Privy Council Appeal No. 101 *of* 1928.
Bengal Appeal No. 25 *of* 1927.

Raj Kumar Gobinda Narayan Singh and others - - - *Appellants*

v.

Sham Lal 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 15TH JANUARY, 1931.

Present at the Hearing:

LORD THANKERTON.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The appellants, the plaintiffs in the suit out of which this appeal arises, represent in two moieties an important permanently settled *zemindari* known as the Pandara Raj. It seems to have been originally part of the Jungle Mehal, but is now included in the District of Manbhum. The appearing respondents are the Thakur of Achra and two other persons representing part-purchasers of the Achra estate. The Thakurs are a junior branch of the Pandara family, and are in possession of the remnants of 32 villages known as Taraf Achra. The question for determination in the appeal is as to the coal-mining rights in one of these villages named Dendua. In 1912 the guardian of the Thakur, who was then a minor, and his co-owner leased Dendua for mining purposes to the Dendua Coal Company, who, in the same year transferred their rights to the New Manbhum Coal Company. In 1915 the appellants sued the latter company and the present respondents in the Court of the Subordinate Judge of Burdwan, praying for a declaration that the subsoil

rights of Dendua belonged to them (the appellants), and for an injunction and mesne profits. Subsequently they came to a settlement with the company, and the suit was fought out only between the present opposing parties, each of whom claimed to be entitled to the coal. The Subordinate Judge decided in favour of the respondents, and his decision was confirmed on appeal to the High Court, but the grounds of decision differed substantially in the case of each of the three Judges before whom the suit and appeal were heard. Under the settlement with the New Manbhum Company the claim for mesne profits seems to have dropped out, and the questions for decision by the Board are only as to the title to the coal and a plea of limitation.

The record in the case is a heavy one, and the facts are complicated. There has been litigation in the family from very early times, and their status has been the subject of conflicting decisions in the Indian Courts. Two central facts, however, stand out from the confusion of details. It is admitted in the first place that the Achra villages were at one time an integral part of the Pandara estate, and that they are held by the Achra branch subject to an annual payment of Rs. 21.4.0. In the second place it is beyond dispute that at the permanent settlement the villages were included in Pandara.

Under these circumstances their Lordships have no doubt that the burden of proving their title lies upon the respondents. The presumption arising from the permanent settlement has been considered by the Board in several cases, but it is sufficient to cite a well-known passage from the judgment of Lord Parker in *Ranjitsingh* v. *Kalidasi Debi*, 44 I.A. 117 at p. 122 :—

> " Passing to the settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the British occupation the *zamindars* had any proprietary interest in the lands comprised within their respective districts, the settlement itself recognizes and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the " *zamindars* independent *talukdars* and other actual proprietors of the soil," see Regulation I, s. 3, and Regulation VIII, s. 4. It is clear that since the settlement the *zamindars* have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly referred to as *malguzari* lands."

It follows from this pronouncement that in the case of any claim against the *zemindar* to lands which were included in his *zemindari* at the permanent settlement the burden of proof is upon the claimant ; but though the long possession of the Achra villages by the Thakurs might well be good evidence of their title to surface rights, the question as to subsoil rights stands upon a different footing. These, at all events where not claimed by the Crown, will be assumed to be in the *zemindar*, *Raja Shri Durga Prasad* v. *Braja Nath Bose*, 39 I.A. 133 : and a long series of recent decisions by the Board has established that if a claimant to subsoil rights holds under the *zemindar*, or by a grant emanating from him, even though his powers may

be permanent, heritable and transferable, he must still prove the express inclusion of the subsoil rights. This is laid down in a passage from the judgment of Lord Buckmaster in *Sashi Bushan Misra* v. *Jyoti Prashad Singh*, 44 I.A. 46, at p. 53, which has been so often quoted in subsequent judgments of the Board that it is unnecessary to repeat it here. In *Raghunath Roy* v. *Raja of Jheria*, 46 I.A. 158, this principle was applied to a rent-free *brahmottar* grant from a *zemindar*, and finally, in *Bijoy Singh Dudhoria* v. *Surendra Narayan Singh*, 55 I.A. 320, it was held to be applicable to a *patni* grant.

