PATNA HIGH COURT

Subodh Gopal Bose

Vs

Province of Bihar

A.F.O.O. No. 303 of 1949

(Reuben and Das, JJ.)

16.12.1949

JUDGMENT

Das, JJ.

1. This is an appeal from an order dated 21st September 1949, of the learned Subordinate Judge of Sasaram, rejecting an application for an ad interim order of injunction made by the plaintiff of Title Suit No.51 of 1949 pending before the said Subordinate Judge. The plaintiff-petitioner is the appellant before us. The respondents, who were defendants in the action, are (1) the Province of Bihar, (2) the Collector of Shahabad, (3) the Additional Sub- divisional Officer, Sasaram and (4) Dalmia Jain and Co. Ltd.

2. The material facts are the following: The appellant styling himself as the proprietor of Kuchwar Lime and Stone Company (which company has to be distinguished from Messrs. Kuchwar Lime and Stone Company Limited, now in voluntary liquidation) brought the suit for a declaration that he is entitled to quarry lime Stone and manufacture lime from certain properties known as upper Murli hill and lower Murli hill, with details of area, boundaries, etc., mentioned in a schedule appended to the plaint, and for a permanent injunction restraining the respondents from dispossessing, or disturbing the possession of, the plaintiff from the said properties. The allegations made by the appellant in his plaint were of the following nature. It was alleged that with regard to upper Murli bill, which has an area of about 137 acres, the appellant was the local agent of Messrs. Kuchwar Lime and Stone Company Ltd., now in voluntary liquidation (hereinafter to be referred to as the lessee company for brevity and convenience). On let April 1928, the Secretary of State of India in Council, the then competent authority, gave a lease to the lessee company in respect of the said 137 acres, being the upper portion of Murli hill, with amongst other rights, the right to quarry lime stone and convert it into lime and do all acts necessary for the extraction of the stone or the manufacture of lime including the erection on the land leased of buildings and plants required for these purposes. There were various other clauses in the lease providing for the payment of rent and royalty with which we are not at present concerned except one clause, clause 20. This clause was a renewal clause and read as follows: -

"That on the expiration of the period of this lease the lessee may, if it has duly observed

all the foregoing conditions, have a renewal of the lease on terms to be agreed upon by the Collector and the lessee, subject to the approval of the Commissioner."

The lease was for a period of twenty years commencing from 1st April 1928, and ending on 31st march 1948. The lessee company went into voluntary liquidation in 1933, and on 30th September 1933, there was a deed of agreement between the liquidators and the appellant, the liquidators being Messrs. Lovelock and Lewes, Chartered Accountants of Calcutta. This agreement of 1933 does not appear to have been printed in the paper book, but was the subject-matter of protracted litigation resulting in the decision of their Lordships of the Judicial Committee in *Secretary of State v. Kuchwar Lime and Stone Co. Ltd.*[1], In the lease of 1928, there was a clause against transfer or assignment without the assent of the Board of Revenue, and the penalty for an infringement of this clause was forfeiture of the lease. The agreement of 1933, which the lessee company made in favor of the appellant, was treated by the Board of Revenue as a sublease without the Board's assent, resulting in forfeiture of the lease. The lessee company then brought a suit in 1934 (Title Suit No.39 of 1934) against the Province of Bihar and its officers. This litigation ultimately went up to the Privy Council, the decision of which we have already referred to above. Their Lordships of the Judicial Committee held that the deed of agreement dated 30th September 1933, in favor of the present appellant did not constitute a sub-lease, but created an agency in favor of the appellant with regard to certain matters coupled with an interest in the property. As, however, the document was not registered, there was no effective transfer of any interest in the property. Therefore, the document did not, in law, constitute an infringement of the clause against assignment or transfer. The agreement of 1933 was renewed in favor of the appellant in 1943, and the appellant continued as the local agent of the lessee company until 29th February 1948. There is an endorsement at the foot of this agreement of 1943 which states that the agreement has been renewed for a term of three years with effect from the date of its termination; therefore, the allegation of the appellant is that he still continues as the local agent of the lessee company and is entitled to quarry lime stone in upper Murli hill. We may here state that Mr. P.R. Das appearing for the appellant based the case of the appellant with regard to upper Murli hill, not on any legal title acquired by the deeds of agreement; for, it is obvious that no legal title with regard to any interest in the leasehold property itself passed under the said deeds of agreement, which were not registered. Mr. Das has referred to the title, if any, of the appellant with regard to upper Murli hill as an equitable title; in other words, he has contended that with regard to upper Murli hill the appellant may be a person in possession without legal title, but he is entitled to the protection of his possession against another trespasser. We have mentioned this aspect of the case at the very outset, because this is the principal point to be considered in connection with upper Murli bill. We shall advert to the details of the argument on this point in due course, Thus though the appellant said in his plaint that he was a local agent of the lessee company in respect of upper Murli bill, his claim, was not based on mere agency. It is urged that the averments made in the plaint show that the appellant has been in possession of upper Murli hill for a number of years-may be without title-and is entitled to the protection of his possession against another trespasser.

