Privy Council Appeal No. 51 *of* 1927.

Bengal Appeal No. 49 *of* 1925.

Rajah Bejoy Singh Dudhoria - - - - - - - *Appellant*

v.

Surendra Narayan Singh and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1928.

Present at the Hearing :
VISCOUNT SUMNER.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiff in the suit from a judgment and decree of the High Court of Judicature in Bengal dated the 26th February, 1925, by which the decree of the learned Subordinate Judge of Murshidabad was reversed and the plaintiff's suit was dismissed.

The plaintiff is the zemindar of the land, in respect of which the suit was brought, and the first defendant, Surendra Narayan Singh, is the assignee of a patni lease of the said land, which the plaintiff's predecessor in title granted on the 18th of July, 1853.

The other defendants are the lessees, to whom the first defendant's predecessor sublet part of the land, which was the subject of the putni lease, for the purpose of making bricks.

The learned Subordinate Judge granted a permanent injunction restraining the defendants from making excavations

in the lands of the mehal for the purpose of making bricks, and directed that the first defendant should pay the sum of 10 rupees to the plaintiff as damages. It was further ordered that the first defendant should pay an amount, specified in the decree, in respect of the plaintiff's costs. The defendants, 1, 2 and 3, appealed to the High Court, which allowed the defendants' appeal and dismissed the plaintiff's suit.

The plaintiff filed a cross objection, which related to the amount of damages. This cross objection was dismissed, and it was further ordered that the plaintiff should pay the defendant-appellants' costs of the appeal and of the trial.

The main point which has been argued on this appeal is that which was raised by the fourth issue, viz., "Have the defendants the right to use the lands of the mehal for the purpose of making bricks?"

The plaintiff contended that the defendants had no right to make excavations in the land for the purpose of making bricks, and thereby to cause substantial damage, whereas the defendants contended that they had such right.

It appears from the terms of the patni kabuliyat of the 18th July, 1853, that eight tarafs, with the exception of the former zemindar's Brohmottur and other Lakhiraj properties, constituting the entire zemindari, including all interests therein, and Jalkar, Bankar, Fulkar, Beels and Jhils were settled with the first defendant's predecessor, at the annual jama of Rs.11,000, exclusive of certain charges and expenses therein specified; a premium of Rs. 13,000 was paid in respect of the lease. The grant to the lessee was described as a "Muffasil Patni Taluk Lease according to the provisions of Regulation VIII of 1819."

The lease provided for the payment of the rental by certain specified instalments and that, on breach of the instalments, the zemindar should, according to the provisions of Regulation VIII of 1819, realise by attachment and sale of the patni interest the arrears, together with interest for default of instalment and costs. It contained further provision that, in the event of non-realisation of the said rents, interest and costs by the sale of the patni interest, the same might be realised by the sale of the lessee's moveable and immoveable properties.

The lease contained the following clause:—

> "I shall not cut the trees myself, nor shall allow anybody else to cut them. In the case of cutting down trees other than timber trees and non-fruitbearing trees, I shall give you information beforehand, and, on obtaining a letter, shall cut them down. And without a sanad signed by you, I shall not excavate a tank myself, nor shall permit anybody else to do so."

It was provided that the lessee should possess and enjoy the patni mehal down to sons and sons' sons, etc., on payment of the rents thereof.

It was argued on behalf of the plaintiff-appellant that the clay used for the making of bricks must be regarded as a mineral,

and that the patni lease did not carry a right to the minerals in view of the fact that there was no express grant of the minerals in the lease. Reliance was placed upon the decision in *Sashi Bhushan Misra* v. *Joti Prashad Singh Deo*, 44 I.A. 46, and particularly upon a passage in the judgment at page 53, which is as follows :—

> "These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that, when a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

It was, however, argued on behalf of the respondents that the above-mentioned decision was not given with reference to such a patni taluk lease, as is under consideration in this appeal, and reference was made to the case of *Satya Niranjan Chakravarti* v. *Ram Lal Kainaj*, 52 I.A. 109, in which it was held that, so far as direct decision of the Board is concerned, the question whether a patni tenure, without more said, transfers all the rights of the zemindar, including the right to the minerals, is still open, and that the question depended upon what is the true nature of a patni tenure. Their Lordships in that case referred to the passage in the judgment in 44 I.A., p. 46, which has been quoted above, and stated that -

> "That only means that the mere fact of a lease being permanent, transferable and heritable does not necessarily carry with it the result that the lessee has all zemindari rights."

