PRIVY COUNCIL.

H. V. LOW & CO., LTD.

v.

JYOTIPRASAD SINGH DEO.

P. C.*
1931

June 22, 23, 25 ;
July 24.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Minerals—Contract for mining lease—Repudiation by lessee—Claim to return of deposit—Alleged want of title—Previous brahmottar *grants—Copies of grants not produced—Specific Relief Act (I of 1877), s. 25—Transfer of Property Act (IV of 1882), s. 108.*

By a contract in writing, the appellants were to take a lease for 999 years of the underground coal rights in two *mouzâs* within the respondent's *zemindâri*, and if within two months they failed to do so, "except for the "reason of the want of the lessor's title to the said *mouzâs*," a *selâmi* of Rs. 34,440, which they had paid, was to be forfeited. After the contract, it appeared that, at some unknown date, an ancestor of the respondent had made *brahmottar* grants of the *mouzâs*. The appellants called for production of copies of the grants in order that they might be satisfied that they did not include the minerals. The respondent being unable to produce copies, the appellants refused to take the lease, and sued to recover the *selâmi*. There was no evidence that the *brahmottardârs* had ever claimed subsoil rights.

Held that, under the contract, the appellants could recover the *selâmi*, upon proof that the title to the subject of the lease was not free from reasonable doubt, the test being the same as under section 25 (*b*) of the Specific Relief Act, 1877, upon a suit by a lessor for specific performance, and that the suit failed as they had not discharged that onus ; it was not shown that the respondent had failed, or was not in a position to perform any of the obligations incumbent upon a lessor under section 108 of the Transfer of Proprety Act, 1882.

Gobindanarayan Singh v. *Shyamlal Singh* (1) and cases there cited referred to.

Judgment of the High Court (2) affirmed.

Appeal (No. 8 of 1930) from a decree of the High Court in its appellate jurisdiction (December 13, 1929) reversing a decree of the Court in its original jurisdiction (February 12, 1929).

The appellants sued the respondent to recover a *selâmi* or premium deposited by them in connection

**Present* : Lord Macmillian, Sir John Wallis and Sir Dinshah Mulla.

(1) (1930) I. L. R. 58 Calc. 1187 ; L. R. 58 I.A. 125.

(2) (1929) I. L. R. 57 Calc. 1189.

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with a contract for the grant to them by the respondent of a lease of the underground coal rights in two *mouzâs* within the respondent's *zemindâri*. The appellants contended that there was a "want of "the lessor's title," which, under the contract, entitled them to refuse the lease and recover the deposit.

The facts are fully stated in the judgment of the Judicial Committee.

The trial Judge (Page J.) decreed the suit. An appeal was allowed by a judgment delivered by Rankin C. J. and concurred in by Buckland J.

E. B. Raikes, K. C. (with him *M. R. Jardine* and *Harry Johnson*) for the appellants. A suit by the respondent for specific performance would have been dismissed under section 25 (*b*) of the Specific Relief Act, 1877, upon it appearing that he could not give a title free from reasonable doubt, and thereupon the appellants would have recovered the *selâmi* under section 18 (*d*) of that Act. Under the clause in the contract, the right of the appellants to recover the *selâmi* is at least as wide as under the general law. Although under the authorities, the *brahmottar* grants did not convey the subsoil rights, unless there were express words, the grants may have been in language similar to that in *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj* (1), which the Board held was sufficient to carry them. In the absence, therefore, of production of copies of the grants or authoritative information as to their terms, there was a reasonable doubt as to the respondent's rights to deal with the subsoil rights. The respondent was bound to supply the appellants with information upon the matter. It should not be accepted that he could not do so; his refusal to give an indemnity shows that he was not acting *bona fide*. Section 108 of the Transfer of Property Act, 1882, is not exhaustive of the obligations between a lessor and lessee. The Board has held that the Contract Act is not exhaustive as to the matters with

(1) (1924) I. L. R. 4 Pat. 244 ; L. R. 52 I. A. 109.

which it deals: *Jwaladutt R. Pillani* v. *Bansilal Motilal* (1). The relations of landlord and tenant in India are regulated by English law as it was before the Vendor and Purchasers Act, 1874, save so far as the Indian legislature has provided otherwise: *Tarachand Biswas* v. *Ram Gobind Chowdhry* (2). Under the law in England before that Act, there was an implied term in a contract to grant a lease that the lessor would make out his title to grant the lease: *Souter* v. *Drake* (3); see also *Jones* v. *Watts* (4). Further, the right of mining contracted for was not a "lease" within section 105 or section 108 of the Act of 1882; it was really a sale of property out and out: *Gowan* v. *Christie* (5), *Campbell* v. *Wardlaw* (6). The respondent was, therefore, under the obligations laid down in section 55 of the Transfer of Property Act, 1882; the appellants rely on sub-sections (1) (*a*) (*b*) and (2).

