PRIVY COUNCIL.

ADJAI COAL COMPANY, LIMITED

v.

PANNALAL GHOSH.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

P. C.* 1929
Dec. 9;
1930
Jan. 28.

Limitation—Conversion without dishonesty—Enchroachments upon mine—Abstraction of coal—Damages—Expense of artificial barrier—Deaths of persons who converted property—Survival of cause of action—Legal Representatives' Suits Act (XII of 1855), s. 1—Probate and Administration Act (V of 1881), s. 89—Code of Civil Procedure (Act V of 1908), O. I, r. 13—Indian Limitation Act (IX of 1908), Sch. I, Arts. 35, 48.

In 1919, the owners of a coal mine sued the lessees of an adjacent mine for damages in consequence of an encroachment upon, and the removal of coal from, their mine; the wrongful acts of the defendants took place between 1904 and 1915, but the plaintiffs did not learn of them until 1919.

Held: (1) that the suit was not barred by limitation, even if the encroachment was by inadvertence, as Article 48 of Schedule I of the Indian Limitation Act, 1908, applies to all conversions, whether dishonest or not, and, accordingly, the plaintiffs could sue within three years from 1919.

Pugh v. *Ashutosh Sen* (1) followed.

(2) that as part of the damages the plaintiffs could recover the cost of erecting an artificial barrier to protect their mine from the risk of fire, water, or foul gases coming through the encroaching galleries worked by the defendants; they were not bound to wait until that risk actually emerged, and an artificial barrier was necessary, as the plaintiffs were entitled to work out the pillars of coal left by the defendants in the encroaching galleries.

Only one of the trespassers was alive when the suit was brought; he died during its pendency, and the suit was revived against his son and heir, respondent No. 1. The defendants-respondents Nos. 2 to 6 were the widows and minor sons of deceased trespassers. The respondents contended that the suit was not maintainable against them, having regard to the Legal Representatives' Suits Act, 1855, section 1 and the Indian Limitation Act, 1908, Schedule I, Article 35.

Held that the Act of 1855 (and consequently Article 35) did not apply, as the suit was to recover property, or its value, after conversion; and that, in any case, the cause of action survived under the Probate and Administration Act, 1881, section 89; further, that in effect the objection was on the ground of misjoinder, and, therefore, was made too late, having regard to Order I, rule 13 of the Code of Civil Procedure, 1908.

**Present:* Lord Thankerton, Lord Russell of Killowen, Sir George Lowndes and Sir Binod Mitter.

(1) (1928) I. L. R. 8 Pat. 516; L. R. 56 I. A 93.

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Appeal (No. 130 of 1928) from a decree of the High Court (April 30, 1926), varying a decree of the Subordinate Judge at Asansol, Burdwan district.

The appellant company and a firm carrying on business as the Nandi Coal Association were lessees of adjacent coal mines. On September 22, 1919, the appellant company instituted a suit, alleging that the firm had encroached upon their mine and removed coal therefrom. They claimed, as damages, the value of the coal removed and the cost of erecting a barrier to cut off their mine from the defendants; they also claimed an injunction.

The only survivor of the firm, as constituted at the date of the alleged trespass, was made defendant No. 1; he died during the suit and his son and heir, respondent No. 1, was substituted for him. Defendants-respondents Nos. 2 to 6 were the widows and minor sons, and representatives, of deceased members of the firm.

The defendants by their written statements denied that the plaintiffs had "any right or title to the "property in suit," and pleaded that the plaintiffs had "no cause of action" against them; they alleged that the coal was not within the boundaries of the plaintiffs' lease, but of their own; they pleaded also that the suit was barred by limitation.

The Subordinate Judge by his judgment found : (1) that the coal was removed from within the boundaries of the plaintiffs' lease, (2) that the firm had wrongfully extracted 18,544 tons of coal, (3) that the coal was taken before 1915, (4) that the encroachment was due to inadvertence and mistake, (5) that the plaintiffs first learnt of the encroachment in 1919. On these findings, he held that the suit was not barred. He made a decree for damages both in respect of the coal taken, and the cost of erecting the barrier, and he granted an injunction.

On an appeal by the defendants to the High Court, and cross-objections by the plaintiffs, the decree was affirmed so far as an injunction had been granted, but in all other respects it was set aside.

Mukerji J. (Greaves J. concurring) agreed with the above five findings of fact by the trial judge. The learned judges held, however, that the claim to damages for the coal extracted was barred by Articles 39 and 49 of the Limitation Act; in their opinion, Article 48 applied only to a dishonest conversion. The claim to the cost of the barrier, though not barred by limitation, in their opinion failed because the barrier was not necessary. They held, agreeing with the trial judge, that Act XII of 1855, and, therefore, Article 35 of the Limitation Act, did not apply, as the coal taken presumably increased the assets of the members of the firm.

The plaintiffs having appealed to the Privy Council, the defendants cross-appealed by special leave, contending that the plaintiffs had no title to the coal, as the *patnidârs*, their lessors, had no title. Both courts in India had declined to entertain that contention on the ground that it was not raised on the pleadings or issues.