3. With regard to lower Murli hill, the position is somewhat different. The case of the appellant with regard to lower Murli hill, which has an area of about 250 bighas, is that the appellant is the owner of the entire surface land having purchased the right of the tenants or the maliks therein. The surface of lower Murli hill appertains to two villages Baknaur and Samhauta. It is alleged that between the years 1908 and 1928 the lessee company purchased the rights of the tenants and

the maliks in the surface land. This was done because there was some opposition by the tenants to possession of the lessee on the strength of two leases made in 1908 in favor of Octavius Steel Company, the then Managing Agents of the Kuchwar Lime and Stone Company Ltd. Those two leases were also for twenty years and related, one to upper Murli hill and the other to lower Murli hill. On 1st April 1928, the lessee company got two fresh leases: the one relating to upper Murli hill, which we have already mentioned the other relating to lower Murli hill, which contained similar clauses with one material difference. The lease relating to lower Murli hill made no reference to the surface land, but gave merely the right to the lessee to quarry lime stone and convert it into lime. When, therefore, the lessee met with opposition from the owners of the surface land, it purchased the rights of such owners. On the same day, on which there was the deed of agreement in favor of the appellant (namely, Both September 1933) by which the local agency was created, there was a sale by the lessee company of its goodwill, etc. and all the movable and immovable properties of the lessee company, set forth in Schs. A and B, for a consideration of Rs.35,000. This deed of sale was duly registered. Now, Schedule A, it is stated, related to the rights which the lessee company had acquired over the surface land of lower Murli hill, namely, the rights of the tenants and maliks therein. Therefore, with regard to lower Murli hill, the claim of the appellant is a two-fold claim. Firstly, the appellant claims that as owner of the surface land he cannot be dispossessed or evicted. Secondly, it is claimed, on the strength of certain entries in the Fardreyaz, of villages Baknaur and Samhauta, that the tenants have the customary right to quarry limestone and manufacture lime for sale, and those rights the appellant has now got by reason of his purchase. As the respondents wish to dispossess the appellant from the property and deprive him of his right, the appellant seeks an order of interim injunction.

4. On behalf of the respondents it is alleged that the two leases in favor of the lessee company expired by efflux of time on lust March 1948, and thereafter its lessee company neither had an absolute right of renewal, nor was it granted any renewal of the lease. The present appellant unsuccessfully tried to get leases in his favor; but on 10th August 1949, the Province of Bihar made two leases in favor of respondent 4, Dalmia Jain and Co. Ltd., in respect of both upper and lower Murli hill. It is alleged that respondent 4, has taken possession and begun quarrying lime stone at least on upper Murli hill. As to local agency, the respondents allege that such agency terminated with the determination of the lease in favor of the lessee company, if not earlier, and in any view the agent has no right to sue on behalf of the principal. It is further alleged that with the determination of the lease in favor of the lessee company the appellant has no title nor possession. As to lower Murli hill, it is not admitted that the entire extent of the surface land is owned by the appellant. It is denied that the tenants have any customary right to quarry lime stone and manufacture lime in derogation of the right of the Province of Bihar. It is contended that the appellant in any case is estopped from saying that the Province of Bihar had no right to grant a lease for quarrying lime stone in lower Murli hill, even though the surface land belonged to, or was in possession of, others. It is alleged that the Province of Bihar has the right to break up the surface, if necessary, in order to reach the underground lime stone. On the question of the issue of an ad interim injunction, the case of the respondents is that the appellant has made out no prima facie case, either on the question of title or balance of convenience.

