Privy Council Appeal No. 90 *of* 1938
Patna Appeal No. 16 *of* 1937

Chandan Mull Indra Kumar and others - - - *Appellants*

v.

Chiman Lal Girdhar Das Parekh and another - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10th OCTOBER 1939

Present at the Hearing :

LORD ROMER
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

[*Delivered by* LORD ROMER.]

This is an appeal from a judgment and decree of the High Court of Judicature at Patna dated the 1st April 1937 which reversed a judgment and decree of the Subordinate Judge of Dhanbad dated the 21st February 1933 and dismissed the appellants' suit.

The question for decision is whether the appellants or some of them are entitled to recover damages from the respondents by reason of the respondents having cut and removed coal under a certain area of land which will be described later.

The appellants' claim to the coal in question is founded upon a lease or rather a sub-lease dated the 17th July 1908 (hereinafter called the sub-lease) whereby there was demised to the Phularitand Coal Company Limited (hereinafter called the Phularitand Company) coal under the land described in the 3rd Schedule thereunder written and also delineated and described in the map or plan thereto annexed and thereon coloured blue. Amongst the land described in the 3rd Schedule was land situate in the mauza Ganeshpur and described therein as being bounded on the north by the mauzas Buddora and Kenduadhi. On the plan there is shown lying between what is marked as Ganeshpur on the south and what is marked as Kenduadhi on the north a streamlet or jore. The plan would seem to indicate that no part of this jore was situate in Ganeshpur inasmuch as it is not coloured blue thereon. So far as the plan is concerned therefore the northern boundary of that part of Ganeshpur which abuts on Kenduadhi is indicated as being the southern bank of the jore. The blue colour on the plan extends to that bank but no further.

In the month of March 1926 the Phularitand Company went into voluntary liquidation with a view to effecting an amalgamation with the Baraboni Coal Concern Limited (hereinafter called the Baraboni Company) by means of a sale to them of all its assets. On the 30th June 1927 accordingly by an agreement of that date the liquidators of the Phularitand Company agreed to sell to the Baraboni Company as from the 1st April 1926 the whole of the assets of the Phularitand Company. According to this agreement the liquidators were to retain possession of the assets until completion of the sale which did not take place until much later. It is alleged, however, by the appellants that the Baraboni Company was in fact put into possession of the assets upon the 1st April 1926.

On the 29th January 1928 the Baraboni Company who are the appellants No. 2 discovered that the respondents who were leaseholders of the coal under the western part of Kenduadhi were or had been working a seam of the coal under the jore. In the belief that for the reasons hereinafter stated such coal was included in the sub-lease they in conjunction with the appellant No. 1 Chandan Mull Indra Kumar instituted on the 29th August 1930 the present suit against the respondents claiming a declaration of title, an injunction, and damages. The appellant last mentioned had in the year 1928 purchased some of the assets of the Baraboni Company and was under the impression that his purchase included the coal under Ganeshpur. In this he was mistaken. It is now conceded, that he had no interest in that coal and he need not be further considered. Nor at the date of the institution of the suit had the Baraboni Company any property in the coal inasmuch as their purchase of the assets of the Phularitand Company had not been then completed. They based their claim to relief however upon their alleged possession of the demised coal since the 1st April 1926 and merely brought in the Phularitand Company as formal defendants. But by order dated the 12th August 1932, the Phularitand Company were struck out as defendants and added as plaintiffs and are now the appellants No. 3.

In view of what has been stated about the plan attached to the sub-lease it would not appear at first sight that the appellants 2 and 3 could have any right to complain of the working by the respondents of coal under the jore. Their claim to do so, however, was as set out in their plaint founded upon the following allegations. They said in effect that the true boundary between mauza Ganeshpur on the south and mauza Kenduadhi on the north was the jore as shown on the Revenue Survey map of 1862; that the said jore had since then gradually shifted its course towards the south with the result that it was now wholly within the boundaries of mauza Ganeshpur; that the respondents had no right to any coal lying to the south of the old jore as depicted in the Revenue Survey map; that the coal lying under the strip of land described in Schedule B to the plaint was therefore the property of the appellants; and

they claimed a declaration to that effect. Such Schedule so far as material was as follows:

> Boundary of the disputed strip of land as referred to hereinbefore.
>
> North. By the jore (streamlet) as it is existing in the Revenue Survey map to the midland (*sic*).
>
> South. By the present jore (streamlet).

