

*Privy Council Appeal No. 130 of 1928.*  
*Bengal Appeal No. 30 of 1926.*

The Adjai Coal Company, Limited - - - - *Appellants*

*v.*

Panna Lal Ghosh and others - - - - *Respondents*

Panna Lal Ghosh and others - - - - *Appellants*

*v.*

The Adjai Coal Company, Limited, and others - - - *Respondents*

*(Consolidated Appeals)*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN  
BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1930.

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*Present at the Hearing :*

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

SIR GEORGE LOWNDES.

SIR BINOD MITTER.

[*Delivered by* LORD THANKERTON.]

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In this action which was instituted on the 22nd September, 1919, the plaintiffs, who are appellants in the leading appeal, sue in respect of a trespass into their coal mine by the principal defendants, who carry on business under the name of the Nandi Coal Association, the lessees of an adjacent mine, and who are respondents Nos. 1 to 6 in the leading appeal.

The relief claimed in the action was (1) an enquiry as to the amount of coal cut and taken away by the defendants and damages

in respect thereof, (2) the cost of constructing an artificial barrier necessitated by the trespass, and (3) an injunction against further trespass.

The original defendant No. 1 having died, the present defendant and respondent No. 1 was brought on the record, and on the 8th December, 1921, filed an additional written statement of defence. Prior to this the issues had been adjusted and they were not subsequently amended. In view of a point raised in the additional statement, Andrew Yule & Company Limited, the present respondents No. 7, were added as pro-forma defendants, on the application of the plaintiffs.

By decree dated the 11th September, 1924, the Subordinate Judge awarded to the plaintiffs Rs. 56,018 as damages for the coal extracted by the defendants and Rs. 18,223 as costs for the construction of the barrier against the defendants Nos. 1 to 6 to the extent of the assets of the deceased partners of the defendant firm in their hands (including the assets of the firm) with costs in proportion to the plaintiffs' success and with interest at 6 per cent. and also granted a permanent injunction against further trespass.

The defendants appealed to the High Court in Calcutta, and the plaintiffs also filed cross objections on the insufficiency of the sums decreed.

On the 30th April, 1926, the High Court gave judgment affirming the permanent injunction, but disallowing the claim for damages as barred by limitation, and also the cost of the barrier on the ground that there was no imminent risk.

From this judgment the present appeal and cross-appeal are taken. By the appeal the plaintiffs maintain (1) that the claim for damages is not barred by limitation, and (2) that they are entitled to the cost of the barrier. In the cross-appeal defendants Nos. 1 to 6 maintain (1) that the plaintiffs have not established a title to the coal taken, and (2) that the cause of action does not survive against them.

While various defences were raised at the trial, it is established by concurrent findings of the Subordinate Judge and the High Court that the defendants encroached on land within the terms of plaintiffs' lease during the years 1904 to 1915 and took coal to the amount of 18,544 tons, and that the plaintiffs first became aware of the encroachment in 1919.

On the question of limitation, their Lordships are of opinion that the point is governed by the decision of this Board in *Pugh v. Ashutosh Sen and others* (1928) 56 Ind. App. 93, a coal encroachment case, in which it was held that Article 48 of Schedule I of the Indian Limitation Act, 1908, applies to all conversions, whether dishonest or not. In the present case the Subordinate Judge found that the trespass was due to inadvertence, while the High Court held that it was due to inadvertence and want of reasonable care, and their Lordships are of opinion that both these views of the conversion fall within the terms of Article 48,

under which the limitation period of three years begins to run when the person having the right to possession of the property first learns in whose possession it is. Accordingly the present suit was instituted in time.

In considering the claim for the cost of constructing a barrier it is necessary to bear in mind the present position of the workings in the area of encroachment. The area is a right-angled triangle, the right angle being formed by straight lines on the east and south, which are on the true boundary between the properties; the hypotenuse on the north-west side is an irregular line, being the limit of the encroachment workings, which were carried on by means of transverse galleries, pillars of unwrought coal being left. According to the findings of the Commissioner, which were accepted by the Courts, the area of the galleries was 48,663 square feet, and that of the pillars 21,192 square feet, while the average height of the galleries was 11 feet  $1\frac{1}{2}$  inches less 2 per cent. for hanging coal. The width necessary for a barrier is stated to be 20 feet and the nearest point of the plaintiffs' workings is considerably further away to the north-west.

