Privy Council Appeal No. 5 of 1934.
Patna Appeals No. 26 of 1931 and No. 12 of 1933.

Maharaja Srischandra Nandy and others - - - - *Appellants*

v.

Baijnath Jugal Kishore (a firm) - - - - - *Respondents*

Baijnath Jugal Kishore (a firm) - - - - - - *Appellants*

v.

Maharaja Srischandra Nandy and others - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1934.

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD THANKERTON.]

These consolidated appeals consist of an appeal by the defendants Nos. 1 and 3 in the suit and a cross-appeal by the plaintiff from two decrees of the High Court of Judicature at Patna dated the 21st May 1931, which, subject to a slight modification, confirmed a decree of the Subordinate Judge of Dhanbad dated the 30th July, 1927.

The plaintiff, who is a sub-lessee of the coalmining rights of a part of Mouza Gararia, instituted the present suit on the 28th May, 1925, against the predecessor of the present defendant No. 1, who was a similar lessee of Mouza Ekra, which lies immediately to the south of Mouza Gararia, and defendants Nos. 2 and 3, who were in succession the agents of defendant No. 1 in working his coal, defendant No. 3 having succeeded defendant No. 2 in May, 1924. The suit was based on the alleged conversion of an area of the plaintiff's coal, and he asked for an order on the defendants to vacate the land encroached on, for an injunction prohibiting future trespass and conversion, for an enquiry and ascertainment of the extent of the defendants' encroachments and the amount of coal removed and for an enquiry as to the quantum of damages.

The plaintiff's sub-lease was obtained by him on the 26th April, 1922, and he set out his cause of action as having arisen in or about November, 1924, when he first came to know of the encroachments.

Gararia and Ekra are both part of the Jharia Raj. In 1896 the then Raja granted a mokarrari lease of the coal-mining rights in Gararia to one Maheshwar Rai, and in 1898 he granted a similar lease of Ekra to the ancestor of defendant No. 1. In 1901, 1902 and 1907 Maheshwar Rai granted sub-leases of the coal-mining rights in plots of 100 bighas, 100 bighas and 40 bighas respectively to the lessors of the plaintiff, who demised by way of sub-lease the rights in the whole 240 bighas to the plaintiff in 1922. The plot with which the present dispute is concerned is the plot of 100 bighas, sub-let by Maheshwar Rai in 1901, which is a comparatively narrow strip running north and south, and having Ekra as its southern boundary. The remaining plots of 100 bighas and 40 bighas may be disregarded.

In the present appeals certain facts are no longer in dispute. It is now agreed that the boundary between the plaintiff's coal area and that of the defendants is that fixed by the Revenue Survey maps, and that the defendants have encroached over the boundary onto the southern part of the plot of which the plaintiff is now sub-lessee. Further, the area of encroachment has been worked as follows, viz. : prior to 1911 coal amounting to 8,209 tons had been removed by working in galleries, leaving 6,643 tons of coal in the pillars ; at some time during the years 1924 and 1925, 4,422 tons of the pillar coal was removed, and the remaining 2,221 tons of coal in the pillars have been rendered unworkable, except at heavy expense, by the defendants' workings and the consequent subsidence. The total tonnage of coal thus involved was 14,852 tons.

The Subordinate Judge held that the plaintiff's claim to recover damages in respect of the gallery coal, which had been taken more than twelve years prior to suit, was barred by limitation, but he awarded him damages in respect of the whole of the pillar coal, viz., 6,643 tons, at the rate of Rs. 4 per ton, under deduction of 12 annas per ton in respect of the cost of bringing it to bank, but disallowed any deduction in respect of the cost of cutting and severing the coal. Both parties appealed to the High Court, which dismissed both appeals, and affirmed the decree of the Subordinate Judge, under alteration of the rate of deduction from 12 annas to 8 annas, which both parties agreed was the rate intended to be fixed by the Subordinate Judge.

While other questions were in issue in the Courts below, the only contentions submitted to their Lordships were as follows :— In their appeal, defendants Nos. 1 and 3 maintained (*a*) that, prior to the institution of the suit, defendant No. 1 had acquired a good title by adverse possession not only of the gallery coal but of the whole area, including both gallery and pillar coal, and

(*b*) that, in any event, they were entitled to a deduction in respect of the cost of cutting and severing the coal. In the cross-appeal, the plaintiff maintained (*a*) that his claim in respect of the gallery coal was well-founded and that it was not barred by limitation, and (*b*) that the rate of Rs. 4 per ton was too small, in view of the evidence.