If, therefore, in the present case nothing more has been established about the tenure of Achra than that it was originally part of Pandara, and has been held by a branch of the Pandara family from before the permanent settlement, subject to an annual payment to the *zemindars*, their Lordships must conclude that the burden which is upon the respondents has not been discharged. The payment may, in its inception, have been a contribution towards the revenue assessed by the paramount power upon the parent estate, but it may equally as well have been a rent-charge reserved to the grantor.

The actual origin of Achra as the estate of the younger branch is lost in obscurity. It seems to be common ground between the parties that the Pandara Raj was founded by Raja Saheb Singh about the middle of the seventeenth century, and that on or after his death, when his eldest son, Raja Mohan Singh, succeeded to the Raj, the 32 villages forming Taraf Achra went to the third son, Thakur Sib Singh, from whom the Thakur respondent is directly descended. The appellants assert that the estate was impartible, and that this was merely a *korposh* or maintenance grant. The respondents' case, on the other hand, is that it was partible, and that Thakur Sib Singh took Achra as his share on partition. If this were established their Lordships would have no difficulty in holding that the subsoil rights passed under the partition, and consequently, that the appellants' suit must fail.

On the question of title the conclusions come to by the Subordinate Judge, in a long and elaborate judgment, were that Taraf Achra was not a *korposh* tenure, but " was acquired by Thakur Sib Singh as his absolute proprietary property, including surface and subsoil under a partition or allotment by way of family settlement," and this, he thought, was confirmed by the conduct of the parties in recent years. In the High Court both Judges agreed that the appellants' case as to the *korposh* grant was not established. Walmsley, J., however, though holding that the Achra Thakurs were " dependent *talukdars* " subordinate to the Pandara *zemindars*, thought that the " proprietary rights " of the latter as *zemindars* did not include the right to the minerals, and that for this reason the suit should be dismissed—a conclusion which is manifestly inconsistent with the decision in *Raja Shri Durga Prasad's* case above referred to, and which

has not been supported before their Lordships. Mukerji, J., on the other hand, thought that the only question was whether the mineral rights were in the appellants or the Thakurs. He seems to disregard the case of partition, and says that "the position," contended for by the defendants, is that "Achra was given to Shib Singh either as a gift or a reward for services, or in lieu of future services, or to keep him in obedience." "Nothing," he says, "that has been proved in this case is inconsistent with this position," and again, "It has to be seen whether [the mineral rights] were reserved by Raja Mohan Singh when he parted with Achra, or whether the plaintiffs' predecessors subsequently acquired such rights in some way or other. Unless one of these points is answered in favour of the plaintiffs they cannot succeed in this suit."

With regard to the annual payment he says :—

> "There is absolutely nothing upon which we can say on what basis this amount was paid . . . It may have been fixed as indicative of that degree of subordination which a Feudatory Chief owes to his suzerain, or . . . may have been imposed by consent as a contribution towards the revenue which Pandara itself had to pay. The payment of this amount no doubt implies subordination, but it does not necessarily indicate the relation as between a lessor and lessee or a landlord and a tenant, and it may as well imply a subordination indicative of a political relation which had its origin under circumstances the nature of which cannot now be probed into with certainty and which has continued down to the present day."

With reference to the first of these quotations from the judgment of the learned Judge, which seem to contain the pith of his reasoning, their Lordships need only say that no case of gift or of a service grant has been made before them, the case for the respondents being argued solely on the basis of a partition or (as the Subordinate Judge puts it alternatively) an "allotment by way of family settlement." They would add, however, that even upon Mukerji, J.'s, view of the respondents' case, it would still seem to be incumbent upon them to prove affirmatively the inclusion of the subsoil rights, whereas the learned Judge appears to consider that it was for the *zemindars* to prove their reservation. Much the same fallacy, their Lordships think, underlies his argument on the annual payment. If there is no evidence as to the basis upon which it was fixed it is at least consistent with such a subordination as has been implied, in the decisions above cited, from a *patni* or a permanent *brahmottar* grant.

The only way in which the respondents attempt to establish the partition is by reference to the proceedings in a suit instituted in 1793 to which the then Raja Protab Narain and the sons of his father's younger brother, Kuljan Singh, were parties. In this suit the Raja's nephews claimed a partition of the estate. Their claim was successful, and Pandara was divided, a moiety of the *zemindari* eventually going to each of the two branches now represented by the two sets of appellants before the Board. The Achra branch was not concerned in this litigation, but it is

said that, as evidence of the Pandara estate being partible, the instance of Achra was vouched, and that the Court in that suit came to the conclusion that the Achra villages had come to the Thakurs' branch by partition, as is now alleged. It also appears that one Chand Mohan Singh, a grandson of Thakur Sib Singh, was called as a witness in these proceedings to prove the partition. His deposition, in a mutilated state, has been brought on the record in the present case, and it is contended for the respondents that this judgment and deposition establish the partition as now in issue.