Dunne K. C. and *Hyam*, for the appellants. The limitation Article applicable to the claim for conversion of the coal was Article 48; that Article applies to all conversions whether dishonest or not. Consequently, time did not run until 1919, when the plaintiffs first knew of the encroachment. The recent decision of the Board in *Pugh* v. *Ashutosh Sen* (1) is conclusive on the above points. Upon the evidence, the barrier was necessary as a reasonable protection from the results of the continuing trespass by the encroaching galleries and the value of the pillars of coal should not be deducted. The respondents cannot raise the contention put forward by their cross-appeal. It depended upon the terms of the *patni* lease granted by the *zemindâr* to the plaintiffs' lessors. Reference was made to *Satya Narayan Singh* v. *Satya Niranjan Chakravarti* (2) and *Bejoy Singh Dudhoria* v. *Surendra Narayan Singh* (3). As the point was not

(1) (1928) I. L. R. 8 Pat. 516; L. R. 56 I. A. 93.
(2) (1923) I. L. R. 3 Pat. 183; L. R. 52 I. A. 109.
(3) (1928) I. L. R. 56 Cal. 1; L. R. 55 I. A. 320.

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raised by the pleadings or issues, the necessary documents were not before the court. Further, the defendants' lease was from the same *patnidârs*, consequently they could not successfully raise the point.

Parikh, for respondents Nos. 1 to 6. Having regard to *Pugh* v. *Ashutosh Sen* (1), the respondents concede that the claim for conversion would not have been barred if the defendants had been the persons who took the coal. But the claim was against their representatives and was, therefore, barred by Act XII of 1855 and Article 35 of the Limitation Act. This contention was rejected on English decisions not applicable in India. The High Court rightly held on the facts that the proposed barrier was unnecessary. The defendants should be allowed to raise the contention as to the *patnidârs*' title. The written statement which put the plaintiffs' title in issue, and asserted that they had no cause of action was sufficiently wide to cover the contention. A narrow construction should not be given to a pleading in India: *Sayad Muhammad* v. *Fatteh Muhammad* (2). If necessary the case should be remitted for a finding upon this contention.

Dunne K. C., in reply, referred to Act V of 1881, section 89, and to Order I, rule 13.

The judgment of their Lordships was delivered by

LORD THANKERTON. In this action which was instituted on the 22nd September, 1919, the plaintiffs, who are appellants in the leading appeal, sue in respect of a trespass into their coal mine by the principal defendants, who carry on business under the name of the Nandi Coal Association, the lessees of an adjacent mine, and who are respondents Nos. 1 to 6 in the leading appeal.

The relief claimed in the action was (1) an enquiry as to the amount of coal cut and taken away by the defendants and damages in respect thereof, (2) the

(1) (1928) I. L. R. 8 Pat. 516; L. R. 56 I. A. 93.

(2) (1894) I. L. R. 22 Cal. 324; L. R. 22 I. A. 4.

cost of constructing an artificial barrier necessitated by the trespass, and (3) an injunction against further trespass.

The original defendant No. 1 having died, the present defendant and respondent No. 1 was brought on the record, and, on the 8th December, 1921, filed an additional written statement of defence. Prior to this, the issues had been adjusted and they were not subsequently amended. In view of a point raised in the additional statement, Andrew Yule & Company, Limited, the present respondents No. 7, were added as *pro forma* defendants, on the application of the plaintiffs.

By decree dated the 11th September, 1924, the Subordinate Judge awarded to the plaintiffs Rs. 56,018 as damages for the coal extracted by the defendants and Rs. 18,223 as costs for the construction of the barrier against the defendants Nos. 1 to 6 to the extent of the assets of the deceased partners of the defendant firm in their hands (including the assets of the firm) with costs in proportion to the plaintiffs' success and with interest at 6 per cent. and also granted a permanent injunction against further trespass.

The defendants appealed to the High Court in Calcutta, and the plaintiffs also filed cross-objections on the insufficiency of the sums decreed.

On the 30th April, 1926, the High Court gave judgment affirming the permanent injunction, but disallowing the claim for damages as barred by limitation, and also the cost of the barrier on the ground that there was no imminent risk.

From this judgment, the present appeal and cross-appeal are taken. By the appeal, the plaintiffs maintain (1) that the claim for damages is not barred by limitation, and (2) that they are entitled to the cost of the barrier. In the cross-appeal, defendants Nos. 1 to 6 maintain (1) that the plaintiffs have not established a title to the coal taken, and (2) that the cause of action does not survive against them.

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While various defences were raised at the trial, it is established by concurrent findings of the Subordinate Judge and the High Court that the defendants encroached on land within the terms of plaintiffs' lease during the years 1904 to 1915 and took coal to the amount of 18,544 tons, and that the plaintiffs first became aware of the encroachment in 1919.