It will be convenient to deal first with the cross-appeal. Apart from any question of limitation, the plaintiff, who only acquired his title in 1922, must show a title to sue in respect of the abstraction of the gallery coal prior to 1911. He claims such a right in virtue of the terms of his sub-lease, in which the subjects of lease are described as follows :—

> " And whereas the lessor has desired to sublet the three plots and the lessee has proposed to take a sublease of the said three plots for a term of 475 years, the lessor abovenamed executes this sublease for a term of 475 years and demises unto the lessee all those coal mines now being worked and all those coal mining rights and other rights of and in the said three plots of coal land comprised set out and described in the schedules A, B and C below belonging to the lessor together with all machineries, buildings, bungalows, houses, huts, coke ovens, tools, plants, engines, boilers, stock of coal, sidings, tram lines, mines, beds, seams and veins of coal, quarries, inclines, all privileges, advantages, appurtenances appertaining or belonging thereto or usually enjoyed with the same. . . "

The plaintiff maintained that the right to recover in respect of the gallery coal in question was included among the " other rights " thus demised to him, but their Lordships are unable to place this construction on these words, which are limited by the words " of and in the said three plots of coal land," which clearly relates to these plots as they stood at the date of grant. It would require clear words to assign such a right of action to a lessee. As regards the plaintiff's second contention, their Lordships see no good reason for disturbing the concurrent findings of the Courts below as to the rate of Rs. 4 per ton. The plaintiff's appeal, therefore, fails.

As regards the defendants' main contention, the principle of law as to what is necessary to constitute adverse possession is well settled, though its application in the circumstances of particular cases may present some difficulty ; this, perhaps, is more likely to occur in cases of the alleged adverse possession of underground mineral seams. The principle has recently been restated by this Board in *Secretary of State for India* v. *Debendra Lal Khan* (1933) 61 Ind. App. 78, at p. 82, as follows :—

> " As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi* v. *Collector of Khulna* (1900) 27 Ind. App. 136, at p. 340, where his Lordship said that ' the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.' The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been

> brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession should be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening."

In their Lordships' opinion, the defendants have failed to show that the plaintiff's predecessors, by exercising due vigilance, ought to have been aware of what was happening, apart from the question of whether the possession was adequate in continuity and extent.

The area from which the gallery coal was taken and its surroundings may be generally described as follows :—The area itself is underground, and measures roughly 50 yards from north to south and 150 yards from east to west. About 65 or 70 yards to the north of it a railway crosses the plaintiff's plot on the surface, running east and west. There is evidence that the defendants at one time understood that the railway line was the boundary of Ekra and that in the adjoining areas, as well as in this case, they worked their colliery on that footing, but so as to leave a margin for protection of the railway. The dip of the strata is generally from north-east to south-west, and it is clear that, although they had pits some little distance off, the coal seam in question in this area and in their adjoining area was mainly raised by means of inclines descending approximately in a southerly direction. There is also little doubt that this area was worked along with their adjoining area as part of one colliery. This is shown by the working plan, dated in 1911, on which are found five inclines to the east, including Nos. 2, 8 and 13—the first of these having a tram line—and two inclines to the west of this area, while on the area itself incline No. 4 is situated. It is on the existence and use of incline No. 4 that the defendants mainly rely as the outward manifestation on the surface of their working of the coal in this area. As shown on the working plan, the foot of incline No. 4 almost reached the defendants' own coal, but this is not very material, for the real question is whether there was that to be seen on the surface, which the plaintiff's predecessors, being reasonably vigilant, ought to have seen, and, so seeing, would have been put on their guard, although they did not have any title to the surface. For a similar reason it does not seem very material whether the coal which was raised by means of incline No. 4 came from the area in question. The point must be that, on seeing coal being raised by means of incline No. 4, the plaintiff's predecessors would be bound to suspect that it came from their seam. The sinking of incline No. 4 was not completed so as to reach coal until 1905 ; it was then ascertained that a certain amount of gallery coal immediately below the incline had already been removed by means of another incline. The account books produced by the defendants, which are not continuous, show that an amount, which the Subordinate

Judge states at 2,000 tons, was raised by means of incline No. 4 before 1911, but it is not possible to identify the place from which that coal was cut. This must have been a very small portion of the total amount of coal raised by means of all the inclines, and which was also being taken along the surface to the sidings. Further, the entrance to the incline No. 4 was in a surface covered with jungle, and the suggestion that the plaintiff's predecessors must have passed along a road in the near neighbourhood has little weight, as also the stacking of coal beside the entrance, the amount and frequency of which is left quite indefinite. The failure of the plaintiff's predecessors to notice these things, even if they were sufficient, when seen, to put them on their guard, involves, in the opinion of their Lordships, no lack of reasonable vigilance on their part, and the defendants' case must fail on this point ; it is unnecessary to consider whether the defendants' possession was adequate in continuity and extent.

As regards the defendants' minor contention as to a deduction in respect of the cost of cutting and severing the coal, their Lordships see no sufficient reason to interfere with the discretionary view which has been taken by both the Courts below.

Their Lordships will, therefore, humbly advise His Majesty that both appeals should be dismissed with costs and that the decrees of the High Court should be affirmed.

In the Privy Council.

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AND OTHERS

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DELIVERED BY LORD THANKERTON.

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