It is to be observed that in this Schedule the northern boundary of the coal claimed by the appellants is the "midland" (which is no doubt a misprint for the "midline") of the jore as shown on the Revenue Survey map; whereas in the body of the plaint it is merely alleged that the respondents have no right to the coal lying to the south of the jore. But however this may be their Lordships are satisfied on a careful examination of the map that the boundary line between the two mauzas in question is therein shown to be the south bank of the jore. A similar conclusion was come to by the learned pleader and commissioner Hem Chandra Roy whose position in the matter will be stated hereafter. In the course of giving evidence at the trial of the suit he said: "According to the Revenue Survey map the jore is within the limits of mauza Kenduadhi." No reference is made in the plaint to the fact that on the map annexed to the sub-lease the jore purports to be shown and is not coloured blue. Now it might be contended that the jore there shown was intended to be the jore in the position it occupied at the date of the sub-lease; in which case, in order to establish their right to the coal under the jore in the position it occupied at the time of the respondents alleged wrongful workings, the appellants would have had to prove a shifting of the jore's position since 1908. It seems however far more probable that the plan merely intended to record the fact that the northern boundary of Ganeshpur was the northern boundary of the coal demised and that such boundary was the southern bank of the jore as it had been shown to be on the Revenue Survey map, and was in no way concerned with the question whether the jore had altered its position since 1862.

A written statement was filed by the respondent No. 2 in which a great number of defences were raised. Of these the only one that need be referred to is the allegation that the jore in the position it then occupied was the true boundary between Ganeshpur and Kenduadhi and that if that position differed from the one shown on the Revenue Survey map, the Revenue Survey map was wrong.

On the 24th July 1931 the first two appellants (the then plaintiffs) petitioned the Court for the appointment of a commissioner with directions to him (amongst other things) (*a*) to prepare a map of the locality (*b*) to find out the intermediate boundary line between the plaintiffs' land and that of the defendants' by reference to the Revenue Survey map and title deeds of the parties (if necessary) (*c*) to ascertain the encroachment, if any, made by the defendants on the plaintiffs' land with reference to such intermediate boundary

line, as also the quantity of coal cut therefrom. This petition was successful and on the 5th August 1931 Babu Hem Chandra Roy, pleader, to whom reference has already been made, was appointed commissioner for the purposes above mentioned.

The commissioner in due course made a careful survey of the *locus in quo* and embodied the result of such survey in a map on the scale of 16 inches to the mile. On this map he indicated the then position of the jore and also its position as indicated on the Revenue Survey map of 1862. He found himself able to ascertain the latter position (as he explained to the Court in his first report of the 14th September 1931) in the following way: He was in possession of the Revenue Survey map and of the Revenue Survey field book. On that map were indicated two trijunction pillars marked C and C and the commissioner was satisfied that these corresponded practically with the two survey stations on his own map marked 1 and 20. Now the position of what may be called the Revenue Survey jore so ascertained by the commissioner and indicated on his own map by a red line is a substantial distance to the north of the present position of the jore. It is plain therefore that any working of the coal to the south of that red line was a wrongful act on the part of the respondents unless (1) the commissioner was wrong in his identification of his survey points 1 and 20 with the points C and C on the Revenue Survey map or (2) the position of the jore in 1862 was not accurately shown on the Revenue Survey map.

At the date of his first report the workings of the respondents to the south of the position of the Revenue jore as shown on his map had long since been discontinued and the site of those workings was full of water and could not be surveyed by him. The mine was accordingly pumped dry by the appellants at a considerable cost and the commissioner then made an inspection of the workings. The result of his inspection was embodied in a further report dated the 16th April 1932 and illustrated on a second map. He calculated that 15,753 tons of coal had been removed by the respondents to the south of the Revenue jore as shown upon his first map. It would appear from this second report of the commissioner that the appellants had changed their views as to the way in which the position of the Revenue jore had shifted to the south. They no longer contended that the jore had gradually shifted its course but "that the present jore is nothing but a diverted course caused by the colliery proprietors and the village cultivators only during the recent years."

