APPELLATE CIVIL.

Before Derbyshire C. J. and Costello J.

1935

Mar. 4.

RAJKRISHNA PRASADLAL SINGH DEO

v.

BARABONI COAL CONCERN, LTD.*

Privy Council—Leave to Appeal—Royalty on coal—Recurring liability—Valuation—Decree in favour of appellant—Adverse finding—Cross-Appeal—Code of Civil Procedure (Act V of 1908), ss. 109(c), 110.

Where the High Court, while decreeing plaintiff's claim for royalty on coal extracted from the lands in suit, decided that he had no title to the said lands, and the separate applications by the two defendants for leave to appeal against the said decree to His Majesty in Council were allowed on the ground of valuation, the judgment of the High Court being one of reversal, leave was also granted to the plaintiff to prefer a cross-appeal against the adverse finding in the said judgment, as important questions of law arose in connection therewith and it was a fit and proper case for leave to appeal under section 109(c) of the Code of Civil Procedure, otherwise it might not be possible for justice to be done between the parties.

Muhammad Wali Khan v. *Muhammad Mohi-ud-din Khan* (1) referred to.

APPLICATIONS FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL by the defendants and the plaintiff separately.

The suit was one for recovery of arrears of royalty and for a declaration that the royalty is the first charge on the colliery in question including machinery, *etc.* The suit was dismissed. On appeal to the High Court (2), though the plaintiff's suit was decreed in full, it was held that "the title in the under-"ground rights is not in the plaintiff, but that the "defendants are estopped from denying the plaintiff's "title and that estoppel still continues having regard "to the terms of the *kabuliyat.*" The defendants, thereupon, filed two applications for leave to appeal to His Majesty in Council and the plaintiff also applied for leave.

*Applications for leave to appeal to His Majesty in Council, Nos. 4, 6 and 7 of 1935, in Appeal from Original Decree, No. 54 of 1930.

(1) (1914) I. L. R. 37 All. 124. (2) (1934) I. L. R. 62 Calc. 346.

Saratchandra Basak, Senior Government Pleader, for the appellant in P. C. Appeal No. 6 of 1935. This appeal is from a judgment of reversal. The only question is one of valuation. The plaintiff claims he is entitled to royalty on the coal mined.

[DERBYSHIRE C. J. You deny title.]

We deny both liability and the title of plaintiff. Reads last but one paragraph of Mitter and Patterson J.J's. judgment. The length of this contract is 999 years, *i.e.*, it is practically a permanent lease and affects property worth more than Rs. 10,000. So I come under the section.

[DERBYSHIRE C.J. You mean the 2nd paragraph of the section.]

I rely on the decisions in *Radhakrishna Ayyar* v. *Sundaraswamier* (1) and in *Surapati Roy* v. *Ram Narayan Mukerji* (2). Although the claim in the trial court is less than Rs. 10,000, this is a recurring liability and, therefore, the valuation is much more, the capitalised value being nearer Rs. 60,000 than Rs. 10,000. Reads *Radhakrishna Ayyar* v. *Sundareswamier* (1) at page 215. Reads *Surapati Roy* v. *Ram Narayan Mukerji* (2) at page 161. In this country we capitalise rental at 20 times ordinarily.

S. C. Roy for the appellant in P. C. Appeal No. 7 of 1935 supported the appellant in P. C. Appeal No. 6 of 1935.

S. N. Banerjee for the respondent. I give the last pronouncement of the Judicial Committee of the Privy Council in *Rashid Ahmad* v. *Anisa Khatun* (3), which, in effect, lays down that a recurring liability does not affect valuation. There is no right of appeal under the Code of Civil Procedure in such a case as this.

(1) (1922) I. L. R. 45 Mad. 475; L. R. 49 I. A. 211.
(2) (1923) I. L. R. 50 Calc. 680; L. R. 50 I. A. 155.
(3) (1931) I. L. R. 54 All. 46; L. R. 59 I. A. 21.

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[COSTELLO J. That is not a case of a permanent lease.]

[DERBYSHIRE C.J. It is a recurring liability, if it comes on year by year *with certainty*, not if it may or may not come on. What is the royalty worth?]

The right to the royalty is not involved.

I rely on *Rashid Ahmad* v. *Anisa Khatun* (1).

[DERBYSHIRE C.J. The fundamental issue was one of title.]

If that is your Lordship's view I don't press it further.

Saratchandra Basak, Senior Government Pleader, for the respondent in P. C. Appeal No. 4 of 1935. I have a preliminary objection. The decree being in appellant's favour, he has no power to file an appeal from the finding said to be against him. There was only one suit and one judgment, but three Privy Council Appeals arise therefrom in this case.

S. N. Banerjee for the appellant. I rely on the definition of "decree" contained in section 3 of the Code of Civil Procedure, as also on section 39 of the Letters Patent of the Calcutta High Court.

[DERBYSHIRE C.J. In another suit you would have to take notice of Mitter J's judgment.]