It was contended on behalf of the respondents that under the grant of 18th July, 1853, all the interest which the grantor had in the land passed to the grantee, that under the Regulation VIII of 1819 there was no right of re-entry or forfeiture for failure to pay the rent, and that the only means of realising arrears of rent was a sale by public auction in accordance with Clause III (3) of the above-mentioned regulation.

On the other hand, it was argued on behalf of the appellant that the grant did not pass the property in the soil, but only entitled the grantee to possession as long as he continued to pay the rent and perform the conditions stipulated in the grant; that the grantee was a leaseholder only, and that the terms of the lease must be construed in order to ascertain what was the subject and the extent of the grant, and that upon the true construction of the lease the right to excavate the soil for the purpose of making bricks was not included in the grant.

The question, therefore, to be considered is, what is the nature and extent of the grant in this case? As already stated, the description in the grant of 18th July, 1853, is "a Maffasil Patni Taluk Lease according to the provisions of Regulation VIII of 1819."

The preamble to the said regulation refers, among other matters, to the liberty and privilege of zemindars, paying revenue

to Government, to grant "talooks or other leases, fixing rent in perpetuity at their discretion." A further recital mentions the fact that, in the exercise of this privilege, a tenure which was called "putnee tenure" had been created by certain zemindars, and that it had become necessary to define the nature of the property given and acquired on the creation of a putnee taluk as above described, and to fix the process by which the said tenures are to be brought to sale for arrears.

In Clause II it was declared that leases fixing rent in perpetuity, or for a longer term than 10 years, were valid.

Clause III is as follows :—

"III. *First.*—The tenures known by the name of putnee talooks, as described in the preamble to this Regulation, shall be deemed to be valid tenures in perpetuity, according to the terms of the engagements under which they are held. They are heritable by their conditions ; and it is hereby further declared that they are capable of being transferred by sale, gift or otherwise, at the discretion of the holder, as well as answerable for his personal debts, and subject to the process of the Courts of Judicature, in the same manner as other real property.

"*Second.*—Putnee talookdars are hereby declared to possess the right of letting out the lands composing their talooks in any manner they may deem most conducive to their interest, and any engagements so entered into by such talookdars with others shall be legal and binding between the parties to the same, their heirs and assignees : provided, however, that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free of all incumbrance resulting from the act of his tenant.

"*Third.*—In case of an arrear occurring upon any tenure of the description alluded to in the first clause of this section, it shall not be liable to be cancelled for the same, under the rule contained in the seventh clause of Section XV, Regulation VII, 1799, for leases conveying a limited interest in the land ; but the tenure shall be brought to sale by public auction, and the holder of the tenure will be entitled to any excess in the proceeds of such sale, beyond the amount of the arrear of rent due ; subject, however, to the provisions contained in Section XVII of this Regulation."

For the purpose of acertaining the nature of a "talook" reference was made to Regulation VIII of 1793, Clauses V and VII. It appears from the said clauses that a talookdar may be the actual proprietor of the land, or he may be a leaseholder only, and he is the latter if the talook is held under a writing in sanad from a zemindar which does not expressly transfer the property in the soil, but only entitles the talookdar to possession so long as he continues to discharge the rent or perform the conditions stipulated therein.

Their Lordships are of opinion that the terms of the grant of 18th July, 1853, show that there was no transfer of the property in the soil and that the intention of the parties was that the grantee should be a leaseholder only.

It was, however, argued on behalf of the respondents that, even if the grant were considered as a lease, the plaintiff's predecessor, after the grant had been made, had no interest in the

land or in the way in which it was used ; that his only right was to receive the rent, and in default of payment to bring the patni tenure to sale in the manner prescribed in Regulation VIII of 1819, and consequently the plaintiff's suit would not lie.