5. The learned Subordinate Judge in the order complained against accepted the contention of the respondents and held that (1) the plaintiff-appellant failed to make out a case of prima facie title with regard to either upper or lower Murli (2) the possession of the Province of Bihar was accepted as soon as the leases terminated; and (3) the balance of convenience was on the side of

the respondents.

6. It would, we think, be convenient to consider separately the case of the appellant with regard to upper and lower Murli hill; for, in our view the legal position is not the same with regard to upper and lower Murli hill, It is well settled that before granting a temporary injunction the Court must be satisfied that the plaintiff has a prima facie case; that the Court's interference is necessary to protect him from irreparable or at least serious injury; that the balance of convenience is in favor of the person who asks for the injunction; and that there is no other sufficient remedy open to him by which to protect himself. These principles are in consonance with commonsense and are so well settled that it is unnecessary to cite authority in support of them.

7. Keeping those principles in mind, we proceed to consider the case of the appellant with regard to upper Murli hill. Mr. P.R. Das thus put the case of the appellant: he said that the Province of Bihar accepted rent or royalty from April 1948 to June 1949 from the lessee company, the bills whereof have been printed at pages 85 to 90 of the appellant's paper book (Parts I and It). Mr. P.R. Das contends that there was thus, a case of holding over, and as the lease was a manufacturing lease, there was no proper determination of the lease without the necessary six months' notice, The correspondence between the present appellant and the Province of Bihar or its officers which has been printed at pages in to 141 of the appellant's paper book (parts I and II) and through which we have been taken by learned counsel for the parties, shows clearly enough that the lessee company was allowed to remain in possession only till such time as a final decision was reached by the Province of Bihar with regard to fresh leases. The petition of the present appellant dated 2nd April 1948, shows that a request was made to allow the appellant to proceed with the normal working till a final decision was reached in the matter of fresh leases. The order of the District Magistrate of Shahabad dated 6th April 1948, shows that the lessee company was allowed to continue the work until further orders were passed by Government. Obviously, therefore, the agreement between the parties was that the lessee company, or the present appellant as the agent of the lessee company, would continue the work of quarrying till such time as the Province of Bihar took a final decision on the question of fresh leases. Section 116, Transfer of Property Act in terms states that unless there is an agreement to the contrary, assent by the lessor to continuance of possession and acceptance of rent from the lessee after the expiry of the lease would constitute holding over. Here, there is an agreement as to the continuance of possession till such time as a final decision is reached by the Province of Bihar regarding fresh leases. It is obvious, therefore, that there is no holding over. When this was brought to the notice of Mr. P.R. Das, he conceded with his usual candour that he could not sustain the plea of holding over by the lessee company.

8. He urged, however, very strenuously the case that the lessee company was entitled to a renewal under the clause of the lease which I have mentioned that it was for the lessor to give the lessee an opportunity of exercising the option of renewal, and in the absence of such opportunity being given, any fresh lease made by the Province of Bihar would be void; and therefore, the position of respondent 4, Dalmia Jain and Co., Ltd., was no better than that of a trespasser; that, in tine, the appellant may be in possession without any legal title, but he is entitled to protection of his possession as against another trespasser. As an abstract proposition of law, we do not think that there is any doubt that possession is a good title against all but the true owner, and entitled the possessor to maintain an action in ejectment against any person other than the true owner who dispossesses him: *Asher v. Whitlock*[2], and *Perry v. Clissold*[3], Learned counsel for respondent

4 referred to Section 9, Specific Relief Act, and contended that the only remedy of a trespasser was under that section. In *Sahodra Suer v. Gobardhan Tewari*[4], it was held by a Division Bench of this Court that previous possession even for a period short of the statutory period of twelve years entitles the plaintiff to a decree for possession in a suit against a tree-passer, and the view of the Calcutta High Court in *Nisa Chand v. Kanchiram Bagani*[5], with regard to remedy under Section 9, Specific Relief Act, was not accepted.

