

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raja Durga Prasad Singh v. Rajendra Narayan Bagchi, since deceased, and others, from the High Court of Judicature at Fort William in Bengal (Privy Council Appeal No. 59 of 1912); delivered the 3rd November 1913.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

This is an Appeal by Raja Durga Prasad Singh, the Plaintiff, from a decree, dated the 26th August 1909, of the High Court at Calcutta, which varied a decree, dated the 27th April 1907, of the Subordinate Judge of Manbhum in a suit for arrears of rent, cesses, and interest, which was brought on the 15th August 1906, in the Court of the Subordinate Judge of Manbhum, upon a mukurari kabuliyat of the 3rd December, 1894.

The kabuliyat was executed by Rajendra Narayan Bagchi, now dead, who, with others who derived title through him, was a Defendant to the suit. The pottah, corresponding to the kabuliyat, was executed by Raja Jaimangal Singh, now dead, the original lessor, whose interest vested before suit in the Plaintiff. In

the kabuliyat, Rajendra Narayan Bagchi acknowledged having received from Raja Jaimangal Singh a pottah corresponding to the kabuliyat, and stated that "On the agreement " that the heirs and representatives of both " of us, yourself and myself, shall be bound by " all the terms and conditions of the pottah " and this kabuliyat, I execute this mokurari " maurasi kabuliyat." The pottah has not been put in evidence in this suit, but it has not been suggested by either side that it differs in any material respect from the kabuliyat or that anything turns upon the construction of the pottah.

The material words of the kabuliyat so far as it affects the matters in issue in the suit are as follows:—

"I, having applied to get from you a settlement of the rights of cutting, raising, and selling, etc., the coal underneath the 400 bighas of land described in the schedule below, within mouzah Dobari, in pergunnah Jharia, recorded in towzi No. 8 of the district Manbhum Collectorate, and which is within the zamindari owned and possessed by you in ancestral right, and you having granted my application, I hereby execute to you a mokurari permanent maurasi kabuliyat for 400 bighas of land as per boundaries below, within the said mouzah and which will be enclosed by me on putting up masonry pillars at my own cost and according to demarcation made by you for your taking from me Rs. 8,400 as salami, and fixing an annual mokurari rental of Rs. 2,800 for the rights in coal under the said 400 bighas of land; and I agree that year after year and according to the instalments, I shall pay to you into your zamindari kachari, every year in three instalments, the fixed rental and also the road and public works cesses and other taxes and cesses payable by me according to law, that may be imposed in future by Government, namely, in Sraban of each year, Rs. 900, in Aghran Rs. 900, and in Chaitra Rs. 1,000 out of the rental fixed; and after taking dakhilas for the same according to the usage in vogue in your serishta, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 bighas by cutting, raising and selling the same, after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignment of the same according to pleasure. The rental fixed shall never on any account be varied,

. . . If I fail to pay any instalment of the rent or cesses, then for the unpaid instalment money, I shall pay interest at the rate of rupee one per cent. per mensem from the date of the lapsed instalment till the date of payment. If I fail to pay six consecutive instalments of the rent or cesses, &c., then on the next date of instalment you will be entitled to bring the settled coal lands into your khas possession. . . . According to this kabuliyat I become vested with the right and title to the coal under the settled land from to-day. I shall have to pay nothing for the year 1301 B.S. as rent or cesses, &c. From the year 1302 B.S., I shall continue to pay the entire rent Rs. 2,800 by proper instalments. You are not liable to me for the return of the above amount of selami (premium) or for any other matter."

The schedule which is referred to in the kabuliyat is as follows :

SCHEDULE OF THE BOUNDARIES.

"On the south—boundary line of mouzah Fatehpur, as per thak.

"On the west—boundary line of mouzah Jharia Khas, as per thak.

"On the east—border of the 100 bighas of land settled with Gopal Krishna Roy and others and the Chatkari jore.

"On the north—boundary line of mouzah Bherakata, as per thak, and the Chatkari jore.

"Right in the coal underneath the 400 bighas of land, within these boundaries."

