

CALCUTTA HIGH COURT

Kumar Raj Krishna Prosad Lal Singh Deo

Vs.

Barabani Coal Concern Ltd

(Mitter, J.)

20.07.1934

JUDGMENT

Mitter, J.

1. This is an appeal by the plaintiff from the decree of the Additional Subordinate Judge of Asansol dated 23rd December 1929 dismissing his suit for recovery of arrears of royalty and for a declaration that the royalty payable to the plaintiff is the first charge on the colliery described in the schedule to the plaint including machinery boiler, implements and office rooms.

2. The case stated in the plaint is that Mouza Manohar Bahal appertains to the permanently settled estate, Chakla Panchakote belonging to the Raja of Panchete who is a pro forma defendant to the suit; that while possessing the undergrounds of the said mouza the Raja settled the said underground rights with Radha Ballav Mukherjee on 25th January 1912 and registered pottahs and kabuliyats were exchanged between the parties, that according to the terms of the kabuliyat Radha Ballav was to pay annually a minimum royalty of ₹ 3,200 and royalty at varying rates for different kinds of coal and that the royalty and minimum royalty were to be the first charge on the mouza and the colliery in suit; that Radha Ballav sold his interest in Mouza Manohar Bahal to Barabani Coal Co. (defendant 1) by a deed of sale dated 14th February 1914, that the Barabani Coal Co. after getting their name registered in the Sherista of the Raja of Pachete executed an agreement on 1st November 1918, that Gour Gunanand Thakur and others who will be described as Thakurs throughout who are the surface holders of the said mouza had never any title or possession in the under-ground rights of the said mouza, that at the time of the agreement of 1st November 1918, the defendants gave out that the Thakurs had underground rights and the royalty was reduced from 3 annas to 2 annas per ton of steam coal to 2 annas perton and certain other stipulations were made; that by a registered deed dated 29th September 1926 the Raja of Panchete (proforma defendant 3) made a gift to the plaintiff of the Manohar Bahal Colliery and other properties for the khorposh of the plaintiff including the arrears of royalty due up to the date of the kobala; that in pursuance of the pottah and kabuliyat dated 25th January 1912 and of the agreement dated 1st November 1918 defendant 1 company paid to the plaintiff the Raja up to December 1926 minimum royalty and royalty (a very large sum of money to the tune of about ₹ 90,000) that the Manohar Bahal Colliery was sold by auction for arrears of road cess due to Government and was purchased by defendant 2, that demands were made for the

arrears of royalty due to the plaintiff since 16th Poush 1333 B.S., but there was no response. Hence the present suit.

3. The suit was contested by defendants 1 and 2 who filed separate written defences. Defendant 1 contended (1) that mouza Manoharbahal thought situate within Pargana Panchakote does not appertain to plaintiff's father's zamindari, but is a separate Touz held directly under Government; (2) that the title of the plaintiff's father was challenged in two suits and a decree was passed on 12th July 1927 declaring that plaintiff's father (D-3) never had nor has any title to the property. They denied the allegation that the underground rights were ever in khas possession of the plaintiff's father and alleged that the lease to Radha Ballav was a fraudulent one. The defendant company asserted that mouza Manohar Bahal has been at all material times and is the Lakheraj debuttar property of the Sri Gopinath Jau Thakur and was in the possession of the shebait of the said Thakur who owned both the surface and underground rights of the said mouza. They allege that on 10th Jaistha 1308 one Coverji Bhoja obtained a grant of the underground rights in respect of 8 annas share of the mouza from the shebait Gourgunand Thakur and others who after taking possession subsequently transferred his interest to Messrs. Laek Banerjee and Co. that Laek Banerjee was adjudicated insolvent in respect and at a sale held by the Official Assignee; the defendant company purchased the underground rights of the whole mouza in 1917 and entered into possession of the said underground property.

4. In paras 4, 5 and 6 of the written statement of defendant 1 company they allege that Radha Ballav was induced to accept the lease in 1912 on false representation by the Raja that he had title to the underground rights, that defendant company was induced to take the assignment on 14th February 1914 under mistake and in ignorance of actual facts and although the Subordinate Judge has based his decision partly on these grounds of defence nothing more need be said about them since Mr P.R. Das, the learned Counsel appearing for the defendant company, has abandoned the defence of fraud or mutual mistake in respect of lease of Radha Ballav, the assignment of Radha Ballav in favour of defendant company in 1914 or the agreement of 1st November 1918.

5. The defendant company further asserted that they had been paying the royalties to the Raja in the bona fide belief that he was entitled to the same; they refer to the Record of Rights as having recorded mouza Manohar Bahal as Lakheraj Debuttar property of the defendants directly under the Government. The defendants refer in para. 9 to a suit for the cancellation of the Pottah pending in the original side and for the refund of ₹ 90,994-9-2, and their learned Counsel Mr. P.R. Das has rightly described this paragraph of the written statement as wholly irrelevant. Defendant 2 was impleaded in their personal capacity and the plaint has been amended and they are now arrayed as defendants (2a) as a firm. Their defence (see p. 33) is substantially the same as that of Baraboni Coal Co. Defendant 3, the Raja of Pachete supports the case of gift of the mouza Manoharbahal to the plaintiff and says he is an unnecessary party. On these pleadings four issues were raised. It is only necessary to refer to issues 2 and 3 as controversy has centered round these issues in the present appeal. They run as follows:

Issue 2. Has the plaintiff got any right to the property in suit?

Issue 3. Is the plaintiff entitled to the royalty claimed; if so, how much and from whom?

6. Both these issues have been decided against the plaintiff and hence the present appeal. Four

questions have been argued before us and fall for determination in this appeal. In the first place it is said that the Subordinate Judge is clearly in error in holding that plaintiff has failed to establish title to the underground rights of mouza Monoharbahal as the evidence both oral and documentary clearly establishes such right. And secondly it is argued that even if the plaintiff fails to establish title the contesting defendants are estopped from raising the plea of want of title in the plaintiff having regard to the rule of law embodied in Section 116, Evidence Act, as on evidence the defendant company was put into possession by the plaintiff's predecessor in title, the Raja of Pachete. With regard to the question of estoppel the Subordinate Judge has come to the conclusion that defendant 1 company was not let into possession of the disputed colliery by the Raja of Pachete and Section 116 does not apply. The finding of fact as to whether defendant 1 was put in possession by the plaintiff has been attacked by the appellant. It is argued next that the finding of the Subordinate Judge that there should be suspension of rent as there has been eviction by title paramount is erroneous. It is argued lastly that even if the mouza is Lakheraj of the defendant the title to the underground right remained in the Raja of Pachete, the zemindar of Chakle Pachakot, through wheat the plaintiff claims.

7. The question of title was argued first and we proceed to deal with it first. The plaintiff claims mouza Monoharbahal as appertaining to the permanently settled estate of the Raja of Pachate through whom he claims. The defendants on the other hand asserts that it is the Lakheraj debuttar of an idol whose earthly representatives are the Thakurs. In such circumstances the burden would lie on the plaintiff of showing that mouza Monoharbahal was included in the mal assets of the estate at the date of the Permanent Settlement; in other words that it fell within his regularly assessed Mahal. If any authority is needed for this proposition reference might be made to the decision of the Judicial Committee of the Privy Council in very early cases of *Harihar Mukhopadhyay v. Madhab Chand Baboo*¹ of the Report their Lordships say this:

Their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is, that his mal land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal. The High Court in the judgment already considered has not laid down that he must do this in any particular way He may do it by proving payment of rent at some time since 1790 or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Decennial Settlement. His prima facie case once proved, the burthen of proof is shifted on the defendant who must make out that his tenure existed before December 1790.

8. There is nothing in the later and very recent decision of their Lordships in the case of *Jagdeo v. Baldeo*² which is inconsistent with the case in *Harihar Mukhopadhyay v. Madhab Chand Baboo*³ The burden which lies on the zemindar is not discharged by merely showing that the mouza is within the ambit of geographical limits of his estate; he

¹(1870) 14 MIA 152. At p. 172

³(1870) 14 MIA 152

²1922 PC 272

must go further and show that this mouza was assessed to revenue. It is contended for the appellant that the burden is shifted in the present case as there are some admissions of the defendant company to the effect that the mouza is within the revenue paying estate of the Raja of Pachete. Reference is made to a kabuliyat dated 24th May 1901 of Coverji Bhoja Ex. 1, p. 54, p. 2 where at p. 57 Monoharbahal in the Schedule of boundaries is described as appertaining to Touzi No. 1 of District Manbhumi and Touzi No. 1. is the permanently settled estate of Raja of Panchete.

