Privy Council Appeal No. 137 *of* 1929.
Bengal Appeals Nos. 23 *and* 24 *of* 1927.

Raja Bhupendra Narayan Sinha Bahadur - - - - *Appellant*

v.

Rajeswar Prosad Bhakat and others - - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondents*

(*Consolidated Appeals*)

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 24TH MARCH, 1931.

Present at the Hearing:

LORD MACMILLAN.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* SIR GEORGE LOWNDES.]

The question for determination in these consolidated appeals is as to the subsoil rights in a hill in Mauza Nalhati, in the Birbhum District. There, beneath a stratum of stones and gravel, a valuable deposit of yellow ochre has been found, which is claimed by both parties—by the appellant as the *zemindar* and by the respondents as *dar-putnidars* holding by virtue of two *putni* grants dating from 1861. The respondents have worked the deposit on a considerable scale and have sold the ochre, for which there seems to be a ready market.

The suit was instituted by the appellant on the 12th December, 1919. for a declaration of his ownership and possession of the subsoil, and an injunction restraining the respondents from digging and removing the stones, earth or minerals, including the ochre, and claiming a large sum as damages. The respondents pleaded that the subsoil rights had passed to them under the *putnis* and *dar-putnis*, and alternatively that they had acquired a prescriptive right to them by adverse possession. A further question was also raised

as to the title of the appellant. He was the eldest of four brothers, representing a *zemindari* known as the Nashipur Raj, which he alleged to be an impartible estate vested in him alone. He joined his brothers as *pro-forma* defendants to the suit and they supported his claim.

The Subordinate Judge of Birbhum, by whom the suit was tried, held that the respondents were entitled to remove the superficial stratum of stones and gravel, but not the underlying ochre, and that they had acquired no title to this by adverse possession. He gave the appellant the declaration and injunction asked, in respect of the minerals, but, holding that his sole title to the *zemindari* was not established, gave him only a quarter of the damages proved in respect of the removal of ochre, which he estimated at a total sum of Rs. 46,800.

Both parties appealed to the High Court. For the appellant it was contended that the Subordinate Judge was wrong in holding the respondents entitled to remove the stones and gravel, and that he ought to have awarded to him the full amount of the damages claimed, and not a quarter share only. His appeal met with no success on either point and was dismissed.

The respondents' appeal raised the question of their title under the *putnis* to all subsoil rights, and of their adverse possession of the ochre deposit. The High Court allowed their appeal under both heads, with the result that the appellant's suit was dismissed with costs.

Separate appeals have been taken in the usual course to His Majesty in Council, which have been consolidated, and all the questions above referred to have been raised before the Board.

The disposal of the respondents' claim to the subsoil rights in virtue of their title now presents little difficulty. It was until recently thought that under a *putni* grant subsoil rights passed to the *putnidar* unless expressly excluded, and the High Court in so holding followed previous decisions to that effect in India. It was, however, determined by this Board in *Bejoy Singh Dudhoria* v. *Surendra Narayan Singh*, 55 I.A. 320, that unless the terms of a *putni* lease showed an intention to grant a right of user other than that to which the *zemindari* lands were subject at the date of the grant, no other right passed to the grantee, and that such general words as "including all interests therein" were not sufficient to pass a right to excavate brick earth. The *putni* in that case was an ordinary *putni* grant "according to the provisions of Bengal Regulation VIII of 1819," and their Lordships think that the effect of the decision is to put *putni* tenures generally in this respect on the same footing as other permanent, heritable and transferable tenures created by a *zemindar*, and that the subsoil rights will only pass under a *putni*, as in the case of the other tenures referred to, when granted in express terms: see *Raj Kumar Gobinda Narayan Singh* v. *Sham Lal Singh* (decided on 15.1.31).

It has been suggested, however, that there are words in the present grant which are apt to pass these rights, and various obscure phrases are quoted as having this effect. Thus *Chaya Hrad*, which is translated "shades and lakes," is said, by some supposed mythological reference, to include everything from the sky to the centre of the earth. But none of the judges before whom the case has come has ventured so to expound the words, and their Lordships can hardly be expected to do so. The words *Daro bast Hakuk*, "with all rights," are also relied on, and it is pointed out that they were treated as of some significance in the judgment of the High Court. They are, however, regarded there not as words of express grant, but merely as indicating that nothing was expressly excluded, which in the view of the High Court was the proper test. Their Lordships think that these words are in themselves of no more significance than the expression "*mai hak hakuk*," which was held not to be sufficient in *Girdhari Singh* v. *Megh Lal Pandey*, 44 I.A. 246, or the corresponding words in *Bejoy Singh's* case *supra*, and that the valuation placed upon them by the Subordinate Judge was correct.

Their Lordships must therefore hold that the subsoil rights in the hill in question did not pass to the *putnidars* or from them to the respondents under or by virtue of the grant.

The question of adverse possession perhaps presents greater difficulties. It has not been seriously disputed before the Board that the respondents have been quarrying and removing the stone and gravel from pits opened in all parts of the hill for more than 12 years before suit, but it is, their Lordships think, clear that the ochre deposit has not been worked as such for more than six or seven years at most. No doubt some ochreous earth would be removed with the stone, but merely as a waste product. The stones and gravel were used for road making and ballast, and the evidence is that the yellow earth would be washed out by the rain, and it was evidently of no use for the purposes to which the stones and gravel were put. The ochre deposit was only exposed when the superficial layer of stone was removed. It appeared at first in what is described as cylindrical form, and only at a lower level still in the form of a solid deposit. Quarrying leases for stone had been granted by the *dar-putnidars* at all events since 1903, but the first lease of the ochre earth is dated the 4th August, 1915, and it is noticeable that it purports to reserve to the lessors (the respondents) the rights in the stone and gravel, thus clearly distinguishing them as separate commodities.

