ORIGINAL CIVIL.

Before Lort-Williams J.

1937
—
July 2.

CHANDRA MANI DEBEE

v.

CHANDAN MULL INDRA KUMAR*.

Sub-lease—Colliery—Grant of sub-lease by co-sharers in the leasehold interest, each in respect of his share—Suit by one of such co-sharers alone for his share of the royalty—Implied agreement.

Where a sub-lease of a colliery is granted by all the co-sharers in the leasehold interest, not jointly but by each of them in respect of his particular share, and there is an implied agreement between the sub-lessee and such sub-lessors that the sub-lessee should pay separately to one of such sub-lessors the latter's share of the total royalty reserved under the sub-lease, such sub-lessor can competently sue alone for his share of the total royalty.

Pramada Nath Roy v. *Ramani Kanta Roy* (1) relied upon.

Baraboni Coal Concern, Limited v. *Gokulananda Mohanta Thakur* (2) and *Narendra Nath Kumar* v. *Atul Chandra Banerjee* (3) distinguished.

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The relevant facts of the case and arguments of counsel appear sufficiently from the judgment.

P. N. Chatterjee and *H. N. Bhattacharya* for the plaintiff.

I. P. Mukerji for the defendants.

LORT-WILLIAMS J. Under a *pâttâ* dated about September 7, 1900, granted by Raja Banwari Lal Singha of Nawagarh, one Kedar Krishna Banerji, since deceased, became entitled to an undivided two-thirds share of and in the leasehold rights in respect

*Original Suit No. 1138 of 1934.

(1) (1907) I. L. R. 35 Cal. 331; L. R. 35 I. A. 73.
(2) (1933) I.L.R. 61 Cal. 313; L. R. 61 I. A. 35.
(3) (1917) 27 C. L. J. 605.

of a colliery known as the Sonardih Coal Fields, and one Kshiti Bhooshan Mukherji, since deceased, became entitled to the remaining one-third share.

The plaintiff is the widow of Kedar Krishna Banerji, and he left an only son, Shambhu Das Banerji, since deceased. Shambhu Das Banerji inherited the two-thirds share belonging to his father, but during his lifetime, he disposed of half of his inheritance by a deed in favour of the defendant Ray Jateendra Nath Mukherji Bahadur.

On Shambhu Das Banerji's death, sometime in 1927, his mother became the sole heiress and legatee under a will executed by him whereby he appointed her executrix. The plaintiff has thus become the owner of an undivided one-third share in the leasehold rights in respect of the said colliery.

Kshiti Bhooshan Mukherji died in 1909 leaving a will whereby his sons, the defendants Sudhangshu Bhooshan Mukherji and Sitangshu Bhooshan Mukherji, became owners of the undivided one-third share that belonged to their father.

Various sub-leases were granted by the original holders, and ultimately under a sub-lease dated 1919 the Baraboni Coal Concern, Ltd., became sub-lessees in respect of the Sonardih Coal Fields.

By virtue of certain transactions to which I need not refer in detail the defendants Messrs. Chandan Mull Indra Kumar became holders under that sub-lease.

These defendants duly paid separately to the plaintiff her third share of the royalties reserved under the sub-lease up to the end of 1932, but since that date they have failed and neglected to do so on various grounds, but especially, on a plea of financial difficulties and the allegation that the colliery had become waterlogged and useless.

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The plaintiff through her counsel has urged that these facts show that there was an implied agreement between the parties that the plaintiff's share should be paid to her separately from time to time when it became due, and I have allowed an amendment to be made in the plaint setting up this implied agreement.

In September, 1932, the plaintiff filed a suit against the firm of Chandan Mull Indra Kumar and others for the recovery of Rs. 1,757-8 for her third share of the minimum royalty payable from January, 1931 to July, 1932, with interest at 12 per cent. and the defendant firm did not contest the suit and when the plaintiff obtained a decree, the defendants paid the full amount of the claim and also her third share of the minimum royalty due up to the end of December, 1932.

The plaintiff relies upon these facts also in proof of the implied agreement that she has alleged.

On the contrary, the defendant firm in their written statement say that they have never pleaded financial difficulties as the reason for refusing to pay the plaintiff's claim, and that they had no knowledge of the decree to which I have just referred and for that reason did not take any steps to get it set aside; in the result they had to pay the claim when, as they allege, the plaintiff maliciously executed the decree.

Since December, 1932, the defendant firm has failed and neglected to pay the plaintiff her share of the minimum royalty, or to supply her, in each year, under the covenants in the sub-lease, for her domestic consumption, with one wagon containing not less than 18 tons of coke, and she alleges that she has had to pay road and other cesses and taxes which the defendant firm covenanted to pay under the sub-lease.

She now claims a decree for a sum of Rs. 1,797-7-2 for the said royalty, cesses, interest and coke. She

has added the defendants Ray Jateendra Nath Mukherji Bahadur, Sudhangshu Bhooshan Mukherji and Sitangshu Bhooshan Mukherji because they are her co-sharers in respect of the leasehold premises, but she claims no relief against them.

