P.C.*
1910
April 14, 15;
May 7.

HARI NARAYAN SINGH DEO
v.
SRIRAM CHAKRAVARTI.

[On appeal from the High Court at Fort William in Bengal.]

Landlord and Tenant—Permanent tenure of an agricultural character—Underground rights not mentioned in lease—Minerals under surface of land—Rights of zemindar—Onus of proof—Transfer of Property Act (IV of 1882) ss. 108, 117.

The question for decision in this case was, whether certain Goswamis, the sebaits of an Idol and lessees of a village in the zemindari of the appellant, the Rajah of Pachete, had under their lease, which had been granted by a predecessor in title of the appellant about 60 years ago, acquired any rights to the minerals beneath the surface of the village which they could have transmitted to the respondents who claimed to hold under them. There was no document or evidence defining the terms of the lease to the Goswamis. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," and in the other as "britti-holders." There was no evidence whatever that the Rajah had ever granted mineral rights in the village to the Goswamis or to any other person. Both the Courts in India found that the village was a *mal* (rent-paying) village of the zemindari of the Rajah, and that no prescriptive right had been proved by the respondents to any underground rights in the village. The High Court held that the zemindar had created a permanent tenure of an agricultural character, and that the tenure-holder would possess all underground rights in the absence of express reservation by the zemindar.

Held, by the Judicial Committee (reversing that decision), that the title of the zemindar Rajah to the village being established, he must be presumed to be the owner of the underground rights appertaining thereto in the absence of evidence that he had parted with them, and no such evidence had been produced.

Field's Bengal Regulations, Introduction, page 36, referred to.

In the case of leases under the existing law of 1882 (the Transfer of Property Act, IV of 1882, s. 108), no right arises for a lessee to work mines not open when the lease was granted.

APPEAL from a judgment and decree (28th July 1905) of the High Court at Calcutta which reversed a judgment and

**Present*: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

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decree (16th July 1903) of the Court of the Additional Subordinate Judge of Burdwan.

The son and representative of the first plaintiff, and the successor as manager of the second plaintiff, were the appellants to His Majesty in Council.

The principal question for decision on this appeal was whether the respondents had acquired any right or title to the underground minerals beneath the village Petena, a *mal* (rent-paying) village situate within the ancestral zemindari of the Rajah of Pachete. The original plaintiffs were Kumar Hari Narayan Singh Deo Bahadur, and Mr. A. T. Ricketts, manager of the Pachete Estate under the Encumbered Estates Act (Bengal Act VI of 1876). By order of the Court of 22nd April 1903, Kumar Jyoti Pershad Singh Deo Bahadur, son of the first plaintiff (deceased), and Mr. E. B. Clair Smith, successor to the second plaintiff in the management of the estate, were respectively substituted for them on the record.

The facts of the case fully appear from the report of the appeal to the High Court (PRATT and PARGITER JJ.), which will be found in I. L. R. 33 Calc. 54.

On this appeal,

Sir R. Finlay, K. C., DeGruyther, K. C., and *J. M. Parikh*, for the appellants, contended that in view of the fact that both the lower Courts had found (*a*) that the village of Petena was a *mal* village of the appellant's zemindari leased to the Goswamis, (*b*) that the village was not Moguli debattar of the Goswamis, and (*c*) that the respondents had not proved any title by prescription to the underground rights in the said village, the onus was on the respondents to show that their alleged lessors, the Goswamis, had ever acquired any underground rights in the village. That onus they had not discharged. The land and all the rights on it, or under it, belonged to the zemindar as the owner of a permanent, hereditary, and transferable tenure, and the only rights considered at the time the lease was granted were agricultural rights, which would not carry the right to minerals or any other underground rights

unless they had been specially granted. Such rights were not then thought of, and it was unnecessary for the zemindar to specially reserve them. It was for the tenant to prove any right he alleged to be his. The zemindar in this case never granted mineral rights in the village to the Goswamis, nor to any other person; and there was no documentary evidence of any kind to show that he ever did so. As he was the owner of the right to minerals, he must, in the absence of evidence to the contrary, be presumed to have reserved that right. The lease was not a permanent one, as had been wrongly held by the High Court, but one liable to forfeiture if the land were used in a manner not justified by the terms and conditions of an agricultural lease; and if, as contended, the Transfer of Property Act (IV of 1882) did not apply, the case should be decided by "equity and good conscience, generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances." The High Court having wrongly held the lease to be a permanent one, decided that the grant of a permanent tenure included mines where not expressly reserved. A lease without mention of mines might include any mines which were then open (and there were no such mines in question here), but not unopened mines. Reference was made to *Clegg* v. *Rowland* (1), *Elias* v. *Snowdon Slate Quarries Company* (2), *Waghela Rajsanji* v. *Masludin* (3), *Kally Dass Ahiri* v. *Monmohini Dassee* (4), *Abhiram Goswami* v. *Shyama Charan Nandi* (5), Bengal Regulation I of 1793; *Wise* v. *Bhoobun Moyee Debia Chowdhranee* (6), *Secretary of State for India* v. *Luchmeswar Singh* (7). The landlord can insist on the land being used for the purpose for which it was granted: Transfer of Property Act (IV of 1882) sections 8, 108, clause (*o*) and section 117; Tagore Law Lectures for 1895; "The Land Law of Bengal" by Sarada Charan Mitra,