On the conclusion to which their Lordships have come that only the surface rights passed under the *putnis*, it is clear that the respondents have acquired a title by adverse possession to the stone and gravel over the whole of the hill. It is equally clear that there has been no adverse possession for the statutory period in respect of the ochre, if it can be treated as something

separate from the overlying stratum and capable of separate ownership.

The Subordinate Judge was of opinion that the right to the stone passed under the *putni* grants as being the only natural surface product of the hill, but that the working and removal of it did not constitute adverse possession of the underlying deposit. The High Court thought that it did, and that time ran against the appellant in respect of all subsoil rights from the time when the quarrying began.

Their Lordships think that the stone and the ochre must be regarded as separate portions of the subsoil, of which there may be separate ownership and separate possession.

There can be no doubt that upon a grant of the surface rights by a *zemindar* he remains in the eye of the law in possession of the subsoil. It may be only constructive possession, and that is in one sense nothing more than the right to take physical possession. But the doctrine that " possession follows title " is well established : see per Maule J. in *Jones* v. *Chapman*, 2 Ex. 803, at p. 821, and the remarks of Lord Blackburn in *Bristow* v. *Cormican*, 3 App.Cas. 641 at p. 661. So, while lands are submerged, constructive possession is with the true owner, and that, though immediately prior to the diluviation physical possession had been with the adverse claimant : *Secretary of State* v. *Krishnamoni Gupta*, 29 I.A. 104 ; *Kumar Basanta Roy* v. *Secretary of State*, 44 I.A. 104. It is for this reason that cases as to adverse possession of mineral rights must ultimately fall to be decided under Art. 144 of the Limitation Act, rather than under Art. 142. Once title is proved or admitted to be in the *zemindar* he will be presumed to continue in possession until adverse possession by the trespasser is established, and that whether the trespasser is the grantee of the surface or a stranger. It is in effect only an instance of a shifting onus.

It is well recognised that there can be separate ownership of different strata of the subsoil, at all events where minerals are involved : see per Wilde C.J. in *Cox* v. *Glue*, 5 C.B. 533, at 549, and per Watson B. in *Rowbotham* v. *Wilson*, 8 E. and B. 123, at 142. It is not disputed before their Lordships that the ochre in the present case is a mineral : it is indeed established by the evidence ; and in this country almost every kind of clay of commercial use has been so recognised. That the deposit in question is a fairly defined stratum their Lordships have no doubt. Possession, therefore, must be presumed to be with the *zemindars* until adverse possession by the respondents for the statutory 12 years is established. That this cannot be presumed from their adverse possession of the superincumbent stratum of stone and gravel is, their Lordships think, clear. Thus in *Low Moor Company* v. *Stanley Coal Company*, 34 L.T.N.S. 186, the Lord Chancellor (Lord Cairns) says (p. 189) :—

> " It is true that in cases where a man has entered upon and taken possession of one seam of coal, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to all the other seams of coal lying under that particular one."

So too in a very recent case before this Board (*Nageshwar Bux Roy* v. *Bengal Coal Company*) not yet reported, it is laid down that :—

> " Where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed."

Their Lordships must hold, therefore, that in the present case the respondents have acquired no title by adverse possession to the ochre deposit.

It remains only to consider the question of the appellant's claim to the full sum of the compensation assessed by the Subordinate Judge. The correctness of the amount so assessed has not been disputed before their Lordships, but it is said that, the appellant not having established that the *zemindari* is by custom impartible, he cannot in any event be entitled to recover more than the quarter ascribable to his share in the estate. If the finding as to impartibility is correct, the family must apparently be joint, and it is perhaps not easy to see how any member can recover his individual share. But their Lordships think that the question of impartibility should not have been gone into in the present proceedings. All the members of the family were parties to the suit, and were at least jointly entitled to the whole. The *pro-forma* defendants asked that a decree should be passed in favour of the appellant. If there was a technical objection to this, the Court clearly had power at any stage of the proceedings to remedy the defect under Order 1, rule 10, of the Civil Procedure Code by adding the *pro-forma* defendants as co-plaintiffs with the appellant. Such a course should, in their Lordships' opinion, always be adopted where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. Having regard to the conclusions to which their Lordships have come upon the other aspects of the appellant's claim, they feel no difficulty in holding that he is entitled to recover from the respondents the whole of the sum of Rs. 46,800, at which the Subordinate Judge assessed the value of the ochre removed by them. They think that the decree of the High Court should be set aside and that of the Subordinate Judge restored, substituting therein the figures [Rs.] 46,800 for [Rs.] 11,700, and omitting therefrom the words " of plaintiff's one-quarter share," and they will humbly advise his Majesty accordingly. The respondents must pay the costs of the appellant in the High Court and before this Board.

In the Privy Council.

RAJA BHUPENDRA NARAYAN SINHA
BAHADUR

v.

RAJESWAR PROSAD BHAKAT AND OTHERS.

SAME

v.

SAME

DELIVERED BY SIR GEORGE LOWNDES.

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