9. The interest of Bhoja has descended to the defendant company and the admission binds the company. Admission to the same effect in 1926 is made in Ex. 9, p. 206, (p. 2). Reference is made to similar admissions made after suit by the Thakurs: Ex. J, 28th March 1929, (p. 251, p. 2), Ex K, 29th January 1929, (p. 245, p. 2). It is true what a man admits to be true must reasonably be presumed to be so and this admission shifts the burden on to the respondent: see *Chandra Kunwar v. Narpat Singh*⁴ In this view we have to determine whether the defendants have effectually discharged the burden of showing that the mouza is not part of the revenue paying estate of the Raja but that it is revenue free grant of the Thakurs. The defendants seek to discharge the burden by three documents of very ancient date. They first rely on the list of Bazezamin lands (Ex. P-1) which they say is equivalent to Lakheraj lands. The document is at p. 5, p. 2 of the printed paper book. It is a certified copy of Terij of Bajee Zamin (lands) for the year 1178 B.S., i.e. 1771 A.D. The respondent defendant contend, that Bazezamin means lakheraj land and that this is a return of lakheraj lands which is filed in the Collectorate under the provisions of Regulation 1769 and in this return at p. 16 mouza Monoharbahal is shown as a mouza in Pargana Shergura carrying an annual jama of ₹ 200; on the other hand it is contended for the appellant that the word Bazezamin means miscellaneous lands and the words Bajee Asarnir Khuchran Debuttar (these words are in the original) against 70 3/16 villages (in p. 5) shows that these are the petty debuttar of miscellaneous kind belonging to Assamis or tenants of the Raj who as tenants of the Raj would have no underground rights in the absence of express reservation of these rights in the grant. In other words the list is the list of rent free grants from Zemindar of Panchakote according to the contention of the appellant.

10. It is necessary to decide between these conflicting contentions as to the meaning of the words Bazezamin as used in the heading of the list or as used in the body of the document Bajee Jami Khuchran Debuttar (L 20, p. 5, part. 2), Ex. F-1. The meaning of the word Bajee Jami must be taken to be the same when used in the same document (Ex. P-1). This is a certified copy of a copy kept in the Collectorate, it being suggested on behalf of the appellant that the original was lost at the time of the Sepoy Mutiny of 1857(see p 53, p. 1). The copy of which Ex. E-1 is a certified copy was produced from the Collectorate by an Amla of the Collectorate and is a part of the official records. It must have been filed in pursuance of an official request made apparently under the provisions of Revenue Regulations dated 17th August 1769, (see p. 174 of Colebrook's Supplement to the Regulations, Vol 3 of his Digest) One trouble with which the East India Company was confronted after their accession to the Dewany in 1765 was how to tackle the problem of revenue free grants. In 1769 the company appointed supervisors to make a critical and

⁴(1907) 29 All 184

detailed inquiry into the various matters one of which was Bazezamin. At p. 175 in the Extract of Proceedings of the President and Select Committee on 17th August 1769 the following occur:

Charitable and religious donations which successive princes have made, many through zeal but most through vanity, form no considerable part of some districts, and as it may be reasonably supposed that in a course of years the produce of such benefactions has been misapplied and perverted or that the particular persons and societies in whose support they were granted have fallen or decayed, it is expected that you diligently search into and report their true state;

and again at p. 182 there occurs a passage from which it appears supervisors are asked to call for particular, accounts of all lands which are held as taluks, jagheers and charitable or religious donations.

11. There are the following special instructions with reference to charitable or religious donations (see p. 183):

As to charitable or religious donations the lands so sequestered are to be estimated with regard to their extent, production and value.

12. Apparently Ex. F-1 was filed in pursuance of the regulation on behalf of the zamindar of Panchakote. The zamindars have enjoyed considerable tracts rent free on various pretences and for various purposes (see p. 175 of Colebrooke's supplements) and the Supervisors were to investigate into the value of these lands. Reference was made to Philip's Land Tenures-Tagore Lectures p. 212-where the learned author states that Baze zamin lands mean land paying no revenue, to exchequer." In a revenue regulation enacted on 31st May 1782 it is recognized that for sometime past the attention of Government has been drawn to Baze zamin or lands exempt from the payment of revenue (see p. 224 Colebrooke's supplement to his Digest). It is pointed out that "such lands exist to a very considerable degree is well known" and further that partial attempts have been made at different periods to ascertain the amount and annual value of the Baze zamin lands but no general register had been formed of them, and complaint. It is argued for the appellant that the word "Baze zamin" might have acquired the technical meaning of revenue free lands in 1782 several years after the Terij which was filed in 1771 and the same technical meaning cannot be attributed to the document which was filed eleven years before. But this comment loses force when we find the regulation stating that such lands exist to a considerable degree is well known and has drawn the attention of Government for a considerable number of years.

13. The word Baze zamin has been used in the sense of revenue free grants in Section 48, Regulation 9 of 1793. It is also to be noticed that this Terij was filed in the Pachete case which went up before their Lordships of the Judicial Committee of the Privy Council and is reported in *Secy. of State v. Jyoti Prosad Singh Deo*⁵ their Lordships speaking of this return say this:

But the Raja has made a previous return of the Baze zamin or Lakheraj lands within the zamindari in 1771.

⁵1926 PC 41. At p. 112(of 53 I A)

14. It would thus appear that the respondents have discharged their onus of showing that these

lands were revenue free lands. It is argued for the appellant that if these lands were lakheraj they were invalid lakheraj lands and should surely have been resumed by the Government and further they could not be regarded as lakheraj not having been registered in accordance with the provisions of Regulation 19 of 1793. It appears that non-badshahi grants which formed the subject of Regulation 19 of 1793 fall under three heads. (1) Those that were created before 12th August 1765, the date of company's accession to the Dewani (2) those that were created after 12th August 1765 but anterior to the date of the Decennial Settlement viz., 1st December 1790, and (3) those that were made revenue free after the date of the Decennial Settlement.

15. The lakheraj lands in the present case fall within the second class and being in excess of 100 Bighas (area of Monoharbahal being 566 acres) were invalid lakheraj and liable to resumption by Government and could be assessed to revenue. This was never done and it is argued for the appellant that this is consistent; with the lands being rent free grant of the Raja of Pachete and not revenue free lands. The answer to this is that Government might have resumed the lakheraj but it did not do so and Government's right to resume is barred by the Statute of Limitations, sixty years having expired from the year 1178 B.S. i.e. 1771. The effect of the Regulation in the case of invalid lakheraj grants is not to dispossess the exlakherajdars but to make the lands subject to the payment of revenue, and this has not been done and this is a matter between the Government and grantee. If these lands were the rent free lands and were within the regularly assessed mehal of the Pachete estate of the Raja one would have expected that these lands would be shewn to be so included within the Decennial Settlement papers. But as shall be seen presently they are not so included.

16. It becomes necessary to examine therefore the Decennial Settlement kabuliyat dated 24th of some month in 1197 B.S. corresponding to 1790 (Ex. G p. 33, para 2) on which the respondent very strongly relies. With respect to the first class, all grants, by whatever authority made, and whether in writing or not, were admitted and allowed to be valid, if the grantees had got possession and the land had not subsequently been made subject to the payment of revenue by competent officers of Government. Whether any particular officer of Government had been competent, in this respect, it was left to the Governor. General in-Council to decide in case of doubt (Section 2, Regulation 19 of 1793). With respect to the second class, all grants made by any other authority than that of Government and not subsequently confirmed by Government or by any officer empowered to confirm them were declared invalid. Whether any officer had been competent to confirm it rested with the Governor-General-in-Council to decide in cases of doubt. Grants made by the Chiefs of the Provincial Councils were valid, and so were grants of less than 10 bighas, the produce of which was bona fide appropriated for the endowment of the temples or for the maintenance of Brahmins of other religious or charitable purposes, provided that these latter grants were of dates antecedent to the Bengal year 1178, or the Fussily or Willaity year 1179. Grants of the second class so declared invalid were subdivided into grants exceeding 100 bighas and grants not exceeding 100 bighas. The revenue assessable on the former was declared to be the property of Government, and these grants when assessed were to become independent taluks, that is, their revenue was to be paid direct to Government and not through any zamindar. The revenue assessable on grants of less than 100 bighas was made over by Government to the proprietors of estates within which these grants were situate, who were authorized to assess them and realize the revenue from them, without being at the same time liable to pay any additional revenue for the estates in which the lands so resumed were included. These grants were to become dependent taluks. With respect to the third class, i.e., grants made since 1st December

1790; and these whether exceeding or not exceeding one hundred bighas, were declared null and void, and Section 10, Regulation 19 of 1793 enacted that no length of possession was thereafter to give validity to any such grant either with regard to the property in the soil or the rents of it. The kabuliyat excludes all lakheraj lands whether covered or not covered by Sanads. Then occurs the following important statement with regard to the jama which has been assessed in respect of the Tahut I shall allot the same in mofussil (according to each village) and shall within the current year file a list the of in the District Record under my own signature together with Taidads of Talabi and Be Talabi lands as per boundaries determined.