I would ask your Lordship to consolidate these three appeals.

Basak for the respondent. Plaintiff is appealing only from a certain adverse finding in the judgment, though the decree is in his favour. The Privy Council does not interfere with concurrent findings of fact. My learned friend has to make out not only a question of law but also a substantial question of law. I have not been able to find any case in any report on this point of appealing against a finding and not against the decree.

(1) (1931) I. L. R. 54 All. 46; L. R. 59 I. A. 21.

S. C. Roy for the 2nd respondent. The Privy Council may have an inherent right to entertain such an appeal from a finding in a judgment where the decree is in appellants' favour. But plaintiff has no right of appeal against a decree in his favour. Your Lordship's jurisdiction is given by sections 109 and 110 of the Code of Civil Procedure and by section 39 of the Letters Patent and there is no appeal from a finding in a judgment.

[COSTELLO J. The question re estoppel was not discussed in the trial court.]

The question of estoppel was very fully gone into in the trial court and the High Court.

[DERBYSHIRE C.J. See the case in *Muhammad Wali Khan* v. *Muhammad Mohi-ud-din Khan* (1), which has some bearing on this application.]

Banerjee, in reply. Section 109 of the Code is very wide and whenever your Lordships consider it "a fit and proper case" leave can be granted. It would be a saving of time and money if these three appeals arising out of the same judgment were consolidated.

Appeal No. 6.

DERBYSHIRE C.J. It is admitted by Mr. Banerjee that the question between the parties is in substance whether his client—the plaintiff—shall receive and continue to receive royalties in respect of coal raised for over a long period of years, stated to be 999 years in the lease, the *minimum* royalty payable by the defendants to the plaintiff being Rs. 3,200 *per annum.* In my view, that brings the value of the subject matter of the suit in the court of first instance over the amount of Rs. 10,000. The liability is of a recurring nature and the case is governed by the decision of the Privy Council in the case *Surapati Roy* v. *Ram Narayan*

(1) (1914) I. L. R. 37 All. 124.

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Mukerji (1). Further, the decree made by the court directly or indirectly involves a claim or question to or respecting property of over the value of Rs. 10,000. This brings the matter within the second limb of section 110 of the Civil Procedure Code. On those grounds and, regard being had to the fact that the decree appealed against is one of reversal, I am of opinion that leave to appeal to the Privy Council should be granted.

Appeal No. 7.

A similar order is made as in Appeal No. 6 just now disposed of.

Appeal No. 4.

In this appeal, the plaintiff is asking for leave to appeal. This appeal and appeals Nos. 6 and 7 arise out of the same matter decided by the same judgment and the questions of fact and law involved in appeal No. 4 are substantially those involved in appeals Nos. 6 and 7. The plaintiff originally claimed royalties on the ground that he was the owner of the land in question and that he had granted a lease of mineral rights to the defendants. The defendants defended the action on two grounds, namely, (i) that the plaintiff was not the owner of the land and (ii) that they were not liable to pay royalties under the lease. The court of first instance decided against the plaintiff, following the contentions (i) and (ii) of the defendants. The plaintiff appealed to the High Court and the High Court held that the contention (i) was correct and that the plaintiff had no legal title to the land, but also held that the defendants' contention (ii) was incorrect and that, notwithstanding the plaintiff had no title to the land, the defendants were estopped because of the *kabuliyat* from denying the plaintiff's title to the land and were, therefore, liable to pay the royalties in question.

(1) (1923) I. L. R. 50 Calc. 680 ; L. R. 50 I. A. 155

The final paragraph of Mr. Justice Mitter's judgment (1) reads:—

> The result is that this appeal is allowed and plaintiff's suit is decreed in full. With regard to costs, as plaintiff has failed on the principal issue of the title, he will get half his costs throughout.

The plaintiff now wishes to appeal against that part of the decision of the High Court, which decided that he had no title to the land.

I think this case is a proper one, in which we can certify under section 109(*c*) of the Civil Procedure Code that it is a fit one for appeal to His Majesty in Council. In the first place, the decree appealed from involves directly or indirectly some claim or question to or respecting property of the value of over Rs. 10,000; secondly, there is involved in it as appears in the judgment a substantial question of law; and thirdly, unless leave is given to the plaintiff to appeal in this case it may not be possible for justice to be done between the parties in view of the final decision in appeals Nos. 6 and 7; moreover, it is convenient that the matters in issue between the parties raised in these three appeals should be decided together and finally in one appeal. For these reasons I am of opinion that leave to appeal to His Majesty in Council should be granted in appeal No. 4 also.

I think I might refer to the case of *Muhammad Wali Khan* v. *Muhammad Mohi-ud-din* (2), which supports to some extent the view, that I have taken in this matter.

COSTELLO J. I agree.

Leave granted.

G.S.

(1) (1934) I. L. R. 62 Calc. 346, 368. (2) (1914) I. L. 37 All. 124.