PRIVY COUNCIL.*

1929, March 15.

RAJA OF PITTAPUR (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Minerals—Unenfranchised Service Inam—Finding that estate held under grant from zamindar—Second appeal—Absence of proof of grant of minerals—Code of Civil Procedure (Act V of 1908), sec. 100.

The owner by a purchase in 1879 of 27 villages in the Northern Circars claimed that he was entitled to the underlying minerals. The villages had formed part of an estate held by the vendor's forefathers as Mansabdars. In or about 1785 the Mansabdar had been paying a fixed annual sum to a neighbouring Zamindar and was under an obligation to provide him with 700 peons. In 1802 the zamindari was permanently settled, the annual payment being treated as among the assets upon which the peshkash was fixed. In 1847 the Government acquired the zamindari, and in 1859 commuted the services for an annual payment. There had been no enfranchisement of the inam. The Subordinate Judge (on appeal from the Munsif) found that the estate was originally held under a grant from the Zamindar subject to a fixed rent and an obligation to provide a military force. Upon appeal it was contended that the Mansabdars had been independent chieftains and did not take under any grant.

Held, that the above contention was inadmissible as there was evidence upon which the finding of the Subordinate Judge could have been based, and that it was therefore binding under the Code of Civil Procedure, 1908, in the second appeal; and as

* *Present*: Lord SHAW, Lord DARLING, Lord ATKIN, Lord TOMLIN and Sir LANCELOT SANDERSON.

it was not established that the grant by the Zamindar included the minerals, the suit failed.

Shashi Bhusan Misra v. *Jyoti Prasad Singh Deo*, (1916) I.L.R., 44 Calc., 585 ; L.R., 44 I.A., 46, followed.

APPEAL (No. 72 of 1927) from a decree of the High Court (March 31, 1925) reversing a decree of the Subordinate Judge of Cocanada (December 12, 1921) affirming a decree of the District Munsif.

The appellant instituted a suit against the respondent Secretary of State claiming a declaration that he was entitled to the underground rights in certain villages in the Northern Circars; he claimed also a return of sums collected from his tenants as royalties and penalties on gravel and stone raised by them, and an injunction.

The facts of the case and the course of the proceedings in India are stated in the judgment of the Judicial Committee.

The appeal to the High Court was finally heard by PHILLIPS and ODGERS, JJ. The learned Judges pointed out that the High Court had already held that the villages had not been enfranchised. It had been found that Totapalle was held as an inam burdened with service. By a series of decisions of the Privy Council the onus was upon the plaintiff to show that the minerals were included in the grant, but there was no evidence that that was so. Nor was there anything in the judgment of the Privy Council in 1870 to support the view that the Mansabdar was in the position of an independent chief. The suit was accordingly dismissed.

DeGruyther, K.C., and *Narasimham* for the appellant.—The material before the Board as to the early history of the estate concerned shows that the holder of Totapalle was an independent chieftain owning all rights in the soil of the estate. Though Totapalle was subjugated by Peddapur and a tribute, in the form of services and an annual payment, was imposed, the rights of the Mansabdar in the soil remained unaffected. He held

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independently of any grant; there is no indication that one was made. Upon the permanent settlement of Peddapur the annual tribute was naturally treated as an asset in fixing the peshkash, but that did not affect the title of the Mansabdar to all the rights in the soil. The proceedings before the Board in the appeal of 1870 (1) show that there was no creation of a tenure under Peddapur, but a recognition of hereditary right as Zamindars. As the Mansabdars did not hold under a grant, the decision of the Board in *Shasi Bhusan Misra* v. *Jyoti Prasad Singh Deo*(2), and in similar cases do not apply. Nor has *Secretary of State for India* v. *Srinivasa Chariar*(3) any bearing upon the question now raised.