On the question of limitation, their Lordships are of opinion that the point is governed by the decision of this Board in *Pugh* v. *Ashutosh Sen* (1), a coal encroachment case, in which it was held that Article 48 of Schedule I of the Indian Limitation Act, 1908, applies to all conversions, whether dishonest or not. In the present case, the Subordinate Judge found that the trespass was due to inadvertence, while the High Court held that it was due to inadvertence and want of reasonable care, and their Lordships are of opinion that both these views of the conversion fall within the terms of Article 48, under which the limitation period of three years begins to run when the person having the right to possession of the property first learns in whose possession it is. Accordingly, the present suit was instituted in time.

In considering the claim for the cost of constructing a barrier, it is necessary to bear in mind the present position of the workings in the area of encroachment. The area is a right-angled triangle, the right angle being formed by straight lines on the east and south, which are on the true boundary between the properties; the hypothenuse on the north-west side is an irregular line, being the limit of the encroachment workings, which were carried on by means of transverse galleries, pillars of unwrought coal being left. According to the findings of the commissioner, which were accepted by the courts, the area of the galleries was 48,663 square feet, and that of the pillars 21,192 square feet, while the average height of the galleries was 11 feet 1½ inches less 2 per cent. for hanging coal. The width necessary for a

(1) (1928) I. L. R. 8 Pat. 516; L. R. 56 I. A. 93.

barrier is stated to be 20 feet and the nearest point of the plaintiffs' workings is considerably further away to the north-west.

The Subordinate Judge held that there was no evidence of "any present risk of fire, water or foul "gas coming to the plaintiffs' colliery from the "defendants' colliery even if the plaintiffs by working "up to the encroached portion happen to establish "connection between the two mines," on the assumption that the defendants would work their colliery properly; but he stated that he could not ask the plaintiffs to rely on the good sense and competency of the defendants, nor could he ask the plaintiffs to leave a barrier of coal within their land on the west of the portion encroached on, for the plaintiffs had a right to cut and take the pillars on that portion up to the boundary, but they could not do so without driving a gallery up to the disputed land. The learned Judge, therefore, found that the defendants' acts had rendered it necessary for the plaintiffs to keep an artificial barrier between their mine and the defendants' mine. He further found the plaintiff company entitled to erect an artificial barrier (if they liked) on the east and south of the disputed area and to ask for such price or damages as they might be found entitled to on that account. He, thereafter, gave the plaintiffs a decree for Rs. 18,223, being the cost of the barrier (Rs. 28,125) less the value of the coal (Rs. 9,902) abstracted by the defendants, which the plaintiffs would have had to leave as part of a barrier if there had been no encroachment and the plaintiffs themselves had been working the disputed area, such value being already included in the damages awarded by the learned Judge for the coal extracted. By the judgment of the High Court on appeal, these findings in favour of the plaintiffs were reversed on the ground that, in view of the absence of risk as found by the Subordinate Judge, the plaintiffs, if they wanted to ensure the safety of their own mine, were bound to look to themselves for leaving a barrier, and that they might still keep such a barrier out of the

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coal that is left between the two mines, on the hypothenuse of the triangle. In their Lordships' opinion that finding is not justified as it excludes the plaintiffs' right to work out the pillars left in the encroachment area. Their Lordships are of opinion that the decree of the Subordinate Judge on this point should be restored, as the plaintiffs are entitled to be protected against any possible risk due to the defendants having wrongfully pierced the margin of coal on the plaintiffs' side of the boundary, which would in ordinary course have been left as a barrier, and that the plaintiffs are not bound to wait until any risk emerges, when it might well be too late to construct a barrier. Further, it may be at least doubtful whether, on the subsequent emergence of such risk, it will then be open to the plaintiff to recover the cost from the defendants. While it might have been more logical to have deducted the value of the coal which would have had to be left from the amount of the damages for coal abstracted and not from the cost of construction of the barrier, their Lordships are not disposed to disturb the course adopted by the Subordinate Judge.

There remain the two questions raised by defendants Nos. 1 to 6 in the cross-appeal, of which the first relates to the plaintiffs' title; on this question, their Lordships agree with the conclusion of both the courts below, *viz.*, that the question whether the *patnidârs*, from whom the plaintiffs hold their leases, had themselves any title to the minerals was not raised by the written statements or by the issues in the suit, and cannot be raised at this stage of the suit.

As regards the contention that the cause of action does not survive against any of the defendants Nos. 1 to 6, their Lordships are of opinion that section 1 of Act XII of 1855 does not apply to the present case, which seeks to recover property or its value after conversion, and that, in any event, the cause of action survives under section 89 of the Probate and Administration Act, Act V of 1881, which applies to Hindus, against executors and administrators, and

that in effect these defendants' objection is on the ground of misjoinder—an objection which comes too late in view of Order I, rule 13 of the Code of Civil Procedure, Act V of 1908.

Their Lordships are, therefore, of opinion that the appeal should be allowed, and the decree of the Subordinate Judge restored, with costs to the appellants in the High Court and before this Board, and that the cross-appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants: *Sanderson, Lee & Co.*

Solicitor for the respondents Nos. 1 to 6: *T. L. Wilson.*