below in favour of the appellants, on the grounds that the real question in the case had not been considered, nor had an issue been framed on it, and that those Courts had wrongly decided that on the evidence there was fraud on the part of the respondent. The Judicial Commissioner found that there was no evidence to support the finding of fraud, and that the real question in the case should, on the evidence, have been found in favour of the respondent, and made a decree in his favour.

**Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, SIR JOHN EDGE AND MR. AMEER ALI.