PRIVY COUNCIL.

P. C.*
1938
June 28.

BENGAL COAL COMPANY

v.

JANARDAN KISHORE LAL SINGH DEO.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Mining lease—Covenant by lessee to pay all taxes, rates, assessments and impositions in the nature of public demands charged, assessed or imposed upon the mines—Liability of lessee to pay (i) *Road and Public Works Cess under Cess Act, 1880,* (ii) *Mines Health Cess under Bengal Mines Settlements Act, 1912 and* (iii) *Income-tax on royalties.*

A covenant in a mining lease was in the following terms :—

The lessees shall pay the royalty and royalties reserved by this lease.....and shall also pay and discharge all taxes, rates, assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by authority of the Government of India or the Local Government or otherwise except demand for land revenue.

Held that the words " taxes, rates, assessments and impositions whatsoever " followed by the words " charged, assessed or imposed on the said mines " were intended to avoid restricting the covenant to cases in which the demand was in its strictest sense " charged upon the land ".

The lessees were, therefore, under the covenant, bound to pay the Road and Public Works Cess imposed under Bengal Act IX of 1880 and the Mines Health Cess under Bengal Act II of 1912, but were not bound to pay income-tax upon royalties.

Allum v. *Dickinson* (1) ; *Foulger* v. *Arding* (2) and *Payne* v. *Esdaile* (3) referred to.

Consolidated Appeal (No. 69 of 1937) from two decrees of the High Court (March 24, 1936) which affirmed a decree of the District Judge of Burdwan (December 7, 1932) which modified a decree of the Subordinate Judge of Asansol (July 17, 1930).

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

Ratcliffe, K. C., and *Jopling* for the appellant.

*Present : Lord Romer, Sir Shadi Lal and Sir George Rankin.

(1) (1882) 9 Q. B. D. 632. (2) [1902] 1 K. B. 700.
(3) (1888) 13 App. Cas. 613.

There is a distinction between a charge on a mine and a charge on the landlord and tenant in respect of the mine. Key & Elphinstone, 13th ed., Vol. I, pp. 892, 1070; Prideaux, 22nd ed., Vol. III, pp. 1029, 1046.

In *Manindra Chandra Nandy* v. *Secretary of State for India* (1), it was held that the landlord was correctly assessed under the Bengal Road and Public Works Cess Act of 1880 upon the annual profits of the mines.

A tax is not a tax upon a property unless it is specially imposed on the property and can be recovered by special proceedings against the property. It is not a tax upon the property where it can be recovered by proceedings against the general property of the owner. Here there is: (*i*) no charge against the property, (*ii*) the charge carries no remedies against the property, but only a general remedy against the landlord and (*iii*) it is a tax in respect of the landlord's interest in respect of royalties and not in respect of the mine itself.

The definition of "owner" in the Bengal Mining Settlements Act (Ben. II of 1912) is the same as that in the Indian Mines Act (VIII of 1901).

[Reference was made to ss. 2 to 5 and 10 of the Bengal Mining Settlements Act.]

Under this Act two separate taxes are imposed, one on the owner of the mines, dependant on the out-put and the other on the receiver of the royalties.

[Reference was made to the Bengal Public Demands Recovery Act, ss. 3, 10 and 14 and Sch. I.] Income-tax is a personal tax, depending on total income, and cannot be brought within the covenant. In regard to the distinction between a charge on and a charge in respect of property: *Allum* v. *Dickinson* (2); *Foulger* v. *Arding* (3) and *Eastwood* v. *McNab* (4).

(1) (1910) I. L. R. 38 Cal. 372; L. R. 38 I.A. 31.
(2) (1882) 9 Q. B. D. 632.
(3) [1902] 1 K. B. 700.
(4) [1914] 2 K. B. 361.