The Plaintiff in his plaint alleged that default had been made in the payment of instalments of the fixed rent and of the cesses, and claimed a decree for Rs. 23,868 in respect of principal and interest and further reliefs. So far as is now material, the Defendants to this suit by their written statement alleged that the coal underneath 400 bighas of land in mouzah Dobari had been demised by Raja Jaimangal Singh to the Defendant Rajendra Narayan Bagchi ; that they had not been given possession of the underground rights of the 400 bighas of land ; that they were entitled to an abatement of the rent which had been fixed by the kabuliyat ; and that they had made tenders of the rent which, according to them, was due, and consequently denied that the interest which was

claimed by the Plaintiff was payable. Their tenders were based upon a reduced rent. It appears that the grounds upon which the Defendants alleged that the Plaintiff was not entitled to the rent fixed by the kabuliyat, and was entitled only to a reduced rent, were that Raja Jaimangal Singh had, according to them, in 1898 reduced the fixed rent from Rs. 2,800 a year to Rs. 2,000 a year on the representation of Rajendra Narayan Bagchi that the coal which had been demised was of inferior quality and could not be sold as steam coal, and that under part of the land no coal was found ; and that by an injunction which was decreed on the 15th December 1902, in a suit which had been brought by the present Plaintiff on the 26th April 1902, the right of the Defendants to work coal under the demise was restricted to an area of 274 bighas 4 cottahs. The Defendants further alleged in their written statement that they had paid the cesses direct into the Collectorate, and denied that the Plaintiff was entitled in law to get any cesses. The Defendants claimed to set off *pro tanto* certain costs and interest thereon which had been allowed to them as against the Plaintiff by the decrees in the suit of the 26th April 1902.

The Subordinate Judge of Manbhum held in this suit that the rent fixed by the kabuliyat had been reduced by Raja Jaimangal Singh to Rs. 2,000 a year, and that the Defendants were not entitled to any further reduction. He also held that the Defendants had tendered the amounts of the reduced rent, and consequently that the Plaintiff was not entitled to interest in respect of the amounts so tendered. The Subordinate Judge also found that the Defendants had paid the cesses direct to the collector, and were not liable to pay them to the Plaintiff. The Subordinate Judge properly decided that

the Defendants were entitled to set off the costs, with interest, awarded in the suit of 26th April 1902. From the decree of the Subordinate Judge each side appealed to the High Court at Calcutta.

The High Court found that the document by which the Defendants sought to prove that Raja Jaimangal Singh had agreed to reduce the rent from Rs. 2,800 to Rs. 2,000 a year was, for want of registration, inadmissible in evidence to vary the terms of the kabuliyat, and that the alleged agreement for reduction of rent was without consideration and was not enforceable. On both points their Lordships agree with these findings of the High Court. There was no reliable and admissible evidence to prove that Raja Jaimangal Singh ever bound himself to accept a reduced rent. The fact that he did for some years accept a reduced rent is consistent with the reduction having been a mere voluntary and temporary abatement.

The High Court having found on evidence not contained in the kabuliyat that the rent of Rs. 2,800 a year had been fixed by Raja Jaimangal Singh and Rajendra Narayan Bagchi on the assumption that within the boundaries specified in the schedule to the kabuliyat there were in fact 400 bighas, concluded that the description by boundaries of the subject of the demise might be disregarded, and that the demise was a demise of 400 bighas, whether 400 bighas were or were not contained within the specified boundaries, and finding on the evidence of an Amin, which their Lordships will later consider, that within the specified boundaries there were not 400 bighas, and that the Defendants were in possession of only 275 bighas 3 cottahs 10 chittaks, the High Court decided that the Defendants were entitled to a proportionate abatement of the fixed rent.

Although, in their Lordships' opinion, the question as to what had been demised in 1894 turned upon the true construction of the kabuliyat, and that construction could not be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence showing that within the boundaries specified in the schedule to the kabuliyat there was not 400 bighas of land, their Lordships consider that it will be satisfactory to ascertain what evidence, if any, there is as to the actual bigha area of land within the boundaries specified in the schedule to the kabuliyat, and how it happened that the right of the Defendants to work coal was, at the time when the rent sued for accrued due, restricted, apparently, according to the High Court, to the coal under 275 bighas 3 cottahs 10 chittaks.

Before the lease by pottah and kabuliyat was made the land within the boundaries specified in the schedule to the kabuliyat had not been measured. There is no evidence to show that the land had, at any time, been measured by, or on behalf of, Raja Jaimangal Singh. The Defendant, Rajendra Narayan Bagchi, in his evidence in this suit, stated, "The 400 bighas were fixed by guess. It was not fixed by any measurement. When I took the settlement (the lease)-it was settled that I would get 400 bighas of land. It was also settled that if the land was found to be less the deficit would be made good." He admitted that some months before the 26th April 1902 he had the coalfield in his possession measured by an Amin, but he stated that he did not remember how much land had been ascertained by that measurement. He said, "I never tried to ascertain the area myself." No evidence has been brought to their Lordships' attention which suggests that Rajendra Narayan Bagchi or any of the other

Defendants ever complained to Raja Jaimangal Singh that they had not been placed in possession of the area of coalfield which had been demised in 1894. Raja Jaimangal Singh, who accepted in 1898 and subsequently a reduced rent, did so on the representation of Rajendra Narayan Bagchi that the coal was of inferior quality and was not saleable as steam coal, and that under part of the lands no coal had been found, and not on any representation or complaint that there were not 400 bighas of land within the boundaries specified in the schedule to the kabuliyat.