Upjohn, K. C. (with him *Parikh*) for the respondent. Under the clause in the contract, the appellants could recover the *selâmi* only upon proof by them of a "want of title" in the respondent, a cloud upon the title was insufficient. The Board has held in *Raja of Pittapur* v. *Secretary of State for India* (7) that the fact that persons are in possession of the surface rights of *zemindâri* lands shows no want of title in the *zemindâr* of the subsoil rights. Even if the suit was one by the respondent for specific performance, so that the tests of "reasonable doubt" and "imperfect "title" in sections 25 (*b*) and 18 of the Specific Relief Act, 1877, applied, the appellants would not be entitled to succeed. There is no ground for suggesting that the respondent did not make a *bona fide* search for the grants; no grants were produced by the grantees at the settlement. They have never asserted any right to the subsoil rights; the

(1) (1929) I. L. R. 53 Bom. 414; L. R. 56 I. A. 174.
(2) (1879) I. L. R. 4 Calc. 778, 781.
(3) (1834) 5 B. & Ad. 992; 110 E. R. 1058.
(4) (1890) 43 Ch.D.574.
(5) (1873) L. R. 2 H. L. Sc. 273, 284.
(6) (1883) 8 App. Cas. 641, 649.
(7) (1929) I. L. R. 52 Mad. 538; L. R. 56 I. A. 223.

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appellants could have called them at the trial. No written grant since 1866 could affect the title in the absence of registration. It is almost inconceivable that there could be any successful claim by the grantees adverse to the appellants. Decisions of the Board show that in the absence of evidence of the terms of a grant by a *zemindâr*, he is to be presumed to own the subsoil rights of his *zemindâri* lands: *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1), *Durga Prasad Singh* v. *Braja Nath Bose* (2), *Sashi Bhusan Misra* v. *Jyoti Prasad Singh Deo* (3) (relating to this particular *zemindâri*), *Raghunath Roy Marwari* v. *Durga Prashad Singh* (4), *Raja of Pittapur* v. *Secretary of State for India* (5), *Gobindanarayan Singh* v. *Shyamlal Singh* (6). The above cases were between grantor and grantee, but they establish principles applying between vendor and purchaser. There is always a remote possibility that there may be a defect in a title, even though it is one which in law has to be accepted. The right to compensation under the provisions of section 108A (*b*) and (*c*) of the Act of 1882 cover that. The respondent made the disclosure required of him by section 108A(*a*). There is no ground for the suggestion that section 55 and not section 108 applied. The cases cited for the view that the contract was for a sale not a lease, related to the law in Scotland. Even a *mokarrari pâttâ* is not to be regarded as a conveyance of the fee simple: *Abhiram Goswami* v. *Shyama Charan Nandi* (7) [Reference was made also to *Alexander* v. *Mills* (8), *Johnson* v. *Clarke* (9) and Dart on Vendor and Purchaser, 7th edition, page 266].

(1) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.
(2) (1912) I. L. R. 39 Calc. 696 (703); L. R. 39 I. A. 133 (142).
(3) (1916) I. L. R. 44 Calc. 585; L. R. 44 I. A. 46.
(4) (1919) I. L. R. 47 Calc. 95; L. R. 46 I. A. 158.
(5) (1929) I. L. R. 52 Mad. 538 (547-548); L. R. 56 I. A. 223 (231).
(6) (1931) I. L. R. 58 Calc. 1187 (1195); L. R. 58 I. A. 125 (132-133).
(7) (1909) I. L. R. 36 Calc. 1003; L. R. 36 I. A. 148.
(8) (1870) L. R. 6 Ch. 124, 131.
(9) [1928] Ch. 847.

E. B. Raikes, K. C., in reply. It is not permissible to make any presumption as to the contents of the grants: *Secretary of State for India* v. *Laxmibai* (1) and cases there followed, *Secretary of State for India* v. *Girjabai* (2), and Indian Evidence Act, 1872, section 114.