Their Lordships are not able to accept that argument.

A man who, being the owner of land, grants a lease in perpetuity, carves a subordinate interest out of his own and does not annihilate his interest. This result is to be inferred from the word "lease," which implies an interest still remaining in the lessor. See *Abhiram Goswami* v. *Shyama Charan Nandi*, 36 I.A. 148, at p. 167.

The grant of 18th July, 1853, was clearly a lease and the intention of the parties is to be gathered from the terms of the grant, and if it be found that the grantee or his assigns is using the subject of the lease in a way not contemplated by the grant, the fact that it was made in accordance with the terms of Regulation VIII of 1819 is not sufficient to prevent the plaintiff from suing for the purpose of obtaining an injunction to restrain such user.

The question still remains, what was the subject of the lease ?

It was contended on behalf of the respondents that the terms of the lease, and especially the words "the entire zemindari, including all interests therein," show that it was intended to grant a lease not only of the surface of the land, but also of the subsoil, with a right to use the same for any purpose which the grantee wished, even if such user caused substantial damage to the subject of the lease.

In their Lordships' opinion, the expression "including all interests therein" does not increase the corpus of the subject of the lease.

In *Giridhari Singh* v. *Megh Lal Pandey*, 44 I.A. 246, at p. 250, it was held that the expression "with all rights," which was amplified as meaning "with all right, title and interest," only gave expressly what might otherwise quite well have been implied, viz., that the corpus, being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but, it may be, of rights of passage, water or the like which enure to the subject of the lease and may even be derivable from outside properties.

In that case attention was drawn to the point that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear.

In their Lordships' opinion the intention of the parties as to what was the subject and extent of the lease must depend upon the true construction of the terms of the grant of 18th July, 1853.

It contains no reference to minerals or to the subsoil ; or to the right to excavate for making bricks. There is nothing in the lease to suggest that the land included therein was to be put

to any use other than that to which the zemindari lands were subject at the time of the lease.

On the other hand, the lease contains restrictive covenants relating to the cutting of trees and the excavation of the land for the purpose of a tank without a sanad signed by the zemindar, which are inconsistent with a grant of the lands with an unlimited and unrestricted power to the grantee to use the lands in any way which he desired, including the excavation of clay for brickmaking and causing thereby substantial damage to the land.

On a consideration of all the terms of the lease, their Lordships are of opinion that it was not intended by the parties that the grantee should be entitled to use the lands for the purpose of making bricks.

In view of this decision it is not necessary for their Lordships to express any opinion on the question whether the substance used for the making of bricks in this case would come within the meaning of the word "minerals." It is sufficient to hold that on the true construction of the terms of the lease no right to use the lands so leased for making bricks and causing substantial damage thereto was granted.

The learned Judge who tried the case held that, in consequence of the excavations made for the purpose of brick making, there had been substantial damage to and deterioration of the property, and on the sixth issue that he was not satisfied that their were such brick kilns on the mehal as alleged by the defendants, or that any brick kiln was made with the plaintiff's knowledge. He held, further, that the plaintiff protested as soon as he came to know about the kilns on the disputed lands, and that the suit was not barred by estoppel, acquiescence, waiver or delay.