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The lease should not be construed as using terms in a wide and general sense so as to cover all taxes. The conveyance was drawn and entered into when both the parties knew perfectly well that Road Cess and Mines Health Cess were payable. Terms were used which are common terms of conveyancing and must have been intended to have been used in their recognized meaning. The lease was for thirty years. It is possible that taxes might in that time be imposed on the mines. It was not the intention of the parties that taxes imposed on the lessor should be brought within the covenant.

Jopling followed.

Dunne, *K. C.*, and *J. M. Parikh* for the respondent.

[The Board intimated that it did not wish to hear him on the question of the road cess.] The conveyance was drafted in India. The question is not what it was intended to mean but what it does mean. The words in the deed have reference not only to cesses then in force but to others that might come into force. Everyone knew there were liabilities in the form of cesses. The parties knew they would have to pay public demands and the deed provided for indemnifying the owner. A charge on land is in no way different from a charge in respect of land: *Payne* v. *Esdaile* (1). The Mines Health Cess is a public demand in respect of the mine. It is suggested that it is not a "charge on the mine", but the words in the deed go beyond that. In the Act the words "on the "property" and "in respect of the property" are used as convertible terms. It would be too narrow a construction to limit the words "on the property" in the way suggested. [Reference was made to the Mines Settlement Act.]

As regards income-tax, there is nothing in the point raised that it is a personal tax imposed on the whole income, variable with the amount of the total income and super tax. At the time of the lease the

(1) (1888) 13 App. Cas. 613, 621, 626.

income-tax under the Act then in force was at a fixed rate. Income-tax is a public demand. Here it is a tax imposed on the mine in respect of the profits of the mine.

Parikh, following. The Income-tax Act in force at the time of the deed was the Act of 1886. The rate of tax was 5 p.c. per rupee on incomes over Rs. 2,000. The royalty here was over Rs. 2,000.

Ratcliffe, K. C., in reply.

[The Board intimated that it did not wish to hear him on the question of income-tax.] [Referred to s. 10 of the Bengal Mines Settlements Act.] The question is whether the separate tax imposed on the owner is capable of being described as a tax charged on the mine. The covenant in the deed is not one to indemnify the owner but to make certain payments. It would be natural to suppose that the lessee was not covenanting to pay taxes which would be imposed on the landlord personally. *Payne* v. *Esdaile* (*supra*) is distinguishable. Unless there is something to justify a wider meaning, the ordinary meaning would attach. In the context here there is nothing to show that any other than the natural interpretation is to be given to the words "charges on the land". The parties must be deemed to have known the Acts in force and to have deliberately adopted words of a narrower meaning.

The judgment of their Lordships was delivered by

Sir George Rankin. By a mining lease dated March 4, 1915, the plaintiffs demised to the Bengal Coal Company, Ltd. (defendants) therein called "the "lessees," the mines, beds, veins and seams of coal in *mouzâ* Poidih in the district of Burdwan for thirty years from April 1, 1915. The first of the lessees' covenants contained in Part VII of the schedule to the lease was in the following terms:—

> The lessees shall pay the royalty and royalties reserved by this lease at the time and in the manner above appointed in that behalf and shall also pay and discharge all taxes, rates, assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by

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authority of the Government of India or the said Local Government or otherwise except demand for land revenue and shall also pay interest at the rate of 12 per cent. per annum on all arrears of such royalty or royalties from the due date thereof.

By their plaint filed in the Court of the Subordinate Judge at Asansol on June 21, 1929, the plaintiffs claimed to be entitled under this covenant to decree against the defendants for a sum of Rs. 2,095-8 together with certain interest. The claim is for re-imbursement in respect of certain cesses or taxes for which the plaintiffs became liable between the years 1923-1929 (inclusive) and which they have paid. These public demands are three in number—*namely*, (*1*) Road and Public Works Cess under the Cess Act, 1880 (Bengal Act IX of 1880); (*2*) expenses charged to the plaintiffs under cl. (*b*) of sub-s. (*1*) of s. 10 of the Bengal Mining Settlements Act, 1912 (Bengal Act II of 1912); (*3*) Income-tax upon royalties reserved by the lease.