17. Exhibit F (p. 36 para 2) is the Ferist of the Talabi lands of Perganah Shergarh in which mouza Monoharbahal is situate and we do not find in the list any mention of Monoharbahal as a Talabi or Be Talabi Brahmottar or Debuttar. This is very significant for it shows that no mention was made of Monoharbahal as a rent free or Be Talabi grant within the estate on which revenue was assessed. It is common ground that Monoharbahal is situate within the ambit i.e., the geographical limits of Chakla Panchkote; but before it could be regarded as within the mal lands of the estate it must be shown to be assessed to revenue. This kabuliyat rather re enforces the conclusion that Manoharbahal lands being lakheraj lands were withdrawn from the Permanent Settlement in view of the provisions of 8. 36 of Regulation 8 of 1793. If Monoharbahal had been assessed to Government revenue it would undoubtedly be in the list Ex. F The fact that it was not so included in the list and no revenue was allotted to it leads to the irresistible inference that it was lakheraj or revenue free land. An argument was advanced for the first time before us by Mr, Bose who opened the case for the appellant that the list was not a complete list at all. To this contention the respondent replied by saying that the question whether the list is a complete list or not is essentially a question of fact and it is impossible for them to go give further evidence. The evidence of the recordkeeper at p 47, part 1 is that the original list of Pergana Shergarh was found in the record of the collectorate and was proved. The original, it may be mentioned here was itself a copy. There is no cross-examination of the record keeper on this point. The learned Subordinate Judge has arrived at a finding that the list purports to be a complete list of mouza Shergarh and this finding has not been challenged in grounds of appeal. It is idle for the appellant to contend now that the list was not a complete list.

18. It has already been stated that the appellant laid stress on the circumstance that if Monoharbahal was a lakheraj village it would not have escaped the attention of Government seeing that it was an invalid lakheraj consisting of an area far in excess of 100 bighas. It is impossible, it was argued, that the existence of a village of the extent of over 500 acres paying no revenue to Government could have been unknown to the revenue authorities. This is no doubt a matter which requires consideration. It appears it is true from Colebrookes (supplement to) at pp. 224 and 485 that under the regulation of 31st May 1782 and of 26th August 1783 respectively that such invalid lakheraj lands were directed to be resumed, and a register was directed to be made of such lands. This was however a pious wish and the register was never prepared. The East India Company was doing its best to get rid of this evil of large alienation of public revenue but the task was a hopeless one, and many invalid lakheraj lands were not resumed: see Philip's Tagore Lectures-pp. 255 to 258. It is possible that the village was not resumed because it was rent free Debuttar but all these speculations are of no avail seeing that the list of 1771 shows that they are Baze Zamin of Lakheraj (revenue free lands). The right of the Government to assess them to Government revenue has become barred by the lapse of 60 years: see *Maharajadhiraj Mahatab Chand Bahadur v. Bengal Government*⁶ It was because Monohar Bahal village was

revenue free village that it was withdrawn for settlement for under Section 36, Regn. 8 of 1793. By virtue of the said section the assessment is to be fixed exclusive and independent of all existing lakheraj lands, that is lands exempt from the public revenue. Such lands are therefore in effect withdrawn from the settlement land the zamindar though these lands might be locally situate within his district, could claim no title therein by virtue of the settlement: see the observations of their Lordships of the Judicial Committee in *Ranjit Singh v. Kali Dasi Debi*⁷

19. We have next to consider a few document on which the plaintiffs very strongly rely in support of their case that the grant was not a revenue free grant but merely a rent free grant. (1) They rely on the Thak statement of mouza Monoharbahal dated 20th July 1862 (Para. 2, p. 46) which was signed by the Karpardaz for the debuttar lakherajdars, the Thakurs. In answer to the question

What is your connexion with this village, zamindar or Mokarraridar a Ticcadar,?

20. The Karpardazs said this:

We are Karpardazs for the lakheraj debuttar holders, Jnananda Mohpnto Thakur.; the Lakheraj Brahmottar of the said Thakur, is from the Taraf of Maharaja Nilmoni Singh Deo Bahadoor Raja of Panchakote and annual gross collection is ₹ 311-8-0.

21. The appellant argues that the document shows that the grant has emanated from Raja Nilmoni Singh Deo and is really a rent free grant. The word Lakheraj is sometimes used to denote rent free grants. If this document had stood alone it might have been possible to argue having regard to the equivocal meaning of the word 'Lakheraj' that the grant was the rent free grant of the Raja of Pachete in favor of the Thakurs, but the Baze Zamin list, the kabuliyat of the Decennial settlement and the list of Talabi lands already referred to make this an impossible contention. If on the other hand the word Lakheraj meant revenue free grants then the Thak return would support the respondents' case. Although the right to make revenue free grants belonged to the Crown the zamindars made many alienation which are revenue free grant: see Tagore Lectures Phillip's, pp.215 to 257. There was some discussion at the bar as to the evidentiary value of the Thak statements. It was contended by learned Counsel for respondents that Thak maps and statements have nothing to do with the question of title and that they are concerned with the demarcation of villages and have no evidentiary value on the question of title and reference was made to Major Hirst's book on the revenue surveys of India pp. 7 or 8 in support of this

⁶(1846) 4 MIA 466 (502 et seq)

⁷1917 PC 8

position. It is too late now to contend this. The evidentiary value of Thak maps has been considered in several decisions of their Lordships of the Judicial Committee of the Privy Council: see *Jagadindra Boy v. Secy of State*⁸ where it was said that thak maps have been held to be good evidence of the state of things at the date of the permanent settlement in the absence of evidence to the contrary. Referring to certain remarks regarding thak statements in the case of *Jagdeo v. Baldeo*⁹ their Lordships observed as follows in the recent case of *Krishna Pramada v. Dhirendra Nath*¹⁰

In their Lordships' opinion it was not intended in that case to lay down that these statements could never have any evidentiary value still less that they were inadmissible in evidence, but only that they were of no evidentiary value when, as in that case they dealt with matters altogether outside the scope of the survey.

22. Thak surveys were made for revenue purposes and the statements used to be signed by the agents of the parties concerned and are valuable evidence. The words "from the Taraf of Raja Nilmony Singh Deo" in the statement shows that it started originally as a revenue free grant from the Pachete Raj, or although the word Lakheraj might mean a rent free grant as well, having regard to the earlier documents Exs. B, F and G, the word must be understood in the sense of revenue free grants. In this connexion the appellant has relied very strongly on the circumstance that the defendants have not produced the Char Sanad which the Thakurs had from the Raja of Pachete as appears from a statement in a kabuliyat executed by Coverji Bhoja in favour of the Thakoors on 24th May 1901: see p 55, Part 2. At p 58 occurs the following statement of Coverji Bhoja whose rights have devolved on the defendants:

Have gone through the record of suit No. 37 of 1884 of the Munsifs Court and Case No. 123 of 1884 of District Judge's Court. You will give the decree and judgments of these Courts as well as the char sanad whenever I shall demand them and this document also contains towards the end the statement mouza Moacharbabal appertains to touzi No. 1 of District Manbhumi see p. 58;

and we have been asked to infer that if the Char Sanad had been produced it would have shown that the mahal in question appertained to Raja, of Pachete's estate originally and a rent free grant was made to the Thakoors. The char sanad must be in the possession of the Thakoors and not of the defendants and the Thakoors are no parties to the present suit. It is, true that the defendants might have cited the Thakoors to produce the char sanad but as the defendants are not in possession of the char you cannot necessarily draw the inference that if produced it would not support the defendant's case. It is surely a matter of comment.