9. The question here is if respondent 4, who now holds a lease from the Province of Bihar, is a trespasser. It is not seriously disputed that with regard to upper Murli hill at least, the Province of Bihar has the right to grant a lease; but it is contended that the lease in favor of respondent 4 is void, because the lessee company was not given an opportunity to exercise the option of taking a renewal of the lease. Mr. P.R. Das has relied on *Hemanta Kumari v. Sefatulla Biswas*[6], and *Prodyot Coomar v. Maynuddin Mia*[7], for this part of his argument. He has also drawn our attention to the affidavit of the appellant, dated 19th September 1940, (printed at pp.48 to 54 of the appellant's paper book, Parts I and II) in para 10 of which it was stated that the lessee company at first made an application for renewal of the lease in the name of the appellant and thereafter applied for renewal in their own name. From the letter of the appellant, dated 15th February 1919, it appears that the lessee company requested Government to grant a fresh lease to the appellant on the expiry of the two leases: this request was, however, made in 1944-some four years before the expiry of the leases. On behalf of the respondents, it has been contended that-(1) from the circumstances of the ease, and inference of waiver by the lessee company should be drawn, and (2) under Section 205, Companies Act, it was not open to the lessee company to engage in. a new undertaking by renewal of the lease. In reply Mr. P.R. Das has urged that there cannot be any inference of waiver in respect of the renewal clause, merely because in 1944, four years before the right of renewal accrued, the lessee company had requested Government to grant a lease to the appellant; and further more, the averment that the lessee company had asked for renewal has not been denied. He has also referred to Section 212 (1) (b) read with Section 179, Companies Act in support of his argument that the lessee company could ask for renewal, and such renewal would not in any way contravene the provisions of Section 205, Companies Act. Learned counsel for the Province of Bihar said that the renewal clause was uncertain and not enforceable. For the purpose of the present appeal, it is not necessary to decide these contentions and counter-contentions.

10. There is another aspect of the case which has a more direct bearing on this question. In the suit the main relief which the appellant has claimed (as disclosed by the plaint) is a declaration that the appellant is entitled to quarry lime stone and manufacture lime from the Murli hill. As a mere local agent of the lessee company, the appellant has no such right of suit. An agent who has some interest in the property - may be a qualified interest - can maintain an action to protect that interest (see *Whittingham v. Bloxham*[8], In Smith's Leading Cases, Vol.II, p.395 (12th Edn.) the following. statement of the law is made:

> "But it is not merely in cases where the agent has contracted in his own name for an unnamed principal that he has a right, at law, to sue upon the contract, when he has made a contract in the subject matter of which he has a special property, he may, even though he contracted for an avowed principal, sue in his own name."

In the case before us, the appellant did not get an effective transfer of any interest in the property

of upper Murli hill: he is, therefore, in the position of a trespasser. It is well-settled that the law does not lean in favor of a tree. passer, and the possession of a trespasser, for which he can seek protection, is ordinarily confined to what is actually possessed, that is, any limestone actually extracted, and does not extend to what he may take in future by continuing in trespass. Prima facie, this is all the protection to which he is entitled. To grant an injunction in such a case would be tantamount to giving a right both present and future, to a trespasser, which he cannot legally claim.

11. There has been some argument before us if respondent 4 has taken possession of upper Murli hill, either after the lease of 10th August 1949, or shortly before it. The learned Subordinate Judge found that possession reverted to Government sometime after the expiry of the lease. That finding has been challenged before us. We have scrutinised the correspondence at pp.113 to 141 (already referred to) on which the learned Subordinate Judge relied, and, in our view, though the quarrying operations might have been stopped for some time, the appellant or the lessee company did not make over possession to anybody. It is possible, however, that on some occasions the men of Dalmia Jain and Co., Ltd., did some work on upper Murli hill. Whether they approached by an old District Board road, the existence of which has been disputed before us, or went over the surface land of lower Murli bill in order to reach upper Murli hill cannot be decided on the materials before us.