(1) (1866) L. R. 2 Eq. 160, 164.
(2) (1879) L. R. 4 A. C. 454.
(3) (1887) I. L. R. 11 Bom. 551, 561; L. R. 14 I. A. 89, 96.
(4) (1897) I. L. R. 24 Calc. 440, 446.
(5) (1909) I. L. R. 36, Calc. 1003; L. R. 36 I. A. 148.
(6) (1865) 10 Moo. I. A. 165, 171
(7) (1888) I. L. R. 16 Calc. 223, 231

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pages 393, 394; Bengal Tenancy Act (VIII of 1885), sections 2, 4-6, 10, 11-16, 18-20, 75-77, and 179; *Lal Sahoo* v. *Deo Narain Singh* (1) (a case under Bengal Act VIII of 1869, the old Bengal Rent Act); and the cases of *Tituram Mukerji* v. *Cohen* (2) and *Megh Lal Pandey* v. *Rajkumar Thakur* (3) were distinguished on the ground that in the former mineral rights were specially granted, and in the latter "all rights" were leased. Field's Bengal Regulations, Introduction, page 36, and *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (4) were also referred to. It was submitted that the respondents had failed to prove that the village in suit was debottar property held in the name of the Idol Gopi Nath Jiu as alleged; and that the Goswamis were tenants of the appellant only in respect of the surface of the land of the village, and as such did not acquire any underground rights in it.

Ross, for the respondents, contended that the High Court had rightly held that the tenure of the Goswamis was a permanent one created by a predecessor in title of the appellant many years ago, and that its annual rental of Rs. 22-15-6 was fixed in perpetuity; that the underground rights in the village of Petena passed with the said tenure when it was created, and were in no way reserved to the zemindar; and that the underground rights appertained not to the appellant's zemindari, but to the permanent tenure of the Goswamis. He pointed out that there had been quarrying by the respondents without any objection for a considerable number of years; and relied mainly on the following portion of the judgment of PARGITER J. in support of his contentions:—

"The question then must be decided solely upon a consideration of the nature of such permanent tenures as (are) settled by the land-law of this country. Now when such tenures are created, the zemindar invests the tenure-holder with every right that can appertain to him short of the quit-rent due to the proprietorship; the tenure is permanent, herit-

(1) (1878) I. L. R. 3 Calc. 781.
(2) (1905) I. L. R. 33 Calc. 203; L. R. 32 I. A. 185.
(3) (1906) I. L. R. 34 Calc. 358.
(4) (1894) I. L. R. 22 Calc. 742, 750.

able and transferable, its rental is as fixed as the Government revenue that the zemindar pays; and the tenant can do what he likes with it, short of altogether destroying it; in short, it has all the rights of proprietorship except the name; and the zemindar (in the absence of express conditions) has really divested himself of everything except the nominal proprietorship, and has turned his rights practically into a perpetual annuity of the amount of the rental. He has no right of reversion. In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them, because he has no reversion and no right to enter on the land for that purpose. In the absence of any express warrant for such a view, I cannot assent to such an unreasonable proposition. In my opinion the underground rights belong to permanent tenures. When the landlord created the tenure, he made over the land with all its capabilities to the tenant, and merely imposed on the tenure the rental that he thought best in the circumstances. When neither of them knew of undiscovered materials of value within the land, and the idea of reserving anything never entered their minds, it certainly cannot be held that there was any such reservation in the grant, nor that a distinction can be afterwards drawn between various rights that may exist in the land for the purpose of qualifying the original grant and of importing into it what neither party could then imagine.

"The fact that the land was agricultural when the tenure was created, and that the tenure is classed as an agricultural one, does not derogate from the rights conveyed in the tenure, because no restriction was put on the use of the land, and the tenure-holder's use of it is not limited to agriculture; he can build on it and apply it to other non-agricultural purposes. There is no distinction in law, or in common usage in this country, between the surface of land and the underlying strata, except when it has been created of recent years, either

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by the law as in the Land Acquisition (Mines) Act XVIII of 1885, or by contract. When a man obtains permanent possession of land with heritable and transferable rights, then, in the absence of any reservation, he obtains it with all rights attaching to it from the centre of the earth to the sky. If a permanent tenure-holder can use the surface which is agricultural land for non-agricultural purposes, there is no reason why his right in the subjacent strata should be less or different. It is impossible to import into contracts stipulations that the law did not attach to them that are not naturally inherent in them, and that the parties themselves had no conception of at the time of contracting. I am decidedly of opinion, therefore, that where a tenure is permanent, the tenure-holder possesses all the underground rights, unless there is something express to the contrary."