23. The next document on which the plaintiff very strongly relies is the General Register Part 2 of revenue paying estates, p.258, Part 2, and is prepared under the Land Registration Act 8 of 1876 B.C. which shows Monoharbahal as within the Touzi No. 1 Chakla Panchakote, District Manbhumi and the name of the proprietor is given as Raja Nilmoni Singh Deo Bahadur. And it has been conceded by counsel for respondents that this documents does support plaintiff's title to the Mouza as proprietor The area is shown

⁸(1903) 30 Cal 291

¹⁰1929 PC 50

⁹1922 PC 272

to be 536 acres odd. Provision is made under S 58 of the Act for a register of revenue paying lands, and for registers of revenue paying lands Sections 9 10 and 11 are the provisions applicable. The register must have been prepared shortly after the promulgation of the Act in 1876. From this register it is clear that mouza Monoharbahal bearing an area of 533 bighas was borne on the roll of revenue paying estates and would lead to the inference that the grant by the Raja of Monoharbahal was a rent free grant and Raja Nilmoni Singh was the proprietor of the

same. If the entry could be supported by the earlier documents there can be no question on the authorities that the right to the minerals would be in the proprietor the Raja.

24. As against this document the respondent rely on Ex. P (Part 2, p. 261) the general register of revenue free lands which show that excepting 1/3rd of Mouza Dubra the whole of Mouza Monoharbahal is revenue free land and in Col. (e) reference is made to the copy of the list of Lakheraj grants of the year 1178 B.S. This register does not bear any date of its preparation but it must have been prepared after 1901 for from Ex. 1 (Part 1, p. 54) it would appear that the document was executed when Radhananda Thakur, father of Pebananda, was alive. The register bears the name of Debananda, son of Radhananda, so that the register must have been prepared after Radhananda's death sometime after 24th May 1901. That Radhananda is the father of Debananda appears from Ex O, p.202, Part 2. This document of which two certified copies Exs. P and P (1) were filed on behalf of the defendants show the area of Monoharbahal to be only 39 acres. The discrepancy between the actual area of Monoharbahal which is 566 acres and the area as shown in Ex. P (1) is indeed very great, and very strong exception has been taken to the reception of this document in evidence on behalf of the plaintiff-appellant. We have however no reasons to suppose that the document is not the genuine one as it has been produced from the records of the Collectorate.

25. The plaintiff has next relied on a decree in a suit for cess against the defendant for the Bengali year 1295 up to 1298: see Ex. 15, p. 50, Part 2. In the claim which is set out in the decree the Maharaja Nilmoni Singh of Pachete states that the Thakurs were in possession of mouza Monoharbahal under the plaintiff. This decree was of the year 1892. The defendant has produced a decree of the Subordinate Judge dated 29th March 1898 (Ex. Q, part 2, p. 52 between the Pachet Raj and the Thakurs in respect of cess for the years 1300-1303 B.S. At that time Pachet was an encumbered estate and the suit was brought by the Manager Mr. Rickett. on the allegation that Mouza Monoharbahal was in the Zamindari of Pachet encumbered estate. The defence of the Thakur defendant was that the mahal was rent free. The learned Subordinate Judge held that the Mahal should be held to be rent free. The Subordinate Judge further observed that the plaintiff cannot recover the cess from the defendant, the holder of lakheraj mahal unless he shows that he has paid the cess of the period in suit to the Collectorate and he dismissed the suit on the ground that plaintiff had failed to establish that he has actually paid the cess for the period in suit.

26. It would appear at any rate from these two decrees that the Thakurs were setting up a rent free tenure under the Pachet Estate up till 1898 as distinguished from a revenue free mahal. We will have to return to these documents, in consideration another issue hereafter for it seems to us that so far as the question of title is concerned they are not conclusive on the question as to whether mouza Monoharbahal appertain to revenue paying estate of the plaintiff. They are good evidence in favour of the plaintiff's title and are liable to be displaced by better evidence. The last series of documents are the Record of Rights which are finally published on 22nd July 1921, which are Exs. R series but which are not printed. The copy of proceedings under Section 103-A, Ben. Ten. Act, Ex. O, is to be found at p 202, part 2 and on this document the defendant places a very great reliance. The Raja of Pachet was the objector and his contention was that mouza Monoharbahal appertain to his touzi No. 19 and that the defendants the Thakurs had got their names recorded in Khatian No. 73 directly under the King-Emperor of India and it was prayed that Khatian No. 73 might be recorded as subordinate to plaintiff's khatian. This objection was

rejected and the entry in the Record of Rights creates a presumption in favour of the defendants case that mouza Monoharbahal was the Lakheraj Debottar of the Thakurs. This presumption is not only not rebutted but the earlier document of the year 1178 B.S. and the decennial settlement Kabuliyat support the entrain the Record of Rights. I am not unmindful of the circumstance that the Record of Rights is no evidence on the question of title as the records are mainly based on possession. In our view it has been established beyond reasonable doubts that mouza Monoharbahal, is the lakheraj debottar of the Thakurs and although situate within the geographical limits of plaintiff's estate was not assessed to revenue and did not form part of the Mal assets of the estate of the plaintiff at the date of the permanent settlement.

27. The next question to consider is one of considerable importance and is not covered by authority. That question is in whom do the underground rights or the rights to the minerals vest. Do they vest in the lakherajdar who holds under an invalid lakheraj grant which has not been resumed by the Government-the right to such resumption having been extinguished by the, lapse of 60 years from the date of grant, or do they vast in the zemindar within the ambit of whose revenue paying estate the lakheraj lands lie. The respondent contends that the lakherajdars the Thakurs must be considered to be the proprietors of the soil and the underground rights vest in them and in support of this contention the respondents rely on Section 4, Regn. 19 of 1793. It is necessary to reproduce this section in extenso as the appellants also found their arguments on the provisions of this section. 8. 4 is in the following terms:

This regulation, as far as regards lands alienated previous to the 1st December 1790, respects only the question whether they are liable to the payment of revenue or otherwise. Every dispute-or claim regarding the proprietary right in lands alienated previous to that date, and which in conformity to this regulation, may become subject to the payment of revenue, is to be considered as a matter of a private nature to be determined by the Courts of Diwani Adalat in the event of any dispute or claim arising respecting it between the grantee and the grantor or their respective heirs and successors. The grantee or the present possessors, until dispossessed by a decree of the Diwani Adalat are to be considered as the proprietors of the lands with the same right of property therein as is declared to be vested in proprietors of estates or dependent taluks, (according as the land may exceed or be less than one hundred bighas as specified in Section 6, 7 and 21) subject to the payment of revenue, and they are to execute engagements for the revenue, with which their lands may be declared chargeable either to Government or to the proprietor or farmer of the estate in which the lands may be situated or to th& officer of Government (according as the revenue of the estate in which the land may be situated may be payable by the proprietor or a farmer, or collected khas) under the rules for the decennial settlement. If by the decision of the Diwani Adalat the proprietary right in the land shall be transferred the person succeeding thereto is in like manner to be responsible for the payment of the revenue assessed or chargeable thereon.

28. The appellant argues that even if the village is considered to be lakheraj the underground rights are still in the Raja of Pachet through whom the plaintiff claims. The respondent on the other hand contends that Manoharbahal having been withdrawn by virtue of Section 36, Regn. 8

of 1793, from Settlement concluded with the Raja it is an astonishing proposition that he should be considered as the owner of the minerals. It is necessary to decide between these conflicting contentions. A long line of authorities has established that mineral rights are in the proprietor of the soil. In the case of *Hari Narayan Singh v. Sriram Chakravarty*¹¹ their Lordships of the Judicial Committee of the Privy Council quote with approval the following passage from Mr. Field's admirable introduction to the Bengal Regulations, p. 30 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.