Their Lordships are unable to accept this contention. They think that the judgment in question is only admissible under the provisions of ss. 13 and 43 of the Evidence Act as establishing a particular transaction in which the partibility of the Pandara estate was asserted and recognized, viz., the partition resulting from the 1793 suit. The reasons upon which the judgment is founded are no part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case. The judgment, therefore, is no evidence that Thakur Sib Singh got the Achra villages by partition; it is at most evidence that he might have done so, and this is plainly not sufficient.

With regard to the deposition of Chand Mohan Singh, their Lordships think that it is clearly inadmissible under ss. 32 and 33 of the Evidence Act. Even if it were technically admissible the fragmentary condition of the record produced would deprive it of all possible weight.

There is, therefore, in their Lordships' view, no affirmative evidence of the partition at all, and it is at least noteworthy in this connection that in litigation in the Achra branch in 1816 between Chand Mohan Singh's widow and his brother, Surjoo Narain, it was alleged—apparently by both sides—that by the custom of the family, Achra was impartible. It is also perhaps of interest to find that in the present case there is no allegation of a partition in the written statements of defence filed by the respondents. They deny the allegation of a *korposh* grant, but as to the foundation of their title they say no more than that "Taraf Achra . . . was owned and possessed in indefeasible and absolute proprietary right by the predecessors of [the Thakur defendant] by right of inheritance all along," and in a later paragraph that "an ancestor of [the Thakur defendant], who settled at Achra before the advent of the British Raj, acquired Taraf Achra in his own right."

There are two documents on the record referring to Achra in pre-British times. They are dated in 1729 and 1759, respectively, and both emanate from the Mahomedan Raj of Birbhoom, to which Pandara was then subordinate. They show the Pandara Raja as in possession of Achra with other villages at a fixed annual rental of Rs. 300, but if not negativing the idea of an

antecedent partition by which Achra had ceased to be part of the Pandara estate, they clearly afford no support to it.

Apart from these documents and the references to Achra in the 1793 litigation, with which their Lordships have already dealt, there is nothing to suggest the Thakurs' full proprietary right in the soil till comparatively recent times. It is true that they have remained in undisturbed possession of their villages, but this is in no way conclusive as to sub-soil rights, which have only become of practical importance since the discovery of the coal.

It seems clear that until the decision of the Board in *Sashi Bushan Misra's* case, which is referred to in an earlier part of this judgment, there was ground for believing that the subsoil rights passed with any permanent tenure created by a *zemindar* at a fixed rental; see, for instance, the judgment of Pargiter, J., in *Shriram Chakra Sarti* v. *Hari Narain Singh Deo*, I.L.R., 33 Calc. 54, and the parties might well have been under this impression till the present suit was launched. This would account for a good deal of the "conduct" of the parties in recent times which is relied upon by the respondents as showing that they were recognized as full owners. There is no doubt a considerable volume of documents of varying importance on the record showing that the Thakurs have regarded themselves, and have been regarded by others, including Government officials, as full proprietors of their villages. There are also cases in which the Pandara *zemindars* are said themselves to have treated the Achra Thakurs as independent proprietors. The Subordinate Judge has classified the evidence on this head with great elaboration, and he considers that it supports the conclusion to which he came upon the question of partition. In the High Court it seems to have been treated as of less importance. Walmsley, J., does not refer to it. Mukerji, J., deals with it at some length, but holds it to be inconclusive. He says :—

> "Many of these documents mentioned in the aforesaid items are of little or no evidentiary value as against the plaintiffs in the present suit either because the assertions made or contained therein were not such as would put the plaintiffs or their predecessors to the necessity of taking steps to refute or disprove them, or the statements so made were in the nature of admissions made by a party in his own interest or were mere descriptions of a general nature of the interest of the holders without having any special or distinctive significance, or the interest at stake was so insignificant that it was hardly worth while on the part of the Pandra *zemindars* to protest. There are, however, amongst these documents some to which special importance must attach in view of the fact that they contain either admissions on the part of the *zemindars* of Pandra as to the character of the rights of the holders of Achra or may be taken as evidence of their conduct in relation thereto."

