PRIVY COUNCIL

H. V. Low and Company, Limited

Vs.

Raja Bahadur Jyoti Prosad Singh Deo

P.C.A.No.108 of 1930
(Lord Macmillan, J. Sir John Wallis, and Sir Dinshah Mulla JJ.)

24.07.1931

JUDGMENT

LORD MACMILLAN J.

1. The appellant company seeks in this action to recover from the respondent a sum of Rs. 34,440 which, on 13th October 1923, it paid to him as salami or premium in respect of a contemplated 999 years lease of the underground coal rights in two mauzas known as Raidi and Methadi comprised in the respondent's zamindari. Subsequent to the payment of this premium the parties entered into a formal agreement dated 22nd January 1925, whereby the appellant company agreed that within two months from the date of the submission of the draft lease by the respondent it would take the proposed mining lease from the respondent or his lessees "on a salami of Rs. 34,440 already deposited," and cm certain specified royalty terms. The agreement contained the following clause :

> "If they (i. e., the appellant company) neglect or fail to take such lease within the aforesaid time except for the reason of the want of the lessor's title to the said mauzas the sum of thirty-four thousand four hundred and forty rupees, deposited as aforesaid, will be forfeited unto the Raja Bahadur."

2. There was considerable delay in proceeding with the transaction, but at length on 29th May 1925, a draft lease was sent to the appellant company. On 30th June 1925, the company's solicitors returned the draft approved, with certain alterations adding in their covering letter, that "our approval is subject to the title of the Maharaja being satisfactory."

3. The letter proceeded as follows:

"We maymention that we do not yet know what right the Maharaja has to properties in question. We are however informed that Mauza Methadi is held under a putness lease under the Maharaja by the Mohtas. If this be so, we shall be glad to know how the Maharaja claims to deal with the underground rights. Mauza Raidi, we understand, is held by Gopal Kaviraj and others. We do not know what the nature of their title is and whether the Maharaja has the underground rights, or these Kavirajas have the underground rights. Before the lease is finally completed we must be satisfied that the Maharaja has the right to deal with the underground."

4. This was the first occasion on which any question was raised by the appellant company as to the respondent's title. On 11th July 1925 the respondent's manager wrote in reply:

"As regards the Maharaja's title in the said mauzas I have to inform you that Maharaja Bahadur is the landlord of both the mauzas under whom the surface right in Mauza Raidi is held as a rent free debuttar tenure paying cess to his estate by Radhasyam Roy and others as shebaits of Dadhipaban Thakur, and the surface right in Mauza, Metbadi is held as a, rent paying (kheraji) brahmottar tenure by Ajodhyaram Chatterjee and others. For your information I am sending herewith a copy of the last survey settlement records of these mauzas, from which it will be quite clear that Maharaja Bahadur is the landlord, and as such the right in the underground minerals is vested in him."

5. The company's solicitors, on 17th July 1925, wrote in reply :

"It is not clear whether the mineral rights of the above mauzas have not been parted with by the ancestors of the Maharaja, Bahadur to the debuttardars and brahmottardars, and we think you will admit that copies of the debuttar and brahottar grants are necessary to arrive at a decision. We shall therefore thank you to send copies of the above document, failing which, we are afraid, an indemnity by the Raja Bahadur will be necessary to safeguard the interests of our clients."

6. On 5th August 1925, the respondent's manager replied as follows :

"I have to inform you that the brahmottar and debuttar grants were made by the ancestors of the Raja Bahadur in days long gone by and no trace of the origin of the grants can be found out. Prima facie, the mining rights in the villages belong to the Raja Bahadur, who is admittedly the proprietor thereof, and if anybody questions his rights it will evidently be for him to show the same. Under the

circumstances the Raja Bahadur is not in a position to execute any indemnity bond."

7. The solicitors of the appellant company, on 18th August 1925, intimated that their clients were not prepared to take the lease "as the Maharaja has failed to produce any title to the underground mining rights," and requested payment of the salami already paid, with interest and expenses, at the same time claiming a sum in name of damages. The respondent denied all liability, and the appellant company thereupon brought the present suit against him in the High Court of Calcutta on 7th June 1926. On 12th February 1929, the Judge of first instance (Page, J.), gave judgment in favor of the plaintiff for the return of the salami with interest. This judgment was reversed and the suit dismissed by the appellate Court (Rankin, C. J. and Buckland, J) on 13th December 1929. The matter is now before their Lordships on the original plaintiff's appeal.