The Subordinate Judge gave the plaintiffs a decree in respect of all three heads of claim but disallowed the claim for interest. On appeal by the defendants the District Judge of Burdwan (December 7, 1932) disallowed the claim in respect of income-tax but upheld the trial Court's decision as to the other two heads of claim. Both sides having appealed to the High Court, Nasim Ali and Edgley JJ. affirmed the decision of the District Judge by decrees dated March 24, 1936. Two appeals to His Majesty have been brought pursuant to certificates granted by the High Court under cl. (*c*) of s. 109, C.P.C., and they have been consolidated. The defendants by their appeal dispute that they are liable in respect of Road and Public Works Cess or the charge under the Mining Settlements Act. The plaintiffs appeal against the disallowance of their claim in respect of income-tax. No question as to interest arises: nor is it contended that there is any reason why the covenant should not have effect according to its tenor.

Learned counsel for the defendants have drawn attention to the fact that the words of the covenant—charged, assessed or imposed upon the said mines or any part thereof—are not accompanied by phrases (to be found in books of conveyancing precedents) designed to enlarge their scope by making express mention of demands imposed in respect of the demised premises or in respect of the royalties reserved by the lease. *Allum* v. *Dickinson* (1) has been cited to show that the fact that a charge can be enforced against the premises does not in all circumstances make it a charge imposed on the premises; and the observations of Mathew L. J. in *Foulger* v. *Arding* (2) have been referred to as showing that unless there be express mention of demands imposed on the owner in respect of the premises, such a demand is not within the covenant.

As regards the claim for monies paid under the Cess Act, 1880, their Lordships are of opinion that the terms of that enactment deprive the defendants' contention of its force:—

5. From and after the commencement of this Act in any district or part of a district, all immovable property situate therein, except as otherwise in ss. 2 and 8 provided, shall be liable to the payment of a road cess and public works cess.

6. The road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways, and other immoveable property ascertained respectively as in this Act prescribed.

These words, together with the preamble and other sections (*e.g.*, s. 80), are to the effect that the cess is levied on the immoveable property and that the immoveable property is liable to pay it. It is assessed differently as regards lands and mines—in the case of lands it is assessed on the annual value and in the case of mines on the annual net profits. The judgment of the Board delivered by Mr. Ameer Ali in *Manindra Chandra Nandy* v. *Secretary of State for India* (3) has been referred to, but their Lordships

(1) (1882) 9 Q. B. D. 632. (2) [1902] 1 K. B. 700, 711.
(3) (1910) I. L. R. 38 Cal. 372; L. R. 38 I.A. 31.

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are unable to find that it casts any doubt upon the character of the cess as one imposed upon the immoveable property by the plain terms of the Act.

The nature of the payment to be made under section 10(*1*) of Bengal Act II of 1912 by the persons mentioned in cl. (*b*)—"all persons who receive any royalty, rent "or fine from such mines"—is not so clear. The word "owner" in this Act points in such a case as the present to the lessees and not to the lessors. Expenses incurred by the Mines Board of Health in respect of any area declared to be a "mining settlement" are to be "charged to" the persons mentioned in cl. (*b*) and to the lessees in such proportions as the Local Government may direct: the total burden of the lessees is to be divided among them on the basis of output, while the total burden of the receivers of royalties, *etc.*, is to be divided among them on the basis of the Road Cess payable by each. There is a provision [sub-s. (*4*)] that "all expenses chargeable under this section shall be recoverable as if they were arrears of land-revenue". This would subject the defaulter not merely to "certificate procedure" under the Public Demands Recovery Act but also to a sale of his estate or interest under the Land Revenue Sales Acts [Act XI of 1859, Bengal Act VII of 1868]. Their Lordships think that the effect of the Act is to distribute the burden of the expenses among the interests (superior and inferior) in the mine. They say nothing upon the question whether a revenue-sale for the *zemindâr's* default would affect the interest of his lessees [*cf.* Act XI of 1859, s. 37] because they are not of opinion that the words "upon the said "mines or any part thereof" refer to the interest of the lessees as distinct from that of the lessors. Nor are the plaintiffs concerned in the present case to demonstrate that for default by the lessees there is a remedy against the leasehold interest. Land revenue is certainly a burden "charged, assessed or imposed "upon" the land. If the remedy against the land be what makes it so, or be sufficient to make it so, then