The Subordinate Judge held that there was no evidence of "any present risk of fire, water or foul gas coming to the plaintiffs' colliery from the defendants' colliery even if the plaintiffs by working up to the encroached portion happen to establish connection between the two mines," on the assumption that the defendants would work their colliery properly; but he stated that he could not ask the plaintiffs to rely on the good sense and competency of the defendants, nor could he ask the plaintiffs to leave a barrier of coal within their land on the west of the portion encroached on, for the plaintiffs had a right to cut and take the pillars on that portion up to the boundary, but they could not do so without driving a gallery up to the disputed land. The learned Judge therefore found that the defendants' acts had rendered it necessary for the plaintiffs to keep an artificial barrier between their mine and the defendants' mine. He further found the plaintiff company entitled to erect an artificial barrier (if they liked) on the east and south of the disputed area and to ask for such price or damages as they might be found entitled to on that account. He thereafter gave the plaintiffs a decree for Rs. 18,223, being the cost of the barrier (Rs. 28,125) less the value of the coal (Rs. 9,902) abstracted by the defendants, which the plaintiffs would have had to leave as part of a barrier if there had been no encroachment and the plaintiffs themselves had been working the disputed area, such value being already included in the damages awarded by the learned Judge for the coal extracted. By the judgment of the High Court on appeal these findings in favour of the plaintiffs were reversed on the ground that, in view of the absence of risk as found by the Subordinate Judge, the plaintiffs, if they wanted to ensure the safety of their own mine, were bound to look to

themselves for leaving a barrier, and that they might still keep such a barrier out of the coal that is left between the two mines, on the hypotenuse of the triangle. In their Lordships' opinion that finding is not justified as it excludes the plaintiffs' right to work out the pillars left in the encroachment area. Their Lordships are of opinion that the decree of the Subordinate Judge on this point should be restored, as the plaintiffs are entitled to be protected against any possible risk due to the defendants having wrongfully pierced the margin of coal on the plaintiffs' side of the boundary, which would in ordinary course have been left as a barrier, and that the plaintiffs are not bound to wait until any risk emerges, when it might well be too late to construct a barrier. Further, it may be at least doubtful whether, on the subsequent emergence of such risk, it will then be open to the plaintiff to recover the cost from the defendants. While it might have been more logical to have deducted the value of the coal which would have had to be left from the amount of the damages for coal abstracted and not from the cost of construction of the barrier, their Lordships are not disposed to disturb the course adopted by the Subordinate Judge.

There remain the two questions raised by defendants Nos. 1 to 6 in the cross-appeal, of which the first relates to the plaintiffs' title; on this question their Lordships agree with the conclusion of both the Courts below, viz., that the question whether the putnidars, from whom the plaintiffs hold their leases, had themselves any title to the minerals was not raised by the written statements or by the issues in the suit, and cannot be raised at this stage of the suit.

As regards the contention that the cause of action does not survive against any of the defendants Nos. 1 to 6, their Lordships are of opinion that Section 1 of Act XII of 1855 does not apply to the present case which seeks to recover property or its value after conversion, and that in any event, the cause of action survives under section 89 of the Probate and Administration Act, Act V of 1881, which applies to Hindus, against executors and administrators, and that in effect these defendants' objection is on the ground of misjoinder—an objection which comes too late in view of Order I, Rule 13 of the Civil Procedure Code, Act V of 1908. Their Lordships are, therefore, of opinion that the appeal should be sustained, and the decree of the Subordinate Judge restored, with costs to the appellants in the High Court and before this Board, and that the cross-appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.



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In the Privy Council.

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DELIVERED BY LORD THANKERTON.

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