The defendant firm's original written-statement consisted mainly of a denial of many statements set out in the plaint, and of some kind of vague suggestion that they had never got possession of the coal-fields in their entirety.

Subsequently, however, leave was given to amend the written statement by adding an allegation that there was no privity of contract between the plaintiff and the defendant firm and that the plaintiff being a joint-lessor had no right to sue alone for recovery of her third share. In effect, the latter point has been the only issue argued by learned counsel appearing for the defendant firm. He relies mainly upon a statement made in the judgment in the case of *Baraboni Coal Concern, Limited* v. *Gokulananda Mohanta Thakur* (1). That was a case in which four *shebâits* of a deity had executed a mining lease of the deity's interest in a *mouzâ*, and it was held that one of them could not maintain, with or without the consent of the others, a suit against the lessees for a fourth share in the royalties reserved, and that the suit was not made regular by the plaintiff joining the other *shebâits* as defendants.

The facts of that case are clearly distinguishable from the facts in the present case, because the property in that case belonged to the deity; the respondents were merely interested in it as *shebâits*, and his Lordship Lord Alness stated:—

> It is *primâ facie* difficult to see how one of them can competently sue for his share in the idol's interest. The terms of the lease would seem to forbid that course. They afford no warrant for splitting up the property of the family deity in the manner in which the first respondent essayed to do.

(1) (1933) I. L. R. 61 Cal. 313 (316-17); L. R. 61 I. A. 35 (38-39).

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But he went on to say that the lease disclosed a joint demise or contract :—

That being so,................no one of the four lessors, with or without the consent of his co-lessors, can sue for an aliquot part of the whole. The suit must be for the whole of the interest demised, else it fails. This is not the case, which is familiar, where one joint contractor has invited his co-contractors to join with him in a suit, where they have refused to do so, and where accordingly he joins them as *pro formâ* defendants. In that case differing from this case, the claim made is for the entire amount of the joint interest.

Similarly, in the case of *Narendra Nath Kumar* v. *Atul Chandra Banerjee* (1), in a similar suit by *shebâits* the Court agreed with the observations of the Subordinate Judge that—

The *shebâits* are not co-sharers but co-worshippers and any family arrangement at which they may have arrived amongst themselves cannot entitle them to treat the *debattar* property as personal property and to sue personally for their share of the rent payable to the idol.

That case also is obviously distinguishable from the present case.

But, in my opinion, the demise in the present case was not joint in the sense mentioned by Lord Alness. The indenture is made between the parties of the first part, collectively called the lessors. It recites the original *pâttâ* under which Kshiti Bhooshan Mukherji and Kedar Krishna Banerji became entitled to an undivided third and an undivided two-third share, respectively. Further, it recites that a sum of Rs. 9,000 as *selâmi* was paid to them according to their respective shares, and finally the indenture witnesseth that the lessors do and each of them doth respectively grant, transfer and demise unto the Baraboni Company their respective right, title and interest of, in and to all and singular the underground coal mining and relative surface and other rights, liberties, licenses, privileges, benefits, property and premises granted and conferred by the said *pâttâ*. It is true that the covenants refer only to the lessors, but that is because the original reference to the co-sharers

(1) (1917) 27 C. L. J. 605, 606.

is collectively as lessors. In my opinion, it does not alter the effect of the demise, which is made separately by each of the co-sharers in respect of his particular share.

Apart from this consideration, in my opinion, the course of dealings between the parties, namely, the regular payment of a third share by the defendant company to the plaintiff is sufficient evidence of the agreement alleged by the plaintiff in the amended paragraph of her plaint.

In such circumstances, the plaintiff has a right to sue separately for her share. Any authority which is required for this opinion may be found in the judgment of Sir Arthur Wilson in the case of *Pramada Nath Roy* v. *Ramani Kanta Roy* (1):—

> The evidence of the alleged agreement consisted of certain decrees, which seemed to show that the shares of the rent had been from time to time separately recovered. It has long been held in Bengal that agreement, either expressly proved or implied by the conduct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate shareholders; and their Lordships have no inclination to question that course of rulings.

Learned counsel for the defendant firm has argued against this, that the same point was dealt with by their Lordships in the *Baraboni Coal Concern* case, to which I have referred, at page 39 of the report, and in which they rejected such a contention made on behalf of the plaintiff, because it sinned against the familiar principle affirmed in the case of *The North Eastern Railway Company* v. *Lord Hastings* (2) that "where the words in a deed are clear, as they are "in this case, the subsequent conduct of parties is an "irrelevant consideration." It will be noticed, however, that their Lordships primarily rejected the contention, because the facts in that case did not support

(1) (1907) I. L. R. 35 Cal. 331 (344) L. R. 35 I. A. 73 (78).

(2) [1900] A. C. 260.

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it. With regard to the other reason, the words in the deed in the present case are not inconsistent with the implied agreement alleged by the plaintiff.

For these reasons, there must be judgment for the plaintiff, with costs.

Suit decreed.

Attorneys for plaintiff: *S. C. Mukherji & Co.*

Attorneys for defendants Chandan Mull Indra Kumar: *Dutt and Sen.*

P.K.D.