the payment now in question is related in like manner to the lessors' interest. This conclusion cannot be avoided by contending that the persons referred to in cl. (*b*) of s. 10 of the Act of 1912 need not necessarily have any interest in the mine at all. Receipt of "royalty, rent or fine from such mines" *prima facie* imports such an interest, and in the absence of such interest Road Cess would not be chargeable under the Cess Act of 1880.

The words "taxes, rates, assessments and imposi-"tions whatsoever" are followed by the words "charg-"ed, assessed or imposed upon the said mines"—a variety of phrase which is intended to avoid restricting the covenant to cases in which the demand is in the strictest sense "charged upon the land." The phrases are to be taken in their ordinary and natural meaning. In *Payne* v. *Esdaile* (1), the House of Lords had to interpret the phrase in a Statute of Limitations "periodical sums of money charged upon "or payable out of any land except moduses or com-"positions belong to a spiritual or eleemosynary "corporation sole." As moduses were incapable of being charged on land in the sense of being payable out of land or realisable by remedy against the land itself the phrase "charged upon" was interpreted in a wider sense and as having no technical meaning. It was considered by Lord Herschell that the *prima facie* and most common meaning would make it applicable only to those cases in which there was some remedy against the land itself, but that it might well be used to describe a burden imposed upon land if a payment has to be made in respect of land and the land can only be enjoyed subject to the liability for that payment. Lord Macnaghten observed :—

> The liability to the payment falls upon the occupier or taker for the time being by reason of his occupation. The land carries the liability as a burthen from taker to taker. Beyond all doubt that liability subtracts something from the profitable enjoyment of the land ; it must be taken into account on the occasion of a sale, a mortgage, or a lease. An intending purchaser would give so much less purchase-money ; an intending mortgagee

(1) (1888) 13 App. Cas. 613, 626.

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would strike the amount off the rental in calculating the value of the proposed security, and an intending lessee would offer so much less rent. It seems to me that according to the ordinary understanding of mankind that is a charge upon land which cannot be dissociated from the land and which charges the occupier in respect of the land.

The particular illustration of an intending lessee does not here apply owing to the special nature of the demand in question, but the other illustrations (intending purchaser, intending mortgagee) are applicable and add point to the circumstance that a remedy is given against the land itself. Their Lordships see no features in the present case rendering these considerations insufficient to attract the operation of the covenant and are of opinion that the High Court was right in holding that this part of the plaintiffs' claim is well-founded.

Income-tax is in a very different position, as intending purchasers or mortgagees of the lessors' interest would appreciate. It is not a tax imposed upon the mines in any sense relevant to the lessees' covenants in a mining lease. Indeed, express words referring to public demands imposed upon the proprietors in respect of the mine would not have brought income-tax within the covenant. It may be true that the suggestion that the covenant extends to income-tax in respect of the plaintiffs' royalties would not in 1915 seem so unreasonable as it would after the Indian Income-tax Acts of 1918 and 1922 had graduated the tax according to the amount of the assessee's total income. But a general tax on the income of all persons with exceptions for smaller incomes is plainly outside the scope of the covenant.

The result is that in their Lordships' opinion both appeals should be dismissed. They will humbly advise His Majesty accordingly. There will be no order for costs.

Solicitors for Bengal Coal Co.: *Sanderson Lee & Co.*

Solicitors for Janardan and Jaganath K. L. Singh: *Stanley Johnson & Allen.*

C. S.