On the 26th April 1902, the present Plaintiff brought a suit against Rajendra Narayan Bagchi and others, who are either Defendants to this suit or are represented in title by Defendants to this suit. In his plaint of 1902 Raja Durga Prasad Singh alleged that the Defendants had wrongfully entered upon and worked his coal in mouzah Jharia Khas, and claimed damages and a perpetual injunction restraining the Defendants from cutting and raising the coal in Jharia Khas. In that suit of 1902 a Civil Court Amin was deputed to make measurements and to make a report. He made a report which is dated the 29th September, 1902. It appears from that report that for the purpose of measuring and preparing a map he received but little useful or practical assistance from those who represented the Plaintiff, and that the Defendants pointed out to him the lands of which they alleged that they had been given possession under the demise of 1894. According to the Amin's report the lands so pointed out by the Defendants measured 346 bighas 4 cottahs 4 chittaks, but he reported that the boundaries of the lands which were pointed out to him by the Defendants did not agree with the boundaries as specified in the kabuliyat. In his report the

Amin stated that of the 346 bighas 4 cottahs 4 chittaks, only 257 bighas 3 cottahs 4 chittaks were within mouzah Dobari. It is to be observed that the lands which the Defendants pointed out to the Amin included part of mouzah Jharia Khas, where the Defendants were alleged to have committed the trespass, and it is also to be noticed that the Plaintiff in the suit of 1902 had alleged in his plaint that he believed that the coal in Jharia Khas was of a better quality than the coal which had been demised to the Defendants, and found a ready sale in the market. The Amin prepared a map which was in evidence in the suit of 1902, and is in evidence in this suit. According to his report of 1902, it was not possible for him to lay down on the ground the northern, western, and southern boundaries of the Defendants' holding, as there was no field-book to show the bearing at the station points and the distances of the chain lines. The Amin was examined as a witness in this suit on the 27th March 1907, when he stated that he had made the map by relaying on it the lands of the Survey and the Thakbast map. It is to be observed that the boundaries according to the Survey map and the Thakbast map did not agree. In his evidence given in this suit the Amin stated that the area of the lands lying within the boundaries which were specified in the schedule to the kabuliyat were 275 bighas 3 cottahs 10 chittaks, and that in mouzah Dobari, according to the Thakbast, there are 788 bighas 15 cottahs and 2 chittaks of land. If the statements as to areas, which will later be referred to, contained in the Judgment of the Subordinate Judge in the suit of 1902 and in the Judgment of the High Court in Appeal in that suit, be correct, the Amin must have confounded the areas shown by the Revenue Survey map with the areas shown by the Thakbast

map. No reliable conclusion as to areas can be drawn from the report or from the evidence of the Amin.

The Subordinate Judge in the suit of 1902, in his Judgment of the 15th December 1902, stated that "The Amin's report shows that out of the 400 bighas let out to the Defendants, they are in possession of 346 bighas 4 cottahs and 4 chittaks only. Measuring, according to the Survey map, 86 bighas and 8 cottahs of this fall within mouzah Jharia Khas and Fatehpur, and 2 bighas 13 cottahs and 5 chittaks fall within mouzah Bharakata, and 257 bighas 13 cottahs and 4 chittaks only fall within mouzah Dobari. But measured according to the Thak map, the whole of the land in the Defendants' possession, excepting 1,600 square feet, falls within mouzah Dobari." In that suit the Subordinate Judge found that the Defendants had trespassed on the Plaintiff's coal to the extent of 1,600 square feet. On the 15th December 1902, the Subordinate Judge "decreed that an injunction be issued to the effect that the Defendants do not carry on operations outside mouzah Dobari, as delineated in the map by the Civil Court Amin, according to the Thakbast map, and that the remaining portion of the claim be dismissed." Except that an injunction was granted, the suit was dismissed with costs. Whether intentionally or carelessly it is difficult to say, but the injunction which the Subordinate Judge granted was wider in its operation than was the injunction which had been asked for in the plaint of that suit. The Subordinate Judge should have confined himself to the question which he had to determine, which was whether the Defendants had committed a trespass by working coal in the Plaintiff's mouzah Jharia Khas, and having

found that the trespass had been committed, he should have confined the injunction to be granted to the injunction which the Plaintiff had asked for, namely, an injunction restraining the Defendants from trespassing in mouzah Jharia Khas. The Subordinate Judge was not concerned with the extent of the area demised in 1904 in mouzah Dobari. The result is that the Defendants are restrained from working coal outside the limits of mouzah Dobari, as delineated, correctly or incorrectly, by the Amin in his map, which he stated that he had prepared according to the Thakbast map.