Dunne, K.C., and *Kenworthy Brown* for the respondent.—The present contention is inconsistent with the finding of the Subordinate Judge that Totapalle was originally held under a grant from the Zamindar of Peddapur. Under the Code of Civil Procedure, section 100, the finding was binding in second appeal; it is also binding in this appeal: *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*(4), *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh*(5). Further the finding was correct. If the Mansabdar had been in the position now alleged he would have applied for a permanent settlement in 1802. By the annexation any previously existing titles were nullified: *Vajesingji* v. *Secretary of State for India*(6). As the effect of the permanent settlement, Totapalle was a tenure held under Peddapur; the existence of a reversion is the test. Nothing which afterwards occurred affected the sub-infeudation. The failure of the plaintiff to prove that the minerals were granted to him is fatal to his case: *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo*(2), *Raghunath Roy Marwari* v. *Durga Prashad Singh*(7), *Secretary of State for India* v. *Srinivasa Chariar*(3).

DeGruyther, K.C., in reply.—The permanent settlement did not take away any pre-existing rights: *Collector of Trichinopoly* v. *Lekkamani*(8).

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(1) (1870) 13 Moo. I.A., 333.
(2) (1916) I.L.R., 44 Calc., 585; L.R., 44 I.A., 46.
(3) (1920) I.L.R., 44 Mad., 421; L.R., 48 I.A., 56.
(4) (1890) I.L.R., 18 Calc., 23; L.R., 17 I.A., 122.
(5) (1918) I.L.R., 46 Calc., 189; L.R., 45 I.A., 183.
(6) (1924) I.L.R., 48 Bom., 613; L.R., 51 I.A., 357.
(7) (1919) I.L.R., 47 Calc., 95; L.R., 46 I.A., 158.
(8) (1874) L.R., 1 I.A., 282.

The JUDGMENT of their Lordships was delivered by

Lord TOMLIN.—The appellant in this case who is the plaintiff in the suit, and will be hereinafter referred to as the plaintiff, is appealing against a decree, dated the 31st March 1925, of the High Court of Judicature at Madras, whereby the plaintiff's suit was dismissed and the plaintiff was ordered to pay certain costs.

The plaintiff as successor-in-title of his father holds 27 villages, formerly part of an estate known as the Totapalle estate situate in the Gōdāvari District in the Northern Circars of Madras. These villages were purchased in 1879 by the plaintiff's father from the then holder and Mansabdar of the Totapalle estate.

In the years 1913 and 1915 the Tahsildar of Peddapur collected from tenants of the plaintiff in two of the 27 villages royalties or penalties for the removal of gravel and stone from hills within the boundaries of such two villages. He did so on the footing that the underground rights in the villages belonged to the Government.

Thereupon the plaintiff launched in the Court of the District Munsif of Peddapur a suit against the defendant, the Secretary of State for India in Council, claiming a declaration of his title to the underground rights in his villages formerly part of the Totapalle estate. He also asked an injunction to restrain interference with his rights and a refund of the amount collected from his tenants. The defendant denied the title of the plaintiff to the underground rights alleging that the Government retained the right to resume (i.e., to re-assess) the Totapalle estate and that the underground rights were therefore vested in the defendant-respondent. The substantial issue between the parties is the title to the underground rights.

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The Mansabdar of the Totapalle estate admittedly transferred to the plaintiff's father in 1879 all his interest in the 27 villages. It was open to the plaintiff to show either that the interest of the Mansabdar transferred in 1879 included the underground rights or that the plaintiff's father or he himself subsequently acquired them. In fact, in the first instance, he framed his claim on the footing that the underground rights passed to his father in or about 1883 by reason of the Government having at that time resumed the villages and enfranchised them in favour of his father.

This point is raised by paragraph 3 of the plaintiff's filed plaint in the following terms :—

> "The plaintiff is the owner of Nellipudi, Meraka Chamavaram and some other villages in the Totapalle estate as per the plaint schedule. The underground rights in the said villages had become absolutely vested in and been enjoyed by plaintiff and his predecessors-in-title and the said villages were purchased from the then Mansabdar by plaintiff's father in or about 1879. They were subsequently resumed by Government and enfranchised in plaintiff's father's favour and quit-rent imposed on them."