29. Under Section 4 of Regn. 19 the possessors of invalid lakheraj lands until dispossessed by the decree of the civil Court were to be considered as the proprietors of lands with the same rights of the property therein as is declared to be vested in the proprietors of the estate when the lands exceed 100 bighas subject to the payment of revenue. It has been argued for the appellant that Section 4, Regn. 19 deals with the realization of revenue and not with proprietary rights and that every dispute or claim regarding the proprietary rights in lands alienated previous to 1st December 1790 and which in conformity to this Regulation may become subject to the payment of the revenue is to be considered as a matter of private nature to be determined by civil Courts in the event of any dispute arising between the grantee and the grantor. It has been very strenuously argued by Mr. S. N, Banerjee, the learned Counsel who gave the final reply for the appellants, that prior to the permanent settlement the zemindar was the owner of all lands and that the property in the soil never belonged to any body else except the proprietors and that it has never been the policy of the Government to take away the rights which previously existed and that it is for the lakherajholder to prove that the zemindar had prior to the date of the permanent settlement alienated not only the surface rights but also the under ground rights. In other words it was contended that at the date of the permanent settlement the Government recognised pre-existing right in the zemindars and others and did not confer rights by the Settlement. It is sufficient in answer to this contention to say as has been said by Lord Phillimore when delivering the judgment of the Judicial Committee in 1926 P C. 41 (4), with reference to a similar contention that the arguments receive no support from decided cases and appear at first sight to be contrary to the teaching of text books.

30. It is true that their Lordships were relieved from considering the force of this

¹¹(1910) 37 Cal 723

contention because it was not raised in the Courts in India. Mr. Field in his introduction to the Regulations points out at p. 30 that the Provinces of Bengal, Bihar and Orissa were the first territories in which the solution of the problem was attempted.

31. In these provinces there were at the commencement of our rule a class of persons called "zemindars", as to whose position and rights there was then, and has ever since been, the greatest doubt and discussion. No attempt to define their position and rights could now possibly succeed, and this for two reasons. In the first place, the new status which we gave them by the Permanent Settlement in 1793 has effaced many of the traces of the previous state of things. The old foundations are buried beneath the new structure. In the second place it may be doubted if their position and rights were ever capable of exact definition. Under an arbitrary system of

Government, where so much depended upon the will of the Ruler, rights were not demarcated by metes and bounds as they are under a systematic constitution like that of Great Britain.

32. Mr. Field continues at p. 35:

Never, wrote Lord, Hastings in his minute of 31st December 1819 was there any measure conceived in a purer spirit of generous humanity and disinterested justice, than the plan for the Permanent Settlement in the Lower Provinces. It was worthy the soul of a Cornwallis; yet this truly benevolent purpose, fashioned with great care and deliberation, has to our painful knowledge subjected almost the whole of the lower classes throughout these provinces to most grievous oppression-an oppression, too, so guaranteed by our pledge that we are unable to relieve the sufferers. One of the effects of making the zemindars proprietors and fixing for ever the Government demand of revenue was that all other rights in land were so completely effaced that at this present hour it is difficult to find a single vestige of them or to ascertain what they were.

33. That the Permanent Settlement created a title in the zemindars and did not merely recognize a previous title to the ownership of the soil seems to be the result of the research of the learned author Mr. Phillips who delivered the admirable Tagore Lectures on Land Tenures in 1875; see pp. 225-244, 259, 281,311. Another learned author Mr. Sarada Charan Mitra, a former Judge of this Court, in his Tagore Lectures on Land Laws of Bengal (1895) after reviewing the position of the zemindars prior to 1790 was inclined to the opinion that by the Decennial Settlement which was made permanent in 1793 the estate assumed to itself and made over to the zemindars its own supposed proprietary rights to the soil. See pp 100-104. If one looks to the preamble to Regn. 2 of 1793 it would appear that Lord Cornwallis consciously or unconsciously introduced an imitation of English system of landed property and vested the property in the soil in the zemindars, for the preamble states:

The property in the soil was formally declared to be vested in the land holders.

34. It is not necessary however to determine finally as to whether the effect of the Regulations at the time of the Permanent Settlement was that the zemindars were recognised and declared to be proprietors irrespective of whether they entered into a settlement as to particular land or not for this question is inconsistent with the case made in the plaint which was to the effect that mouza Monobarbahal appertained to the permanently settled estate Chakle Panchakate. It was not the case made in the plaint that the said Mouza was within the geographical limits of the zemindari and that the prima facie title was in the zamindar even if the said mauza is not named in the decennial settlement documents in the absence of anything to show that the zamindar has parted with his interest in it. For all these reasons this ground of the appellant must fail. It remains to notice a few cases on which reliance has been placed on behalf of the appellant to show that the title to the minerals in dispute still vests in the Raja. The appellant relies very strongly on the recent decision of their Lordships of the Judicial Committee of the Privy Council in *Bageswari Charan Singh v. Kamakshya Narayan Singh*¹² and contends that having regard to the observations in the last two paragraphs of their Lordships' judgment even if Monoharbahal is treated as lakheraj that circumstance should in no way affect the right of the Raja of Pachet to the

minerals in the said village or mauza. An examination of the case however will show that the plaintiff in that case was zamindar of an estate settled at the Decennial Settlement in 1790 which was made permanent in 1793. The defendants and their predecessors, who were of the senior branch of the zamindar's family, held villages included in the settled estate subject to an annual payment to the zamindar. The holding was recorded in the record of rights under the Chota Nagpur Tenancy Act 1908, as a jagir held from the zamindar. The defendants claimed that the villages with the subjacent minerals were their property; they contended that the payments were in respect of revenue paid through the zamindar instead of direct to Government. In 1791 the agent for the East India Company had granted a sanad to the defendants' predecessors remitting the revenue in respect of two of the villages. In these state of facts their Lordships held that apart from the presumption under Section 84, Sub-section 3 of the above Act, the entry in the Record of Rights was correct, there was a presumption that the villages, being part of the settled estate, were the property of the zamindar, and that the presumption was not rebutted by the evidence. Although the defendants were of the senior branch the inference was that they held under a khorposh, or maintenance jagir; and it was well settled that as between a zamindar and a jagirdar holding from him the zamindar was entitled to the minerals. The remission of revenue, whether with or without the authority of Government, did not affect the zamindar's proprietary rights.

35. It will thus appear that the important point of distinction between that case and the present is that the High Court held contrary to the finding of the Subordinate Judge that the two villages Dharguli and Chalkhusa were entirely in the name of Maninath Sing who was the Raja of Ramgarh in 1790 as proprietor in the settlement register of perganna Ramgarh from 1760 to 1790. It further appeared that the, two villages had been assessed to revenue in the time of Bishan Sing, the Raja who died in 17,63, but that in the time of Raja Maninath Sing they were entered in the accounts without any jama being shown against them, and their Lordships point out that the Ramgarh Raja had the same proprietary rights in them as in the rest of his zamindary and that, a subsequent remission of land revenue in 1791 whether authorized by Government or not would affect the proprietary rights of the zamindar in the said villages. Great stress is laid on the following passage at p. 16 (bottom) of their Lordships' judgment:

¹²1931 PC 30

It appears to them much more likely that, as contended before the appellate Court, these villages were treated as lakhiraj and left unassessed at the decennial settlement.

36. It is contended that their Lordships of the Judicial Committee proceeded on the footing that the two villages were lakheraj and nevertheless held that the Bamgarh Rajas' proprietary rights in these villages could not be affected or his right as against tenure holders under him to claim the ownership of the minerals in them could in any way be affected. The crucial point of distinction is that the two villages were settled with the Raja of Ramgarh at the date of decennial settlement although there was subsequent remission of revenue by the Government. In the present case it is not shown that the lakheraj village Manoharbal was settled with the Raja of Pachet as it could not be by virtue of the terms of the kabuliyat of the decennial settlement. This case therefore does not assist the appellant.

