PRIVCY COUNCIL

Thakur Giridhari Singh

Vs.

Megh Lal Pandey and others

P.C.A.No. 66 of 1910
(Lords Dunedin,CJ. Shaw Sumner, Sir John Edge and Mr. Ameer Ali. JJ)

19.7.1917

JUDGMENT

Lord Shaw J.

1.The appellant is the proprietor of the *zamindari* of pergunnah Nongarh, being Mahal No. 16 of the touzi of the Collectorate of District Manbhum.

2. In 1865 he executed a *mokarari pottah* of a small portion of Mouzah Baramashya "with all rights" (this being the translation of the expression "[mai hak hakuk") as per boundaries.....appertaining to my *zamindar*i, the third kismat pergunnah Nawargarh, which is in my possession." An annual jumma was fixed of 59 rupees and 2 seers of ghee and 1 goat.

3. It is admitted that the possession was of a permanent and heritable character; subject to the payment of rent, failing which latter the *mokarari* "will be cancelled at the end of the year." There is also a clause as to trees in these terms :-

> "You shall be entitled to the extra collections which will be realized in the village, and you shall take the prices of the trees of the same by cutting and selling them, to which I shall not have any right".

4. In 1903 minerals having been discovered below the surface of the land which was the subject of the *mokarari pottah*, the respondents began to work them, claiming that they had a right to do so in respect that the minerals were within the subjects of their *mokarari* lease. This claim was resisted by the appellant, who brought the present suit for injunction and damages. The appellant is the *zamindar.*

5. On the one hand, it is admitted that minerals were not expressly included within the terms of the *pottah*, on the other, that the terms were general, as above quoted, and

that there was no exclusion of these minerals. The Subordinate Judge held that the *mokarari* lease did not pass the underground and mineral rights. The learned Judges of the High Court of Calcutta, on the 19th December 1906, held that it did. They accordingly set aside the decree and judgment of the lower court and dismissed the suit.

6. In their Lordships' opinion, the judgment and decree of the High Court are erroneous and those of the Subordinate Judge fall to be restored. It is unnecessary to enter into the general question of law, as, in their Lordships' opinion, that has been conclusively and recently settled by this Board. It is unavailing to urge that the right granted by the *mokarari pottah* to the lessee is of a permanent, heritable, and transferable character, as even although this be the case it does not advance the question of whether the lease itself embraced within its scope the mineral rights. On the contrary, unless there be by the terms of the lease an express or plainly implied grant of those rights, they remain reserved to the *zamindar* and are part of the *zamindari.*

7. Their Lordships refer to the judgment of the Board in *Kumar Huri Narayan Singh Deo Bahadur v. Sriram Chakravarti*[1]. In the case as reported in *Sriram Chakrabuty v. Hari Narain Sinha*[2] a clear finding had been made which may be cited from the judgment of Pargiter, J. :-

> "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 ho has no reversion and no right to enter on the land for that purpose..... In my opinion the underground rights belong to permanent tenures".

8. This judgment was reversed by this Board, and it was held that the *zamindar* "must be presumed to be the owner of the underground rights thereto (that is appertaining to the *zamindari*) in the absence of evidence that he ever parted with them." Their Lordships think it right to refer to this case because, in the judgment of the High Court, the Calcutta decision is referred to as if still law, this not being the case.

9. Hari Narayan Singh's case was followed by that of *Durga Prasad Singh v. Braja Nath Bose*[3]. This had reference to and claim for minerals underlying two mouzahs of a *zamindari*. The *zamindar* claimed them and the defendant also did so, he being in possession under a digwari tenure. This tenure is hereditary and inalienable, subject to

the digwar's liability to be dismissed by the Government for misconduct. The judgment of the Board was pronounced by Lord Macnaghten to the effect "that it must be presumed that the mineral rights remain in the zamindar in the absence of proof that he had parted with them."

10. Finally, in *Shushi Bhushan Misra v. Jyoti Prashad Singh Deo*[4] and after a review of the decisions, it was held that the grant by a *zamindar* of a tenure at a fixed rent does not carry a right to the minerals. In the language of Lord Buckmaster :-

> "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."

11. On the general question, accordingly, one need not proceed further to consider the suggestion that the lessee in a mokarari pottah has right to the minerals by reason of the nature of such a grant. Such a suggestion stands negatived upon authority.

12. There are two points, however, which remain as applicable to the present case. It is said that minerals must be included because of the use of the expression "*mai hak hakuk* in this *pottah.* On the assumption that the expression means" with all rights "or may be properly amplified as" with all right, title, and interest," such expressions, in their Lordships' opinion, do not increase the actual corpus of the subject affected by the *pottah*. They only give expressly, what might otherwise quite well be implied, namely, that that corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water of the like, which tenure to the subject of the *pottah* and may even be derivable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specialty to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased. Their Lordships accordingly are of opinion that the words founded on they do not add to the true scope of the grant nor cause mineral rights to be included within it.

13. A second point mentioned as a specialty in the present case is the reference in the *pottah* to the trees. The lessee is given power to cut and, if he cares, to sell these; and

the *zamindar* renounces any right in them and their proceeds. Had the *mokarari pottah*, however, been a document which by its nature gave as in property the entirety of the land both on and below the surface, such a provision with regard to the trees would be entire surplus age. The point is not of great importance, but it negatives the idea that the *mokarari pottah* can be so comprehensively viewed. Such a lease is a lease of the surface only. This is the general case to which in the present case there is alone superadded a right to the trees. The minerals are not included.

14. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and below and the decree of the Subordinate Judge restored.

Appeal allowed.

Cases Referred.

1. [1910] 37 Cal. 723 : 6 I.C. 785 : 37 I.A 136. (P. C.)

2. [1906] 33 Cal. 54 : 10 C.W.N.425 : 3 C.L.J. 59

3. [1916] 44 Cal. 585 : 40 I.C. 139 : 44 I.A.46

4. [1912] 39 Cal. 696 : 15 I.C.219 : 39 I.A.133