The judgment of their Lordships was delivered by

LORD MACMILLAN. The appellant company seeks in this action to recover from the respondent a sum of Rs. 34,440, which, on the 13th October, 1923, it paid to him as *selâmi* or premium in respect of a contemplated 999 years lease of the underground coal rights in two *mouzâs* known as Raidi and Methadi, comprised in the respondent's *zemindâri*. Subsequent to the payment of this premium, the parties entered into a formal agreement, dated the 22nd January, 1925, whereby the appellant company agreed that, within two months from the date of the submission of the draft lease by the respondent, it would take the proposed mining lease from the respondent or his lessees "on a *selâmi* of Rs. 34,400 already deposited," and on certain specified royalty terms. The agreement contained the following clause:—

> If they [*i.e.*, the appellant company] neglect or fail to take such lease within the aforesaid time, except for the reason of the want of the lessor's title to the said *mouzâs*, the sum of rupees thirty-four thousand four hundred and forty, deposited as aforesaid, will be forfeited unto the Raja Bahadur.

There was considerable delay in proceeding with the transaction, but, at length, on the 29th May, 1925, a draft lease was sent to the appellant company. On the 30th June, 1925, the company's solicitors returned the draft approved, with certain alterations, adding in their covering letter, that "our approval is "subject to the title of the Maharaja being "satisfactory." The letter proceeded as follows:—

> We may mention that we do not yet know what right the Maharaja has to the properties in question. We are, however, informed that *mouzâ* Methadi is held under the *patni* lease under the Maharaja by the Mohtas. If this

(1) (1922) I. L. R. 47 Bom. 327; L. R. 50 I. A. 49. (2) (1927) I. L. R. 51 Bom. 957; L. R. 54 I. A. 359.

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be so, we shall be glad to know how the Maharaja claims to deal with the underground rights. *Mouzâ* Raidi, we understand, is held by Gopal Kabiraj and others. We do not know what the nature of their title is and whether the Maharaja has the underground rights or these Kabirajas have the underground rights. Before the lease is finally completed we must be satisfied that the Maharaja has the right to deal with the underground.

This was the first occasion on which any question was raised by the appellant company as to the respondent's title. On the 11th July, 1925, the respondent's manager wrote in reply :—

As regards the Maharaja's title in the said *mouzâs*, I have to inform you that Maharaja Bahadur is the landlord of both the *mouzâs* under whom the surface right in *mouzâ* Raidi is held as a rent free *debâttar* tenure paying cess to this estate by Radhashyam Ray and others as *shebâits* of Dadhipaban Thakur, and the surface right in *mouzà* Methadi is held as a rent paying (*kherâji*) *brâhmottar* tenure by Ayodhyaram Chatterji and others. For your information, I am sending herewith a copy of the last Survey Settlement records of these *mouzâs*, from which it will be quite clear that Maharaja Bahadur is the landlord, and as such the right in the underground minerals is vested in him.

The company's solicitors, on the 17th July, 1925, wrote in reply :—

It is not clear whether the mineral rights of the above *mouzâs* have not been parted with by the ancestors of the Raja Bahadur to the *debâttârdârs* and *brahmottardârs*, and we think you will admit that copies of the *debattar* and *brahmottar* grants are necessary to arrive at a decision. We shall, therefore, thank you to send copies of the above documents, failing which, we are afraid, an indemnity by the Raja Bahadur will be necessary to safeguard the interests of our clients.

On the 5th August, 1925, the respondent's manager replied as follows :—

I have to inform you that the *brahmottar* and *debattar* grants were made by the ancestors of the Raja Bahadur in days long gone by, and no trace of the origin of the grants can be found out. *Prima facie*, the mining rights in the villages belong to the Raja Bahadur, who is admittedly the proprietor thereof, and if anybody questions his rights it will evidently be for him to show the same. Under the circumstances, the Raja Bahadur is not in a position to execute any indemnity bond.

The solicitors of the appellant company, on the 18th August, 1925, intimated that their clients were not prepared to take the lease "as the Maharaja has "failed to produce any title to the underground "mining rights," and requested repayment of the *selâmi* already paid, with interest and expenses, at the same time claiming a sum in name of damages.

The respondent denied all liability, and the appellant company thereupon brought the present suit against him in the High Court of Calcutta on the 7th June, 1926. On the 12th February, 1929, the Judge of first instance (Page J.) gave judgment in favour of the plaintiff for the return of the *selâmi* with interest. This judgment was reversed and the suit dismissed by the Appellate Court (Rankin C.J. and Buckland J.) on the 13th December, 1929. The matter is now before their Lordships on the original plaintiff's appeal.

The parties having, in the clause above quoted from the agreement of the 22nd January, 1925, made their own bargain as to the circumstances in which the *selâmi* should be forfeited to the respondent, the first question which arises is as to the true meaning and intent of that clause. The appellant company has failed to take the lease tendered to it; it has, therefore, forfeited its deposit unless the reason for its failure to accept the lease has been "the want of the lessor's title." The burden is upon the appellant company to establish this justification of its rejection of the lease.