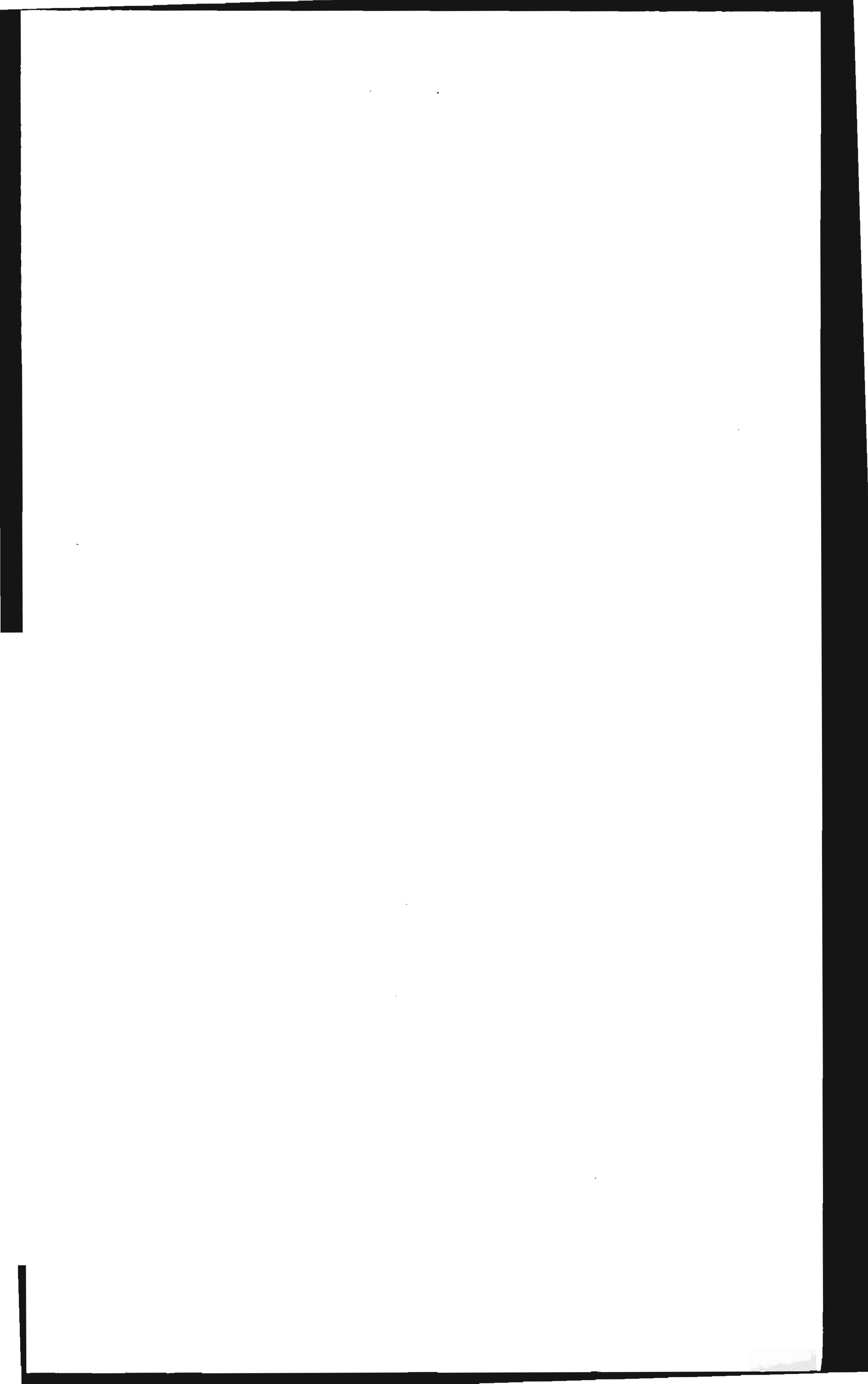
The learned Judge arrived at the above-mentioned conclusions, relying partly upon documentary evidence and partly upon oral evidence, and their Lordships do not find sufficient reasons for differing from the said conclusions of fact.

It has been found that the defendants had no right to use the land for the purpose of making bricks, that they did so use it, and thereby caused substantial damage.

It appears from the written statements that they alleged that they were entitled to use the lands, the subject of the lease, as they liked, and were at liberty to make excavations for preparing brick kilns in all the lands and to make the land unfit for habitation or cultivation. This allegation they maintained at the trial and throughout the subsequent proceedings.

In these circumstances the plaintiff is entitled to the injunction and to the damages which the learned Judge granted.

Their Lordships, therefore, are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside, that the decree of the Subordinate Judge should be restored, and that the defendants should pay the plaintiff's costs in the High Court and of this appeal. They will humbly advise His Majesty accordingly.



In the Privy Council.

RAJAH BEJOY SINGH DUDHORIA

v.

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DELIVERED BY SIR LANCELOT SANDERSON.

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