The learned Judge then summarises the documents which come under this category, and continues :—

> "Not much weight, in my opinion, should be placed upon the descriptions that have been from time to time given of the rights of the holders of Taraf Achra by the predecessors of the plaintiffs. They were sometimes given merely as generally descriptive of the right which the holder or owner

> of the landed properties exercises in his property, and sometimes given with an ulterior object and the description was coloured by the view it was sought to propound as to the nature of the interest. In my judgment an investigation into the conduct of the parties more than their statements in relation to the property is more important. No definite conclusion, therefore, in my opinion can be drawn from the use of the expressions, Zemindari Shikmi Zemindari, Sadar Jama and the like in the documents to which I have referred."

Their Lordships are not prepared to dissent from this conclusion. If the "conduct" relied upon were even approximately contemporaneous with the severance of Achra from the parent estate, and so belonged to a period when it might be assumed that both parties were well acquainted with their rights, it might be of some evidentiary value; but coming, as it does, after a lapse of at least a century and a half, when no one has any very certain idea of what the real rights are, or how they originated, their Lordships think that it would be most unsafe to hold, merely upon the strength of such uncertain material as this, that the respondents had proved affirmatively their title to the subsoil rights.

On the whole, therefore, their Lordships have come to the conclusion that the respondents have not established their title to the Dendua coal, and that, unless the suit is out of time, the appellants are entitled to the declaration and injunction which they seek.

It follows from this finding that it is unnecessary for their Lordships to consider the contention of the appellants that Pandara was an impartible Raj, and that the Achra villages were held only as a *korposh* grant which would not carry the minerals—a contention which must involve considerable difficulties having regard to the decision in the 1793 suit and the position of the second set of the appellants.

It only remains to consider the question of limitation on which all the three Judges in India have held against the appellants, though they have arrived at this end by somewhat divergent routes. The Sub-Judge was satisfied that mining in Dendua only commenced in 1912, and that as the suit was instituted in 1915 there could not be any question of adverse possession by working the coal. He held, however, that the Thakurs had so long asserted a proprietary title to the Achra estate that they must be taken to have been in adverse possession for more than 12 years under Art. 144 of the Limitation Act, and so to have acquired the full proprietorship under s. 28 of the Act. In the High Court both the learned Judges were agreed that the suit, being one for a declaration and injunction, would be governed by Art. 120. Walmsley, J., held that mining operations in Dendua were proved to have been comenced more than six years before suit; Mukerji, J., was not prepared to agree in this, but thought that the appellants' right of action accrued when coal was first worked in any of the Achra villages, which was admittedly more than six years before suit.

Their Lordships find themselves unable to accept any of these conclusions. Assuming that Art. 120 applies, they think that the expression " right to sue " in that article means the right to bring the particular suit with reference to which the plea of limitation is raised, and that the present suit being in respect of Dendua only the starting point for limitation must be the date when the appellants' rights in Dendua were first invaded. Their Lordships think that there is no reliable evidence of mining in Dendua prior to 1912, indeed, the respondents' counsel has made no attempt to support the finding of Walmsley, J., on this point. The appellants may have lost their rights in other villages ; these may or may not have been worth fighting for when they were infringed, and it may well be borne in mind in this connection that the present suit has taken—as their Lordships regret to find—more than 15 years before a final decision can be reached ; but this cannot affect their rights in Dendua which remained intact until 1912.

Nor can their Lordships agree that the long possession and enjoyment by the Thakurs of the surface rights in the Achra villages is evidence of adverse possession of the sub-soil. In their Lordships' opinion, therefore, the plea of limitation fails.

Their Lordships will humbly advise His Majesty that this appeal should be allowed ; that the decree of the High Court (except in so far as it gives effect to the compromise between the appellants and the New Manbhum Coal Company), and the decree of the Subordinate Judge, should be set aside, and that a decree should be made in favour of the appellants other than the said company for a declaration and injunction as prayed in the plaint. The respondents other than the said company must pay the costs of the appellants throughout.

In the Privy Council.

RAJ KUMAR GOBINDA NARAYAN SINGH
AND OTHERS

v.

SHAM LAL SINGH AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES

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