As will be seen from the succeeding narrative, the plaintiff subsequently changed his ground more than once. On the 18th December 1916, the District Munsif pronounced judgment in the plaintiff's favour so far as his title to the underground rights was concerned, and gave him a declaration accordingly, but did not grant him any injunction and rejected his claim for a refund of the royalties or penalties which had in fact been paid not by him but by his tenants.

The District Munsif appears to have held that the alleged enfranchisement did not enlarge the appellant's rights but that the title to the Totapalle estate rested upon an ancient grant, which had not been produced, and that by virtue of a general rule to the effect that

the grantor must in the absence of evidence to the contrary be taken to have parted with all his rights, the underground rights had passed by the grant and were therefore vested in the plaintiff.

An appeal was taken to the Subordinate Judge who, on the 17th December 1917, also pronounced judgment in the plaintiff's favour. He appears to have held that there was an original service grant of the estate which must be presumed to have carried the underground rights and further that the plaintiff was entitled to the underground rights by virtue of the alleged enfranchisement. He therefore confirmed the decree of the lower Court with the addition of an injunction to which he considered the plaintiff entitled.

The defendant appealed to the High Court of Judicature at Madras. On the 7th March 1919, the Court set aside the decisions of the lower Courts. It remanded the suit to the District Munsif for readmission and retrial, and directed the trial of an additional issue, namely:—"Whether the suit village in the hands of the plaintiff's predecessors was subject to a burden of service or was in lieu of wages for service?"

From the judgments delivered in the High Court it appears that the Court took the view that the Subordinate Judge had decided the case upon the basis that there had been an enfranchisement by the Government which carried the underground rights to the plaintiff's father, but that in fact what had taken place had not amounted to an enfranchisement at all. The learned Judges however directed the trial of the further issue because the plaintiff's counsel had presented to them an argument to the effect that apart from the alleged enfranchisement his client's predecessors-in-title had always held the estate subject to a burden of service and not merely in lieu of wages for service. This fact,

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if established, would (he had contended) lend strength to the plaintiff's claim to the underground rights. The suit was accordingly retried by the District Munsif. On the 21st June 1920, he again gave judgment in the plaintiff's favour, holding that the Totapalle estate was held only burdened with service and was not held in lieu of wages for service, and that the underground rights were therefore in the plaintiff. The District Munsif's view seems to have been that the holding of the villages was first and the imposing of the burden of service subsequent.

On appeal the Subordinate Judge, on 12th December 1921, confirmed the District Munsif, holding that the estate was enjoyed under a grant from the Zamindar of Peddapur, subject to the obligation of rendering some service and paying a quit-rent, and that such a grant carried the underground rights.

The suit was again taken by the defendant to the High Court of Judicature at Madras. The appeal was, on the 1st May 1925, allowed, the learned Judges holding that in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

It is to be observed that in the High Court on the second appeal the plaintiff for the first time put forward a new contention that the Mansabdar of the Totapalle estate was originally a chief in a position analogous to a Poliagar in the South of the Presidency and as such entitled to the underground rights. This contention was rejected by the learned Judges of the High Court on the grounds that it had not been raised in the lower Courts and that there was no evidence to show any similarity between the tenure of the Totapalle estate and that of an estate held by a Poliagar.

It is against this judgment that the plaintiff now appeals.

The history of the Totapalle estate prior to the early part of the 19th century is not free from obscurity. No grant of the estate has been produced. The material placed before the lower Courts consisted of (*a*) Mr. James Grant's Political Survey of the Northern Circars, written about 1785 and annexed to the Fifth Report of the Select Committee on the affairs of the East India Co.; (*b*) Morris's account of the Gōdāvari District, published in 1868 under Government authority; (*c*) "The Gōdāvari Gazetteer" a Government publication of 1907; (*d*) the Government documents relating to the transactions of 1881–1883, which are printed at pp. 89–100 of the record; and (*e*) the extracts from the statement of a former Mansabdar of Totapalle printed in 13 Moo. I.A., 333, in the course of the report of the case of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora.*