37. The next case which is very strongly relied on by the appellant is *Sachidananda v. Jyotiprosad Sing*¹³ This case was with reference to a village called Itapara which is shown in the lakheraj list of 1771 at p. 16, Vol. 2 (Ex. F-1) and it was held that the underground rights were in

the Raja of Pachet who was the proprietor of the estate within whose limits the mauza Itapara lay. It appears in that case the list Ex F-1 was not produced but the sanad was produced from a previous Raja of Pachet but it is pointed out that the sanad does not distinctly make a grant of the soil to the defendant's ancestor assuming it included the land of the said mauza. The learned Judges proceeded on the footing that the documents filed by the plaintiff the Raja of Pachet in that case disclosed that this mauza had all along been treated as within the revenue paying estate of the plaintiff. The learned Judge remarked however whether this mauza was assessed with revenue or not at the time of the permanent settlement does not appear to me to be a guiding factor in this case and they held on a reading of the sanad that it was a rent free grant by way of a lease by the grantor for the purpose of Debsheba. If according to, the learned Judges the grant was a rent free grant there can be no question that the minerals would not pass to the grantee in the absence of express reservation: see *Raghunath Roy v. Durga Prosad*¹⁴ In the very recent case of *Gobinda Narain Sing v. Shamlal Sing*¹⁵ their Lordships of the Judicial Committee of the Privy Council have held that the sub soil rights forming part of a permanent settled zamindary are to be presumed at all events when they are not claimed by the Crown, to belong to the zamindar and their Lordships point that 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. This is laid down in a passage from the judgment of Lord Buckmaster in *Sashi Bhusan v. Jyoti Prosad Singh*¹⁶ which has been so often quoted in subsequent judgments of the Board that it is unnecessary to repeat it here. In *Raghunath Roy v. Durga Prosad*¹⁷ this principle was applied to a rent free brahmottar grant from a zamindar, and finally in *Bijoy Sing Dudhoria v. Surendra Narain Singh*¹⁸ it was held to be applicable to a patni grant.

38. The case of a lakheraj grant within the ambit of a zamindary has not been considered with reference to the question of underground rights. On the best consideration that we

¹³1929 Cal 791

¹⁵1931 PC 89

¹⁷1919 PC 17

¹⁴1919 PC 17

¹⁶1916 PC 191

¹⁸1928 PC 234

have been able to give to this case we are of opinion that the title to the underground rights is in the lakherajdar who holds under an invalid grant which has not been resumed by the Government although the property is situate within the geographical limits of the estate of the zamindar that is the Raja of Pachet in this case.

39. The next matter for consideration is whether the defendants are estopped from disputing the title of their lessor the Raja of Pachet. The derivative title of the plaintiff from the Raja is not denied and the estoppel, if any, is available to the plaintiff. The Subordinate Judge below has gone into the question and has decided against the plaintiff. He has held that defendants were not let into possession of the demised premises by the plaintiff or the Raja and therefore Section 116, Evidence Act, does not apply. The appellant argues that the Subordinate Judge has gone wrong on the question of estoppel for two reasons: (1) that he should have held on the evidence both oral and documentary that defendants Barabon Coal Co were let into possession of the Manoharbahal colliery under the lease by the Raja, (2) and even if plaintiffs fail to prove that the Raja put the defendant into possession there being no case of fraud, coercion mis-representation or mistake the rule of estoppel applies and the defendants are estopped from denying the Raja of Pachete's title to the under-ground minerals. On this question the respondents argue that the plea of estoppel should never have been allowed to be raised in the Court below and should not be

allowed to be raised now as it was never expressly pleaded, and reliance has been placed on a number of authorities. We propose to deal with this contention of the respondents first: In a suit for rent as in a suit for ejectment against a tenant where the relationship of landlord and tenant is alleged to exist it is not necessary that the plaintiff should set out his own title, and this is on the principle that the tenant is estopped from denying that his landlord who put him in possession of the land then had title so to do or that his landlord from whom he accepted a lease then had title to grant the lease or that the landlord to whom he paid rent then had title to receive the rents: See Bullen and Leake's Precedents of Leadings, Edn. 8 p 63.

40. It is argued for the respondent that where the plaintiff in a suit for rent relies on estoppel as a part of his title he should plead it in his statement of a claim or in his plaint and reliance is placed on Halsbury's Laws of England, Vol. 13, 350 where it is stated that under the modern practice facts relied on to establish an estoppel of any kind should be pleaded in any case in which it is intended to rely on it except in an answer to a claim in ejectment and it has been held in the case of *Coppinger v. Norton*¹⁹ that if a plaintiff in ejectment relies on estoppel as a part of his title it seems that he should plead in his statement of claim. The question may arise whether in a suit for rent the ordinary rule should be relaxed that a plaintiff is not bound to anticipate a defence that his title would be denied. The fact that in ejectment a defendant can raise all legal defences under a plea of possession has been regarded as taking the case out of the general rule that a plaintiff is not bound to anticipate a defence. It is not necessary to finally decide on this as in our opinion the defendants had full notice of the plea taken at the trial and they gave evidence to show that plaintiff did not let the defendants into possession under the lease in order to defeat the plea of estoppel. The defendants have not been taken by surprise.

41. The Subordinate Judge below has stated that the estoppel under Section 115, Evidence Act, has not been pleaded in this case and that it was absolutely necessary to

¹⁹(1902) 2 IR 232

plead such an estoppel. We are not concerned in the present case with the estoppel under Section 115, but we are concerned with the estoppel of a tenant under S 116 which is based on a very different principle. Section 116 deals with instances of estoppel by agreement based on permissive enjoyment. The estoppel of a tenant is founded upon a contract between him and his landlord. As has been pointed out in *Re Stringer's Estate v. Jones Ford*²⁰ the tenant took possession under the contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a title. That is a well established doctrine. That is estoppel by contract. In the recent case of *Bilas v. Desraj*²¹ (of 42 I.A.) their Lordships of the Judicial Committee observed that:

Section 116, Evidence Act, is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

42. The case of the plaintiff with regard to the estoppel which prevents the defendants from disputing the title of the plaintiff or the Raja of Pachet is dependent on the following circumstances. (After dealing with some of the circumstances the judgment proceeded.) The next

document on which plaintiff relies is the letter written by Buraboni Coal Co. to the manager of the Pachet Raj on 7th January 1919, p 145, line 35, part 2. The letter states, we got possession of Manoharbahal in the beginning of 1914 that is 1st of April of that year and although we do not know when we started extracting Manoharbahal coal from Choto Nuni it is unlikely that we started doing so immediately we got possession.

43. The plaintiff relies on this letter for the purpose of showing that there is an admission by Burabani Coal Co. that possession was obtained from the Raja of Pachet for there is no point in writing to the Raja unless possession was given by the Raja. With regard to the actual date of possession the plaintiff relied on Ex. 2, the kabuliyat executed by Buraboni Coal Co, on 1st November 1918, in favor of the Raja of Pachet, see part 2 p. 198. In that kabuliyat Buraboni Coal Co. admits we are in possession thereof after purchasing the said puttah holder's interest on 14th February 1914. This is a kabuliyat with reference to Manoharbahal. These documents in our opinion support the case of plaintiff that possession of the colliery was given by the Raja to Buraboni Coal Co. in February 1914. The only document against this case is the conveyance by the Official Assignee dated 22nd June 1917 in which there is a recital that possession was delivered on 1st April 1914 by the Official Assignee. But it is to be noticed that this is a recital in a document to which the 'Raja was no party and such recitals are not evidence against the plaintiff: See *Bangachandra v. Jagat Kishore*²² Dealing with oral evidence of the defendant it appears that one Gobordhon Pal was called and he said that in 1913 the defendant company worked in the colliery, see p. 44 Parb 1. He states that it was by a letter that the Official Assignee put defendant 1 in possession of Manoharbahal but he has not produced the letter. This witness is contradicted by his previous deposition where he stated that Baraboni Coal Co., did not do any work in the underground and they had not any boring done in the property by Turner Morrison or any one else. See p. 46, part 1. It does not

²⁰6 Ch D 9

²²1916 PC 110

²¹1915 PC 98 at 207

seem to us likely that the Official Assignee would put the defendants into possession before the conveyance was actually completed in 1917. Another witness has been called named Bibhuti Bhusan Mahato who says that he had some pit done in the Monoharbahal Colliery for Laik Banerjee from 1316 to 1318. After that the Official Assignee worked in the Colliery from 1319 to 1320. It appears to us that trial pits were dug at the instance of the Official Assignee at Monoharbahal in order to find out whether there was coal inside the mouza. This would appear to be so from letter Ex. H, part 2, p. 127 where a letter is written to the Chief Inspector of Mines bringing to his notice the fact that three trial pits were being sunk at Manoharbahal Colliery to test coal.