Reference was made to the Transfer of Property Act, section 2, it being contended that that Act was not applicable to the present case.

DeGruyther, K.C., replied, referring to *Hari Mohan Misser v. Surendra Narayan Singh* (1).

May 7.

The judgment of their Lordships was delivered by

LORD COLLINS. The appellants are the Rajah of the Pachete Estate and the Manager thereof under Act VI of 1876.

The question in the case is as to the right to the minerals lying under a certain village called Petena, situate within the ancestral zemindari of the first appellant. The case has been left singularly bare of evidence, and must be decided chiefly by giving effect to the proper presumptions arising out of a small number of ascertained facts. Happily the field of controversy has been narrowed by certain concurrent findings of fact. Both Courts are agreed that about 60 years ago, in the time of the first plaintiff's predecessor, a transaction took place whereby the latter appropriated to a certain Hindu Idol known as Thakur Gopi Nath Jiu, of whom certain persons known in these proceedings as the Goswamis, or Gossains, were the

(1) (1907) I. L. R. 34 Calc. 718; L. R. 34 I. A. 133.

shebaits or priests, an interest of some sort in the village of Petena, at an annual rental of Rs. 22-15-6. There is no document or evidence defining the terms of the arrangement with the Idol set up at the trial. The defendants, however, against whom the plaintiff's first took proceedings to restrain interference with their minerals, purported to justify their trespasses under the authority of the Goswamis under whom they claimed to hold a lease. Two leases of the 6th and 7th Magh 1228 respectively (1821 A.D.), purporting to have been granted by the Goswamis to the said defendants, and also certain rent receipts said to have been exchanged, were produced on the part of the defendants at the trial, but they were held by both Courts to be palpable forgeries. Both Courts have held that the village Petena is a *mal* village of the Pachete Estate, *i.e.*, it is a part of the first plaintiff's zemindari. There is no evidence whatever that the zemindar Rajah has ever granted mineral rights in the said village to the Goswamis or any other person. Both Courts agree that no prescriptive rights have been proved by the respondents to any underground rights in the village. The language of the High Court is quite explicit :—

"There is no evidence regarding the extent, publicity, or continuity of such operations to establish the mokuraridar's acquisition by prescription of the underground rights claimed."

The Subordinate Judge finds that there is no evidence to show that the plaintiffs 1 and 2 were aware of the exercise of any underground rights before 1898, when steps were immediately taken to stop it. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," in the other as "britti-holders."

On this meagre foundation of fact the two Judges who constituted the High Court have built up the theory that the Goswamis were tenure-holders having permanent heritable and transferable rights.

"When such tenures are created," says Pargiter J., "the zemindar invests the tenure-holder with every right that can appertain to him short of the quit-rent due to the proprietorship; the tenure is permanent, heritable, and transferable, its rental is as fixed as the Government revenue that the zemindar pays; and the tenant can do what he likes with it short of altogether destroying

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it; in short, it has all the rights of proprietorship except the name....In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure: and that the landlord can never work them because he has no reversion and no right to enter the land for that purpose.... In my opinion the underground rights belong to the permanent tenures."

No decided case was cited in support of the view of the High Court, which seems practically to ignore the distinction between the mere tenure-holder and the zemindar, and the law as laid down in the passage cited from Mitra's Land Law of Bengal does not appear to quite accord with the view of Mr. Field in his admirable Introduction to the Bengal Regulations, page 36, where he says :—"The zemindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zemindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship." It would seem, therefore, that Mr. Field did not regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals. In the case of leases under the existing law of 1882, no right arises for a lessee to work mines not open when the lease was granted. The learned Subordinate Judge inferred from the smallness of the *jamma* fixed that only the surface rights and nothing more were intended to be let out to the Gossains. On the whole, it seems to their Lordships that the title of the zemindar Rajah to the village Petena as part of his zemindary before the arrival of the Goswamis on the scene, being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced. Their Lordships will humbly advise His Majesty that the decision of the High Court be set aside, and that of the Subordinate Judge restored with costs here and below.

J. V. W. *Appeal allowed.*

Solicitor for the appellants : *Edward Dalgado.*

Solicitors for the respondents : *T. L. Wilson & Co.*