It was in these circumstances that this suit came on for hearing before the Subordinate Judge of Dhanbad in the month of August 1932. A great number of issues had been framed for trial of which the only ones material for the present purpose were substantially these:

> "(9) What is the correct intermediary boundary between Mouza Ganeshpur and Kenduadhi? (10) Is the property described in Schedule B of the plaint included within the property described

in Schedule A of the plaint? (i.e., the property described in the underlease). (12) Have the defendants wrongfully extracted the plaintiffs' coal and if so what is the quantity?"

At the trial the appellants sought to discredit the accuracy of the commissioner's maps particularly in so far as they indicated the position of the jore as shown on the Revenue Survey map. They contended (amongst other things) that the commissioner was wrong in thinking that the survey points 1 and 20 on his first map corresponded to the points C and C on the Revenue Survey map. If they were right in this contention it is obvious that the position of the Revenue jore as shown on the commissioner's map could not be relied upon. The learned trial Judge in his judgment of the 21st February 1933 considered this as well as the other objections urged by the appellants against the accuracy of the commissioner's maps and reports in great detail and with the greatest care. The commissioner had himself given evidence at the trial and the learned judge made an able and exhaustive analysis of that evidence and of the evidence of other witnesses. In the result he found that the intermediate boundary between Kenduadhi and Ganeshpur and therefore the boundary between the coal of the appellants and the respondents was the Revenue jore as depicted on the commissioner's maps. He accepted the commissioner's findings as to the amount of coal extracted and decreed to the respondents damages at the rate of Rs.1.14.0 per ton of such coal.

The learned Judge does not appear to have considered the question whether the Revenue Survey of 1862 could itself be relied upon as showing accurately the position of the jore at that time.

The respondents thereupon appealed to the High Court at Patna where it came on for hearing before Sir Courtney Terrell C.J. and James J. In the result the appeal was allowed.

The Chief Justice thought that the sub-lease indicated quite clearly that the northern boundary of the present appellants' coal was the southern bank of the jore as it existed in 1908, and that as there was no evidence that the jore had shifted its position since that time the suit should have been dismissed. He thought that it was quite immaterial what was the boundary between Kenduadhi and Ganeshpur for the purpose of the Revenue Survey of 1862.

Their Lordships find themselves unable to regard this as a satisfactory solution of the question in dispute. In their opinion the sub-lease included the coal under Ganeshpur up to the true northern boundary of that mouza as fixed by the Revenue Survey—that is to say up to the southern bank of the jore in the position that it occupied at the date of the Revenue Survey. The only question is whether that position was the same as the position that the jore now occupies. That was the view of the matter taken by James J. He pointed out that no witness had deposed to

any alteration having taken place in the course of the jore. He also gave his reasons for thinking that no such change as was alleged by the appellants could have taken place in that district without a convulsion of nature. In those circumstances he said there were two alternatives neither of which he thought impossible (1) that the commissioner was unable to find the fixed points of the Survey of 1862 or (2) that the boundary was incorrectly plotted in that Survey. The first of these two alternatives had been rejected, and in their Lordships' opinion rightly rejected, by the Subordinate Judge. He had said:

> " It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party."

This in their Lordships' judgment is a correct statement of the principle to be adopted in dealing with the commissioner's report. It is substantially the principle already laid down by this Board in the case of *Ranee Surut Soondree Debea* v. *Baboo Prosonno Coomar Tagore* 13 Moo. Ind. Ap. 607 at p. 617.