44. The respondent has placed very strong reliance on Ex 4 submitted to the Chief Inspector of Mines on 21st July 1914 see p. 135, part 2. It shows that date of commencement of mine to be 1st May 1914, and it is argued that from the entry in the said letter that the number of inclines were two in number and the depth of the shaft will approximate 300 feet shows that the mine must have been worked long before 31st May 1914. The appellant argues that the words "will approximate it" do not show that the shaft exists. It is further pointed out that if the mine was worked then the statutory return would have to be furnished under Section 20, Mines Act. This letter seems to us to be equivocal but it is important to remember that the books of account of the company have been withheld. If any working was done during Laik and Banerjee's time the papers would be given to Barabani Coal Co. The absence of these papers suggest that

Manoharbahal was not being worked independently but was being worked through Nuni. The last paragraph of the letter 7-G shows that the only raising of the coal was through Chota Nuni. If Manoharbahal was being worked separately one would expect despatch reports but they have not been produced and the inference is irresistible that it was being worked through Choto Nuni. This letter Ex. 7-G which is at p. 138, part 2 makes it clear that the Buraboni Coal concern have for sometime been extracting Manoharbahal coal through Choto Nuni and that the quantity extracted amounts to 21,000 tons, and the last paragraph of the letter shows that if the royalty on 21,000 tons exceeds the minimum the company will pay the excess royalty.

45. This letter destroys entirely the theory set up on behalf of the respondents that additional coal was being worked through Choto Nuni and that there were separate risings of coal through Manoharbahal pits. The respondent also relies on Ex 7L, p. 148, part 2, to show that additional Manoharbahal coal was being raised through Chotonuni but if one looks at Ex. 70, p. 153, part 2 letter written by the company to the Manager of Pachet Raj it would appear that there was one raising for Manoharbahal and Chotonuni coal for which an account of royalty was given, for at that time the Chotonuni coal had admittedly been exhausted, for from the end of the account at p. 154 it would appear that only minimum royalty for Chotonuni colliery ₹ 200 was being asked for. It would also appear from p. 98 of the record that the appellant took out a subpoena asking the Burabani Coal Co., to produce the half yearly statements of the Manoharbahal Colliery for 1917 and 1918 and yet they were not produced. From this an inference unfavourable to the defendants case is drawn. On the oral and documentary evidence which we have reviewed we have no doubt that the Buraboni Coal Co. after their purchase from Radhabullav Mukherji were put into possession of Manoharbahal Colliery by the Raja of Pachet who allowed the defendant company to take Manoharbahal coal through Chotonuni Colliery which admittedly belong to Pachet. The Subordinate Judge has dealt with the question of possession very summarily and after a consideration of the evidence we are unable to agree with him. The Buraboni Coal Co. having been let into possession of Colliery by the Raja of Pachet under the lease of 1912 in favor of Radhamadhav which was assigned to Buraboni Coal Co. in February 1914, Section 116, Evidence Act, is attracted to the present case and defendant 1 company is precluded from disputing plaintiff's title to the same.

46. The appellants have also argued that even if the Raja had not put the defendant company into possession the case of fraud, misrepresentation for mutual mistake on which the Subordinate Judge proceeded having been abandoned in this Court the defendant would be estopped from disputing plaintiff's title. In the view which we have taken it is unnecessary to deal with this question which has been canvassed during the argument or to express any opinion on the same. The respondent contends that even if the rule of estoppel under Section 116 applies the suit should be dismissed as there has been eviction by title paramount, for the estoppel lasts only so long as the tenant has not been evicted from the lands. The next question therefore for consideration is whether, as has been contended by the respondent there has been eviction by title paramount so as to entitle the respondent to contend successfully that there should be suspension of rent and to get a dismissal of the suit. The respondents in their written statement in para. 2, (page 25) refers to two suits which had been brought by the Thakurs against the Baraboni Coal Co. claiming royalty in respect of Manoharbahal Colliery from them and states now that the suits had succeeded and that they had attorned to the Thakurs and consequently there has been eviction by the paramount title of the Thakoors.

47. The suit for rent by some of the shebait succeeded up to the High Court and was pending appeal to His Majesty in Council. But we have taken as additional evidence the judgment in appeal of their Lordships of the Judicial Committee in *Baraboni Coal Co. v. Gopinath Jiu Thakur*²³ (marked as Ex. 20 in the High Court) by which the suit of the Thakoors for royalty for a different period was dismissed. To that suit the present plaintiff or Raja of Panchakote was not a party and it is contended that although the findings in that judgment cannot be regarded as any evidence against the appellants, the judgment is admissible in evidence, to show under Section 13, Evidence Act, the fact of eviction by title paramount. The circumstances that the findings in the judgment of the High Court in the case which went to the Privy Council are not binding on the appellant is of no consequence seeing that our own finding is that the Raja of Pachete has no title to the underground rights and consequently of the plaintiff claiming through him and that the title is in the idol Gopinath Jiu, the lakheajdar represented by Thakoors who are its earthly representatives. In order that the plea of eviction by title paramount might constitute a good defense three conditions must be fulfilled. The eviction must have been from something actually forming part of the premises demised, (2) the party evicting must have a good title (3) and the party must have quitted against his will. Forcible expulsion is however not necessary for it is sufficient if the tenant gives up possession and the person claiming by title paramount, i.e., by a title superior to those both of the lessor and lessee against tenant who is enabled to make a defense: See Lord Denman C.J's observations in *Neale v. Mackenzie*²⁴ It is pointed out in Foa's book on Landlord and Tenant that the authorities show that it is not necessary for the tenant actually to go out of possession and

²³1934 PC 53

²⁴1 M & W 759

that if upon a claim being made by a person with title paramount he consents by an attornment to such person to change the title under which he is holding: see *Hill v. Saunders*²⁵ *Doe v. Barton*²⁶ and the other cases cited at p. 194 foot note (q) in Foa's sixth edn., p. 194. We have to examine whether these conditions exist in the present case.

48. The question of eviction by title paramount is also complicated by the agreement of 1st November 1918 (p. 198, part 2) which states that title or no title the defendant will go on paying royalty at a rate less than the rate under the original lease and this question will depend on the further question as to whether the agreement of 1st November 1918 has consideration to support it. We proceed therefore to consider the validity of the agreement of 1st November 1918 (Part 2, p. 198 Ex. 2). After the Baraboni Coal Co. had purchased the underground leasehold rights in Monoharbahal Colliery in 1914 and after the Company had been put into possession of the said Colliery the Company took a conveyance from the Official Assignee of whatever right, title and interest the insolvents Laik and Banerjee had in mouza Manoharbahal in 1917. At that time it is common ground that coal was "booming" to use an unforensic expression used by the learned Counsel on both sides on account of the Great European War and the Company in order to make its title perfect about the underground rights in Manoharbahal took the Conveyance from the Official Assignee with the result that they had to pay at that time royalty both to the Raja as also to the Thakurs. By this action of the company in taking the conveyance of the underground rights a cloud was thrown on the title of the Raja of Pachete to the underground rights in Manoharbahal Colliery. The Raja denied the title of the Thakur. The Raja had a claim to evict, and he was putting forward that claim and in order that the Raja might forbear from not enforcing the claim

to evict the agreement (Exte. 2) dated 1st November 1918 was executed the Raja reducing the commission from 3 annas per ton coal to 2 annas and a further term was introduced in this agreement the effect of which is that if the Raja could establish that the Thakurs and the Searsole estate have not title to underground rights of Manoharbahal then from the year in which it would be so held by the highest Court the royalty would be increased from 2 annas to 7 annas. It was further a part of this agreement that if no such suit is instituted by the Raja the company shall be bound to pay commission at the rate of 2 annas per ton, and shall not be competent to raise any objection to the payment of commission at the rate of 2 annas on the score of Rajas not having title to the underground rights of the said mouzah. The circumstances under which this agreement was executed are detailed in para. 8 of the written statement of the company in another suit. It contains an admission of the company to the following effect:

The defendant company also states that the title of the said Sri Sri Iswar Gopinath Jiu Thakur and the shebaitis thereof was denied by the said Raja of Pachete and that to avoid eviction by title paramount the defendant company also took settlement of such coal mines and coal mining rights from the said Raja. The defendant company states and submits that it has been in open, continuous and uninterrupted possession and enjoyment of such coal mines and coal mining rights under such purchase and settlement as aforesaid since 1914 and that neither the grantee of the said alleged settlement of 21st Baisakh 1316 B.S. nor any

²⁵4 B & C 529

²⁶11 A & E 315

subsequent transferee thereof ever held possession of any share or interest in such mines or mining or mining rights.