From the decree of the 15th December 1902 of the Subordinate Judge, the Plaintiff appealed to the High Court at Calcutta. The Defendants submitted themselves to the injunction which had been granted, and did not appeal. The learned Judges of the High Court who heard the Appeal stated in their Judgment that "The area demised to the Defendants was 400 bighas within Dobari, but they actually hold only 346 bighas. This actual area belongs to Dobari, if the boundaries of that village be taken according to Thakbast map, but only 257 bighas of it belong to that village according to the Revenue Survey map. It is possible that 346 bighas were leased to the Defendants as 400 bighas, but it seems impossible that only 257 bighas could have been leased to them as 400." The High Court dismissed the Appeal with costs. But whatever may be the area in bighas within mouzah Dobari of the land which the Defendants pointed out to the Amin as being in their possession, it is obvious to their Lordships that the Subordinate Judge and the High Court considered that the Defendants had 346 bighas of land within mouzah Dobari underneath which they might lawfully continue to work the coal under their kabuliyat, and that the Subordinate

Judge had not intended that the injunction which he was granting should have the effect of reducing to 257 bighas the area in mouzah Dobari within which the Defendants might lawfully work the coal under the kabuliyat. Their Lordships have no means of ascertaining what was in bigha measurement the area in mouzah Dobari to which the Defendants were restricted by the injunction of the 15th December 1902, and whatever that area may in fact be, it must be borne in mind that there is no evidence to prove that the lands which the Defendants pointed out to the Amin were the lands of which they had, in fact, obtained possession in 1894.

It was for the Defendants to make out a case, if they had one, for an abatement of the fixed rent. On this part of the case their Lordships find that the Defendants have not proved how many bighas in fact were contained in the area of mouzah Dobari which is within the boundaries which are specified in the schedule to the kabuliyat, and they have not proved the area in bighas within those boundaries of which they were put in possession. They have not proved that the area which they pointed out to the Amin as the area of which they were in possession was the area of which they obtained possession under the kabuliyat. They have not proved that otherwise than by the action of the Court of the Subordinate Judge in the suit of 1902, in granting the injunction in the form in which it was granted, and by their own neglect to appeal from that decree, they have been deprived of the right to work any coal which otherwise they would have been entitled to work under the demise. The action of the Subordinate Judge in granting the injunction in the form in which it was granted gave the Defendants no right which they could enforce by

suit or of which they could avail themselves as a defence to a suit for the fixed rent, although the injunction probably restricted their right to work the coal which had been demised in 1894 ; they had their remedy by way of Appeal from the decree which granted the injunction, but they did not avail themselves of it. In their Lordships' opinion the Defendants have failed to prove any facts which would entitle them to any abatement of the rent fixed by the kabuliyat.

It follows from what their Lordships have said that the tenders in respect of rent, and interest upon arrears of rent, which the Defendants relied upon, having been tenders based on a reduced rent, were not good tenders, either as tenders of rent, or of interest on arrears of rent, and were ineffective.

The High Court in the Appeal in this suit found that the Defendants had not proved that they had paid to the collector the cesses and taxes which under the kabuliyat they were bound to pay to the Plaintiff, and gave the Plaintiff a decree for Rs. 361.3.0 in respect of cesses, calculated on a reduced rent ; the Plaintiff is entitled to recover the sum of Rs. 525 in respect of cesses, the only defence pleaded as to the claim in respect of cesses having failed.

Their Lordships will humbly advise His Majesty that this Appeal should be allowed, and that the decree of the High Court should be varied by decreeing the Appellant's claim for Rs. 23,868.0.0 less Rs. 3083.7.9 costs, due by the Appellant to the Respondents in respect of the previous suit of the 26th April 1902, with interest at the rate of Rs. 6 per centum per annum from the date of suit until reali-

sation on the balance decreed, namely on Rs. 20,784.8.3, with costs in the Court of the Subordinate Judge, and on Appeal in the High Court.

The Respondents must pay the costs of this Appeal.

In the Privy Council.

RAJA DURGA PRASAD SINGH

v.

RAJENDRA NARAYAN BAGCHI,
SINCE DECEASED, AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

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