Nor indeed did James J. proceed upon the first of the two alternatives propounded by him. He proceeded exclusively upon the second and did so in these terms:

> " It appears to me clear from examining the Revenue Survey Map that the delineation of the course of the nala shown therein is to be regarded with suspicion. The work of the Revenue Survey so far as it consisted of triangulation was certainly of the first class; but we are here concerned not with the question of whether the traverse survey then made was correct, but of whether the Amin who plotted the boundaries, working from the traverse lines, surveyed them correctly. The map is on a small scale; but it would on the face of it appear that the Amin did not survey the boundary at all, but merely sketched it in by hand. . . . I do not consider that it can be held to be proved that the nala ever flowed elsewhere than in its present position."

He then adverted to the facts that in his survey of the respondents' workings the commissioner had found that they had extended slightly beyond the southern bank of the jore. This encroachment the learned Judge considered to be quite negligible and one that need not be taken into account.

With this judgment of James J. their Lordships find themselves in substantial agreement.

In the first place there is no single witness who deposes to a shifting of the position of the jore. On the contrary: the only four witnesses who dealt with that question all asserted quite definitely that the jore had never shifted its position during the time that they had known it. They were giving their evidence in the year 1932 and seem to have been familiar with the neighbourhood for about 20, 28, 14 and 16 years respectively. It is inconceivable that, if the jore had gradually shifted its position as stated in the appellants'

plaint, or had been suddenly diverted by some colliery proprietors or village cultivators in recent years as they stated, to the commissioner, these four witnesses should have been ignorant of the facts. The truth of the matter would seem to be that the idea of this shifting of the jore first occurred to the appellants in the year 1927, when the same commissioner, in making a survey of the present position of the jore for the purpose of litigation concerning another colliery situate to the east of the appellants' colliery, had discovered that the position of the jore as delineated on the Revenue Survey map was to the north of its present position. It is plain that the appellants' contention was not based upon any evidence but solely upon the map that the commissioner prepared in 1927. The appellants in other words are relying simply and solely upon the position of the jore being accurately delineated in the Revenue Survey map.

In their Lordships' opinion the map cannot be trusted in this respect. If this map be accurate the jore must have shifted its position considerably since 1862. There is, however, no evidence to show that any change of position of a stream was either probable or even possible in that locality; and there is the oral evidence, to which reference has already been made, that no such change as alleged has taken place during recent years. There cannot therefore have been any gradual change of the stream or any change made in recent times by any cultivator or colliery owner and no other kind of change has been suggested by the appellants. It appears moreover from the evidence of the commissioner given at the trial that the revenue field book does not contain the offsets of the line of the jore. It is therefore at least possible, and in view of all the circumstances of this case, it seems to their Lordships highly probable that the Amin did not in 1862 survey the position of the jore at all, but in the words of James, J. merely "sketched" it in.

This being so, the appellants have failed to discharge the onus that lies upon them of showing that the respondents have worked coal comprised in the appellants' underlease. It is true that the commissioner's survey of the respondents' workings indicates that to a small extent the respondents have taken coal from under land lying to the south of the jore. But no reference to any such working is to be found in the appellants' plaint. All that they alleged was that the respondents had worked some coal under the land described in Schedule B to the plaint, and it was only in respect of the coal under that land that they sought a declaration of title and damages. Now the land described in Schedule B did not extend further south than the jore. No application to amend, however, was made at any stage of the proceedings, and in their Lordships' opinion it would be quite wrong to give to the appellants any relief in respect of the respondents' comparatively small workings to the south of the jore. Had the appellants been correctly informed as to the true northern boundary of the coal comprised in their sublease this lengthy and very expensive litigation would never have been undertaken by them. They ought not to be

allowed to avail themselves of the fact that in the course of their unsuccessful endeavour to establish their title to the coal under the land comprised in Schedule B they have discovered that a small quantity of coal to the value of little more than Rs.2,000 has been extracted by the respondents to the south of that land. They did not, in their plaint, claim any relief in respect of such coal and they cannot be heard to claim it now.

For these reasons their Lordships are of opinion and they will humbly advise His Majesty that the appeal should be dismissed. The respondents' costs of the appeal must be paid by the appellants.

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In the Privy Council

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AND OTHERS

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DELIVERED BY LORD ROMER

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