49. Part 2, p. 208. It has been pointed out on behalf of plaintiff by Mr. Banerjee that this' written statement is signed by Mr. Bepin Chandra Mullick, a well known advocate of this Court, whose probity cannot be questioned, and it is argued that from the passage of the written statement just quoted it is manifest that the kabuliyat of 1st November 1918 was executed by the company with a view to induce the Raja of Pachete to desist from bringing a suit for eviction against the company. It is clear from this passage of the written statement which in our view must be taken to represent the true state of things that the company executed the kabuliyat as a consideration for the abandonment of the claim of Raja of Pachete to evict. It is argued for respondent by Mr. Das that the passage in the written statement just referred to above (Part 2, p. 206, para. 8) is not open to the construction that there was an actual threat by the Raja to evict but that the company might have believed that the Raja was threatening to evict. We are unable to accept this construction.

50. In our view what Mr. Mullick meant was that the Raja denied the title of Thakur and the Shebaitis in the underground rights and threatened to evict and thereupon the defendant company took settlement of coal mines and coal mining right from the Raja. The learned Counsel for the appellant has drawn our attention to the recital of the written statement in a judgment in suit No. 1 of 1927 and 45 of 1926 in which it is stated that the Raja of Pachete within whose zamindari the mouza Manoharbahal is situate denied the title of the Thakurs to the sub soil of the mouza and threatened to evict the company whereupon the company was compelled to execute the kabuliyat of 1st November 1918: see p. 226, Part 2 lines 20 to 30. As the said written statement

has not been put in it is doubtful if the recital of the written statement in the judgment in a suit not inter partes can be admissible in evidence. Our conclusion is based on the construction of the written statement filed in Ghati's suit (Ex. 9). At the time of execution of this kabuliyat there was a doubt as to the title of the Thakurs in the underground rights seeing that the view that prevailed was that the title to the underground rights was in the proprietor of the soil, and the Raja as well as the company honestly believed that title to the same was in the Raja. There was the thak statement which was equivocal; there was the earlier register under Act 7 of 1876 of revenue paying lands in which mouza Manoharbahal was shown as appertaining to the Raja's zamindari. There was on the other hand the register of revenue free lands which referred to the list of Baze zamin lands of 1178 B.S., and this kabuliyat was executed with a view to the settlement of doubtful rights. The kabuliyat was a carefully considered document and was executed after advice had been taken by the company from Messrs. Orr, Dignam & Co., a well known firm of solicitors in Calcutta: see p. 45, line 16, part 1.

51. It has been argued for the respondent that the consideration for the deed must appear on the face of document itself, and that it is not permissible to rely on external evidence showing that the real consideration for the kabuliyat, of 1st November 1918, was a settlement of doubtful rights. We are unable to accept this contention of the respondent. We think oral evidence can be given to show what the real consideration was for the kabuliyat: see *Crears v. Hunter*²⁷ In our opinion the settlement of doubtful claim and the

²⁷(1887) 19 QBD 341

forbearance of the Raja to sue to evict the company was sufficient consideration for the kabuliyat of 1st November 1918. The facts and circumstances of the present case fall within the rule of law laid down by Bowen, L.J. as he then was in the case of *Mills v. New Zealand Alford State Co*²⁸. in the following passage. He says this:

It seems to me that i an intending litigant bona fine forbears a right to litigate a questions of law or fact which it is not vexatious or frivolous to litigate he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defense: and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and made the concession. Otherwise you would have to try the whole cause to know if: the man had a right to compromise it, and with, regard to questions of law it is obvious you could never safely compromise a question of law at all.

52. These observations of Bowen, L.J., have been approved by the Judicial Committee in the more recent case of *Jayawickreme v. Amarasuriya*²⁹ Lord Aktinson in delivering the judgment of the Judicial Committee remarked in the game case:

The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she however mistakenly bona fide believed in its

validity. Blackburn, J., in *Callisher v. Bischoffsheim*³⁰ pointed out that in *Cook v. Wright*³¹ it was decided that even if the defendant actually knew that the plaintiff's claim which was compromised was invalid, yet the compromise of it was enforceable; and it was in the former case decided that the compromise of a disputed claim made bona fide is a good consideration for a promise, even though it ultimately appears the claim was wholly unfounded.

53. This kabuliyat is a binding agreement and its terms must govern the rights of the parties. This kabuliyat was really a modification of the lease of 25th January 1912 in favour of Radhabullav. It is argued for the appellant that if this kabuliyat is binding no question of the estoppel of the tenancy ceasing by reason of eviction by title paramount really arises. It is said that by the kabuliyat of 1918 the company contracted themselves out of their rights to cease to pay rent on eviction by title paramount. Title or no title the company made themselves liable to pay at the reduced rate of ₹ 2 per ton. This the company did deliberately with their eyes open. It has been contended for the respondent that as there was no agreement to continue to pay loyalty whether the company was in possession or not the kabuliyat is of no assistance to the plaintiff on this part of the case. We cannot accept this contention. The company bargained with 2 sets of persons both claiming underground rights irrespective of title. The company had already attorned to the Thakurs when the kabuliyat of 1918 was executed. They were also liable to pay rent to the Thakurs, and on defaulting to pay that rent the Thakurs had to bring the suit for rent

²⁸(1886) 32 Ch D 266

³⁰(1870) 5 QB 449

²⁹(1918) AC 869

³¹(1861) 1 B & S 559

which has been dismissed by the Privy Council. When the kabuliyat of 1918 was executed the company knew perfectly well that they would have to pay rent to both sets of persons and they did not mind doing so long as coal was "booming". We are therefore of opinion that in the circumstances of the present case the plea of eviction by title paramount is not available to the respondent company. The learned Counsel for the respondent has relied very strongly on the case of *Ram Chandra v. Promothanath*³² in support of the proposition that even if there is an agreement to pay rent whether the lessor has title OR has no title there will be suspension of rent if there is eviction by title paramount. The distinguishing features between that case and the present is that in that case the lessor was a party to the suit by the person claiming title paramount and in such a suit it was held that the lessor had no title In such state of facts it was held that it is open to the tenant to prove a subsequent cessor of the landlord's title, and that one way in which the tenant can show that the title has determined is by proving an eviction by title paramount or the equivalent to such an eviction, Besides in that case there was no agreement between the lessor and the lessee that the lessee would go on paying rent whether the lessor's title is established or not.

54. Mr. Bose who opened the case for the appellant has relied on the recent decision of the Judicial Committee in the case of *Currimbhoy v. Critts*³³ and he argued that this case supports the position that the lessee is liable to pay rent even if the lessor ceases to have title if the lessee with eyes open deliberately enters into an agreement to the effect that rent would be paid irrespective of the question of title to the rent land. Reference in particular is made to a passage at the bottom of p. 304 and the top of p. 305 (of 60 I A). It was held in *Currimbhoy v. Critts*³⁴ that in a suit for ejectment defendants in possession as assignees from defendants who the plaintiff has put into possession under an agreement for a lease cannot rely in defence upon a lease which they

obtained from cosharers with the plaintiff after the assignment, first because their possession is referable to that given to the assignors, and secondly because Section 116, Evidence Act, precludes them from disputing the plaintiff's title Without first restoring possession. In *Currimbhoy v. Critts*³⁵ as in the present leases were taken from persons who had title as also from those who had no title, it was held that Section 116, Evidence Act, precluded the lessees from disputing the lessor who has put the lessee in possession without first restoring possession.

55. The objection of defendant 2 is that there should be no decree against him as he is not bound by the covenant in the kabuliyat of 1918 as that is not a covenant running with the land and does not bind the assignee. There is no substance in this contention as rent issued out of land and any covenant concerning rent of the demised premises is a covenant which touches the land or runs with the land. If the covenant to pay rent whether there is title in the lessor or not is binding on the original lessee the covenant being one which runs with the land can similarly be enforced against the transferee of the lease. Summarising our conclusions we hold that the title in the underground rights is not in the plaintiff, (2) but that the defendants are estopped from denying the plaintiff's title, (3) that estoppel still continues having regard to the terms of the kabuliyat of 1st November 1918.

56. The result is that this appeal is allowed and plaintiff's suit is decreed in full. With regard to costs as plaintiff has failed on the principal issue of the title he will get half his

³²1922 Cal 237

³⁴1983 PC 29

³³1983 PC 29

³⁵1983 PC 29

costs throughout.

Patterson, J.

57. I agree.

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