12. In view of the scope of the suit, the question is really one of right to quarry lime stone on upper Murli hill, and there is no dispute as to possession or removal of limestone actually extracted. For the reasons mentioned above, we do not think that the appellant as a trespasser is entitled to ask for an injunction for the protection of a right which he cannot legally claim. The claim for an injunction with regard to upper Murli hill was, therefore, rightly rejected.

13. The claim of the appellant with regard to lower Murli bill stands on a different footing. On the materials placed before us the appellant has made out a prima facie case of title to the surface land of lower Murli hill. The sale-deed in favor of the appellant dated 30th September 1933, printed at pp.55 to 70 of the appellant's paper book, shows that the rights of the tenants and maliks which the lessee company bad acquired between the years 1908 and 1928 were transferred to the present appellant. In the proceeding under Section 144, Criminal Procedure Code, which was fought between the parties, it was admitted that the surface right of lower Murli bill was held by the present appellant (vide the statement in the judgment of the Additional District Magistrate, Shahabad, printed at p.101 of the repondents paper book). As to the right of the tenants to quarry limestone and manufacture lime in lower Murli hill, our attention has been drawn to the "Fard-reyaz jungle" of villages Baknaur and Samhauta. The entries in the Fard-reyaz have been made in the form of questions and answers. Question 13 in the Fard-reyaz of village Baknaur was to the following effect:

> "Have the raiyats of the village any right to collect lime, lac or other jungle products 7 If so, what right?"

The answer is given as follows:

> "They can prepare lime from the jungle in the maha 1 for agricultural purposes. Nothing is realised for this. If the lime is prepared for sale, fee is realised according to the schedule

bearing No.279, dated 14th December 1904. Settlement is made of the lac jungle."

The schedule of fees shows different rates for limestone, etc. There is a similar entry with regard to village Samhauta also. In the Fardreyaz of Murli Pahari which related to upper Murli hill, it is stated that the raiyats cannot get stones from the hill as it has been let out on thica lease. There is no similar entry with regard to lower Murli hill. Learned counsel for the respondents has drawn our attention to register D of tauzi No.4769 of the Banskati Mahal in the remarks column of which it is stated that this estate consists of incorporeal rights in the mauzas mentioned below as per notification No.1457 dated 6th march 1909. The nature of these incorporeal rights has been referred to at p.127 of the District Gazetteer of Shahabad (Edn.1924). It is stated there that the Banskati Mahal is an estate of an exceptional order as Government does not possess any proprietary rights in the land, but only incorporeal rights to certain spontaneous products, fuel, grass, minerals and the like. The history of these incorporeal rights is also mentioned. Similar observations occur also in the final report on the survey and settlement operations in the district of Shahabad, 1907-1916. There has been some argument before us if the right is merely to levy the banskati dues, such as the right which Raja Shah Mal and Harbans Rai, who held the mahal previously, exercised, or the right to extract minerals. That is a question which need not be considered at this stage. It is clear to us that the appellant has made out a prima facie case of title, both with regard to the surface land of lower Muth hill and the right to quarry lime stone and manufacture lime in the area of lower Murli hill. Learned counsel for the respondents has, no doubt, contended that the effect of the entries in the Fard-reyaz is not what is contended for by the appellant. He has further contended that the appellant is estopped from saying that the Province of Bihar had no right to quarry limestone in lower Murli hill. It is not necessary to decide these questions at this stage. It is sufficient to state that prima facie the appellant has made out a case with regard to lower Murli hill, both as to title and the serious injury which is likely to follow if no injunction is granted.