8. The parties having, in the clause above quoted from the agreement of 22nd January 1925, made their own bargain as to the circumstances in which the salami should be forfeited to the respondent, the first question which arises is as to the true meaning and intent of that clause. The appellant company has failed to take the lease tendered to it ; it has therefore forfeited its deposit unless the reason for its failure to accept the lease has been "the want of the lessor's title. The burden is upon the appellant company to establish this justification of its rejection of the lease.

9. In their Lordships view the appellant company is not required to prove that the respondent has no title to the subjects he professed to lease. The expression "want of title" in the clause must be read as covering deficiency of title as well as absence of title. If the appellant company can show that, owing to the state of the respondent's title, the lease tendered is not such as it can be required to accept, then forfeiture of the salami has not been incurred. The action is not one by an intending lessor for specific performance, but, in their Lordships' opinion, the test of the appellant company's right to recover the salami is whether an action for specific performance at the instance of the respondent could have been successfully resisted by the appellant company on the ground that the respondent's title was defective. The Specific Relief Act, 1877 (No. 1 of 1877) formulates the test. By Section 25 of that statute it is enacted that a contract for the letting of property cannot be specifically enforced in favour of a lesser who cannot give the lessee "a title free from reasonable doubt." Reference may also be made to Section 18 which enacts that where the lessor sues for specific performance of the contract and the suit is dismissed "on the ground of his

imperfect title," the defendant is entitled to the return of any deposit he has made.

10. The real question at issue therefore is whether the appellant company has shown that the respondent's title to grant a lease of the mineral rights in the two villages is not free from reasonable doubt, or may be fairly described as imperfect. It is obvious that the question is one of degree. The doubt suggested must be a reasonable doubt ; the imperfection must be material.

11. The appellant company has led no evidence and maintains that the infirmity of the respondent's title is sufficiently demonstrated by his admission that his ancestors have at some unknown date in the past made a debuttar grant of Mauza Raidi and a brahmottar grant of Mauza Methadi in virtue of which the successors of the original grantees are at the present day in possession, there being no evidence as to the terms of these grants and, in particular, whether they included the underground rights. The respondent called one witness, a servant, who described his duties as being "to look after suits and to carry out all directions of the manager." This witness stated that he had made a search in the respondent's sherista for any debuttar and brahmottar grants relating to the two villages but had failed to find any such grants or any copies thereof ; that at the survey settlement the holders of the grants attended, but did not produce any grants ; that after the institution of the present suit he had seen the two holders of the largest shares of the grants, upon whom subpoenas had been served, but that neither could produce any grant. The evidence of this witness was criticized on the ground that he was not the regular keeper of the respondent's records, and that his search was inadequate. Their Lordships are satisfied that sufficient diligence was shown in the prosecution of the respondent's investigation.

12. The result is that the appellant company is unable to do more than conjecture that the grants made by the respondent's predecessors may have comprised the underground rights. On the other hand, there is no evidence that the grantees have ever asserted any right to the minerals under the villages or that they have ever been worked by them or their predecessors. It is moreover sufficiently established that there are no written grants in existence, and it must, in any event, be borne in mind that since 1866 no document unless registered, can affect the title to immovable property in Calcutta. Now :

> "a long series of recent decisions by the Board has established that if a claimant to subsoil rights holds under the zamindar or by a grant emanating from him, even though his powers may be permanent, heritable and transferable, he must

still prove the express inclusion of the subsoil rights" :

Gobinda Narayan Singh v. Sham Lal Singh and see cases there cited.

13. In the present case the grants not being in writing, must to be effectual, be earlier in date than 1883, for since then such grants have required to be by written instrument. Consequently the grantees in order to establish the inclusion of. the subsoil rights in their grants would have to prove that the terms of oral grants made half a century ago expressly included these rights. Where, as here, there is no evidence that the grantees have ever claimed or worked the minerals, the possibility of the grantees being now able to prove that the mineral rights were expressly granted to their predecessors is reduced to a contingency so remote as to be practically negligible.

14. The rights and liabilities of lessor and lessee are defined in the Transfer of Property Act, 1882 (No. 4 of 1882), section 108. These contrast markedly with the rights and liabilities of buyer and seller as defined in Section 55, particularly in the matter of the requirements as to title which the seller must satisfy. The appellant company has not shown that the respondent has failed, or is not in a position to perform any of the duties incumbent on a lessor under section 108.

15. Their Lordships, for the reasons indicated, are of opinion that the appellant company has not justified its refusal to take the lease offered to it, inasmuch as it has not shown any such "want of 'title" on the lessor's part as would create a reasonable doubt. This is sufficient for the disposal of the case, and their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Cases Referred.

AIR 1931 PC 89=131 IC 753=58 IA 125 (PC) at p. 133 (of 58 IA)