Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kumar Hari Narayan Singh Deo Bahadur, since deceased (now represented by Kumar Jyoti Pershad Singh Deo Bahadur) v. *Sriram Chakravarti, since deceased, and others, from the High Court of Judicature at Fort William in Bengal; delivered the 7th May*, 1910.

Present at the Hearing:

LORD MACNAGHTEN.
LORD COLLINS.
SIR ARTHUR WILSON.
MR. AMEER ALI.

[*Delivered by Lord Collins.*]

The Appellants are the Rajah of the Pachete Estate and the Manager thereof under Act VI. of 1876.

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

[20] P.C.J. 258—L & M.—125—26/4/10. Wt. 98.

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

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

The Subordinate Judge finds that there is no evidence to show that the Plaintiffs 1 and 2 were aware of the exercise of any underground rights before 1898, when steps were immediately taken to stop it. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22. 15. 6.

by the Goswamis were put in, in one of which they were described as "cultivators," in the other as "britti holders."

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

> "When such tenures are created," says Pargiter J., "the Zamindar invests the tenure-holder with every right that can appertain to him short of the quit rent due to the proprietorship; the tenure is permanent, heritable, and transferable, its rental is as fixed as the Government revenue that the Zamindar pays; and the tenant can do what he likes with it short of altogether destroying it; in short it has all the rights of proprietorship except the name.... In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them because he has no reversion and no right to enter the land for that purpose.... In my opinion the underground rights belong to the permanent tenures."

No decided case was cited in support of the view of the High Court, which seems practically to ignore the distinction between the mere tenure holder and the Zemindar, and the Law as laid down in the passage cited from Mitra's Land Law of Bengal does not appear to quite accord with the view of Mr. Field in his admirable introduction to the Bengal Regulations, p. 36, where he says:— "the Zemindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zemindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship." It would seem, therefore, that Mr. Field did not

regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals. In the case of leases under the existing law of 1882, no right arises for a lessee to work mines not open when the lease was granted. The learned Subordinate Judge inferred from the smallness of the *jumma* fixed that only the surface rights and nothing more were intended to be let out to the Gossains. On the whole it seems to their Lordships that the title of the Zemindar Rajah to the village Petena as part of his zemindary before the arrival of the Goswamis on the scene, being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced. Their Lordships will humbly advise His Majesty that the decision of the High Court be set aside, and that of the Subordinate Judge restored with costs here and below.

In the Privy Council.

KUMAR HARI NARAYAN SINGH DEO BAHADUR

v.

SRIRAM CHAKRAVARTI AND OTHERS.

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