14. I may shortly refer to one other argument of Mr. Sarjoo Prasad appearing for respondent 4. He has contended that even if the surface land of lower Murli hill is owned by the appellant, the Province of Bihar and the lessee under the Province of Bihar have a right to reach the mineral by breaking up the surface. He relied on the statement of the law in Para.1419 of Halsbury's Laws of England, vol.22, Edn.2, at p.661. The statement is as follows:

> "Upon the severance of mines from the surface, whether by grant or exception, working powers and liberties are usually expressly granted or reserved, but in the absence of express provision, there is incident, by implication of law, to the ownership of mines a power to get and carry away the minerals; There is prima facie incident to the ownership of mines, power on the part of the mine-owner to enter upon the surface, to dig pits and get the minerals."

This is a statement of the law as between grantor and grantee. Mr. Sarjoo Prasad has not been able to give us any authority which would show that a person, who is not a grantee but a complete stranger, has a right to go upon somebody else's land in order to reach the minerals underneath.

15. As to the possession of the surface land of lower Murli hill, there is very little doubt. The appellant is in possession and has kilns, buildings, bungalows, dwelling houses, tram lines,

railway sidings, fixed plant and machineries, etc., thereon. It is obvious that very serious injury would be caused to the appellant if he is asked to remove them pending the hearing of his suit. It would be irreparable injury for the avoidance of which he is entitled to ask for an order of injunction-both on the grounds of prima facie title and balance of convenience.

16. A reference has been made before us to certain notifications made by the Province of Bihar under the provisions of the Land Acquisition Act which seem to show that the Province of Bihar is proposing to acquire the surface land of lower Murli hill. It is stated that the notifications constitute a breach of the order of this Court, date 24th November 1949, by which it was directed that the status quo would be maintained pending the hearing of the appeal. Mr. P.R. Das has stated that his client, if so advised, would institute proceedings in contempt. We do not think it proper to say anything about these land acquisition proceedings at this stage, because we have not sufficient materials before us; nor should we like to make any remarks which might prejudice the parties with regard to any future proceeding. Under Section 56 (d), Specific Relief Act no injunction can be granted to interfere with the public duties of any department of the Provincial Government. We do not know whether these land acquisition proceedings are in the performance of public duties or not. Therefore, the order which we are proposing to pass in this appeal will not affect these land acquisition proceedings.

17. For the reasons given above, we would allow this appeal in part to the extent indicated below. The prayer for an order of injunction in respect of upper Murli hill is refused; but the appellant will get an order of injunction, pending the decision of his suit, restraining the respondents from dispossessing, or disturbing the possession of the appellant in respect of lower Murli hill. This order will not, however, affect the land acquisition proceedings, in respect of which the parties will be at liberty to take such steps as they may be advised to take. We express no opinion as to the propriety or impropriety of instituting and continuing such land acquisition proceedings during the pendency of the suit, and in spite of the order of the Bench, dated 24th November 1949.

18. It is unnecessary to put the appellant on terms in view of the order which we are passing. We are giving no decision as to the existence or otherwise of an old District Board road to reach upper Murli hill. But under the order of injunction which we are passing, the respondent will have no right to go to upper Murli hill over Any party of the surface land of lower Murli hill owned and possessed by the appellant. In the circumstances of the case, the parties will bear their own costs of the hearing in this Court as also in the Court below.

19. In conclusion we should make it clear that the observations which we have made should not be construed as a final or concluded decision on any of the questions of law or fact which will arise for decision in the suit. The observations have been made with a view to determining the question of prima facie title and the balance of convenience only, and for no other purpose.

Order accordingly.

Cases Referred.

165 I.A. 45: (AIR(25) 1938 P.C.20)
2(1865) 1 Q.B. 1: (35 L.J.Q.B. 17)
31907 A.C. 73: (76 L.J.P.C. 19)

42 Pat. L.J. 280: (AIR(4) 1917 Pat.546)
526 Cal. 579 (3 C.W.N. 568)
637 C.W.N.9: (AIR (20) 1933 Cal. 477)
7AIR (25) 1938 Cal. 724: (68 C.L.J. 435)
8(1831) 172 E.R. 841: (4 Car. and P.597)