From this material certain facts emerge as to which there is no dispute, namely, (1) that in or about the year 1785 the Mansabdar was paying a fixed annual sum to the Zamindar of Peddapur and was under an obligation to furnish him with a military force of 700 peons when called upon to do so; (2) that some time prior to the end of the 18th century the Zamindar resumed certain villages forming part of the estate to satisfy his claims in respect of the annual sum; (3) that in 1802 there was a permanent settlement by the Government of Madras of the zamindari of Peddapur and that the annual sum receivable by the Zamindar from Totapalle was treated as an asset of the Zamindar; (4) that in 1847 the Government of Madras acquired the zamindari of Peddapur at a sale for arrears of revenue;

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(5) that in 1859 the Government commuted the obligation of the Mansabdar of Totapalle to supply 700 peons for an annual payment of 6,500 rupees; (6) that the Mansabdar from time to time alienated certain other parts of the Totapalle estate as well as the 27 villages alienated to the plaintiff's father in 1879; and (7) that the Government's documents show that the Government regarded the Totapalle estate as a service *inam* and dealt with it on that footing in 1881 to 1883 by making a settlement in respect of it, which was expressly stated not to amount to a permanent settlement or enfranchisement.

Mr. Grant in his survey of 1875, describes Totapalle as a small hilly country and a region of tigers. The obscurity of its early history may in part be due to its lack of importance.

At any rate their Lordships are of opinion that there is a definite finding by the Subordinate Judge to the effect that the estate was originally held under a grant from the Zamindar of Peddapur subject to a fixed annual rent and an obligation to provide a military force. After an examination of the materials placed before the lower Courts (in the course of which their Lordships saw a full copy of the statement of the Mansabdar, extracts from which are printed in 13 Moore's Indian Appeals, 333), their Lordships are of opinion that there was before the Subordinate Judge evidence upon which his finding of fact could have been based.

Before their Lordships it has been urged by the plaintiff that the Mansabdars of Totapalle were originally independent chieftains not taking under any grant at all, and that the findings of fact arrived at by the Subordinate Judge should be reviewed and modified accordingly.

In their Lordships' opinion they have no jurisdiction in the circumstances of this case to embark upon any such review. Under the Civil Procedure Code no second appeal will lie except on the grounds specified in section 100. Directly in point are the observations of Lord MACNAGHTEN in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*(1), in which he says:—

"It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be."

There remains then only the question whether the High Court of Judicature at Madras was right in holding that the underground rights did not pass in the absence of evidence of the inclusion of such rights in the grant found by the Subordinate Judge.

There was, in fact, no evidence that the grant included the underground rights or that the minerals had ever been worked by the Mansabdars of Totapalle or by any of their alienees. The fact that minerals were in terms reserved in leases to tenants granted by the plaintiff and his father cannot in their Lordships' opinion be evidence that the underground rights passed from the Zamindar of Peddapur under the original grant to the Mansabdar of Totapalle.

The lower Courts based their conclusion that the underground rights passed by the original grant upon a presumption that, in the absence of any evidence as to the terms of the grant, the grantor passed all that he had to the grantee.

In their Lordships' opinion no such presumption is admissible. Such a presumption would be contrary to many decisions of their Lordships' Board in which it

(1) (1890) I.L.R., 18 Calc., 22, 30; L.R., 17 I.A., 122, 127.

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has been from time to time pointed out that the rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant.

The principle to be applied to the present case is in their Lordships' judgment to be found stated by Lord BUCKMASTER in *Shashi Bhusan Misra* v. *Jyoti Prasad Singh Deo*(1), where referring to earlier decisions, he says :—

> "These decisions therefore have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

In the result therefore their Lordships are of opinion that the judgment of the High Court at Madras was right and that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Douglas Grant* and *Dold.*

Solicitor for respondent: *Solicitor, India Office.*

A.M.T.

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(1) (1916) I.L.R., 44 Calc., 585, 594; L.R., 44 I.A., 47, 53.