In their Lordships' view, the appellant company is not required to prove that the respondent has no title to the subjects he professed to lease. The expression "want of title" in the clause must be read as covering deficiency of title as well as absence of title. If the appellant company can show that, owing to the state of the respondent's title, the lease tendered is not such as it can be required to accept, then forfeiture of the *selâmi* has not been incurred. The action is not one by an intending lessor for specific performance, but, in their Lordships' opinion, the test of the appellant company's right to recover the *selâmi* is whether an action for specific performance at the instance of the respondent could have been successfully resisted by the appellant company on the ground that the respondent's title was defective. The Specific Relief Act, 1877 (I of 1877) formulates the test. By section 25 of that

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statute, it is enacted that a contract for the letting of property cannot be specifically enforced in favour of a lessor who cannot give the lessee "a title free "from reasonable doubt." Reference may also be made to section 18 which enacts that where the lessor sues for specific performance of the contract, and the suit is dismissed "on the ground of his "imperfect title," the defendant is entitled to the return of any deposit he has made.

The real question at issue, therefore, is whether the appellant company has shown that the respondent's title to grant a lease of the mineral rights in the two villages is not free from reasonable doubt, or may be fairly described as imperfect. It is obvious that the question is one of degree. The doubt suggested must be a reasonable doubt; the imperfection must be material.

The appellant company has led no evidence and maintains that the infirmity of the respondent's title is sufficiently demonstrated by his admission that his ancestors have at some unknown date in the past made a *debattar* grant of *mouzâ* Raidi and a *brahmottar* grant of *mouzâ* Methadi in virtue of which the successors of the original grantees are at the present day in possession, there being no evidence as to the terms of these grants and, in particular, whether they included the underground rights. The respondent called one witness, a servant, who described his duties as being "to look after suits "and to carry out all directions of the manager." This witness stated that he had made a search in the respondent's *sheristâ* for any *debattar* and *brahmottar* grants relating to the two villages, but had failed to find any such grants or any copies thereof; that, at the survey settlement, the holders of the grants attended, but did not produce any grants; that, after the institution of the present suit, he had seen the two holders of the largest shares of the grants, upon whom subpœnas had been served, but that neither could produce any grant. The evidence of this witness was criticized on the ground

that he was not the regular keeper of the respondent's records, and that his search was inadequate. Their Lordships are satisfied that sufficient diligence was shown in the prosecution of the respondent's investigation.

The result is that the appellant company is unable to do more than conjecture that the grants made by the respondent's predecessors may have comprised the underground rights. On the other hand, there is no evidence that the grantees have ever asserted any right to the minerals under the villages or that they have ever been worked by them or their predecessors. It is, moreover, sufficiently established that there are no written grants in existence, and it must, in any event, be borne in mind that, since 1866, no document unless registered, can affect the title to immovable property in Calcutta. Now, "a long series of recent decisions by the Board "has established that if a claimant to subsoil rights "holds under the *zemindâr* or by a grant emanating "from him, even though his powers may be "permanent, heritable and transferable, he must "still prove the express inclusion of the subsoil rights" [*Gobindanarayan Singh* v. *Shyamlal Singh* (1) and see cases there cited]. In the present case, the grants not being in writing, must, to be effectual, be earlier in date than 1883, for since then such grants have required to be by written instrument. Consequently, the grantees in order to establish the inclusion of the subsoil rights in their grants would have to prove that the terms of oral grants made half a century ago expressly included these rights. Where, as here, there is no evidence that the grantees have ever claimed or worked the minerals, the possibility of the grantees being now able to prove that the mineral rights were expressly granted to their predecessors is reduced to a contingency so remote as to be practically negligible.

(1) I. L. R. 58 Calc. 1187 (1195) ; L. R. 58 I. A. 125 (133).

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The rights and liabilities of lessor and lessee are defined in the Transfer of Property Act, 1882 (IV of 1882), section 108. These contrast markedly with the rights and liabilities of buyer and seller as defined in section 55, particularly in the matter of the requirements as to title which the seller must satisfy. The appellant company has not shown that the respondent has failed, or is not in a position, to perform any of the duties incumbent on a lessor under section 108.

Their Lordships, for the reasons indicated, are of opinion that the appellant company has not justified its refusal to take the lease offered to it, inasmuch as it has not shown any such "want of title" on the lessor's part as would create a reasonable doubt. This is sufficient for the disposal of the case, and their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

A.M.T.