

Tarkeshwar Sio Thakur Jiu vs Bar Dass Dey & Co. And Ors on 6 February, 1979

Equivalent citations: 1979 AIR 1669, 1979 SCC (3) 106, AIR 1979 SUPREME COURT 1669, 1979 (3) SCC 106

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, O. Chinnappa Reddy

PETITIONER:
TARKESHWAR SIO THAKUR JIU

Vs.

RESPONDENT:
BAR DASS DEY & CO. AND ORS.

DATE OF JUDGMENT 06/02/1979

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
REDDY, O. CHINNAPPA (J)

CITATION:
1979 AIR 1669 1979 SCC (3) 106
CITATOR INFO :
RF 1987 SC1713 (10)

ACT:
Transfer of Property Act, 1882 (Act IV) Sections 105, 108 read with s. 3(26) of the General Clauses Act-"Immovable Property" definition of, explained.
Mines Act, 1952, s. 2(i) read with Cl. (c) and (d) of s. 3 of the Mines and Minerals (Regulation and Development) Act, (No.67 of 1957), Scope of.
West Bengal Estates Acquisition Act, 1953, Section 6(1)(i), 27 and 28, scope of.
Words and Phrases "Any" "directly worked by him" in s. 28 of the West Bengal Estates Acquisition Act, 1953, meaning of-Interpretation of a document-Regard must be had to the substance and not the words or the form.

HEADNOTE:

The appellant idol, a juristic person, was exercising the rights, through the Shebait, Mohanta Srimati Dandi Swami, of a Darpatnidar in the land in suit. By a lease-deed (Ex. A), dated July 10, 1941, the appellant granted to the respondents a lease of the suit land for the purpose of raising and taking sand out of the land for a period of nine years ending on July 13, 1949. Subsequently, on April 27, 1950, the appellant made a similar grant (Ex. I) for another nine years expiring on April 13, 1959, but this grant was called "licence". The respondents did not pay the licence fee for the period 1362 (14-4-1955) to 1365 B.S. The appellant thereupon issued notice dated March 31, 1966, terminating the 'licence' and then filed a suit No. 37 of 1960 for ejectment of the respondent in the Court of the Munsiff, Chandernagore. The trial court having dismissed the suit, the appellant filed a first appeal which was allowed. In second appeal the High Court restored the decree of the trial court.

In appeal by special leave to this Court, it was contended on behalf of the appellant:

(a) The transaction evidenced by the document (Ex. I) dated April 27 1950 was a 'license' for taking away sand and not a 'lease' of immovable property. Therefore, the appellant-intermediary will be considered to be in Khas possession of the holding on the date of vesting (April 1, 1955) through the licensee and as such, entitled to retain it under Section 6 of the Bengal Estates Acquisition Act, 1953;

(b) Section 28 of the Bengal Estates Acquisition Act, 1953 is not applicable because there was no 'mine' in the suit land, as defined in the Central Act 67 of 1957; the sand deposits naturally exist on the surface and not below it and mere collection and removal of the sand from the surface did not constitute mining operations. therefore, it could not be said that the suit land was comprised in a mine or appertained to a mine within the meaning of the said Section 28;

(c) Even if the land was a 'mine' or appertained to a mine, the mine was being worked by the appellant through a licensee, and as such, was being

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'directly worked' by the appellant-intermediary within the contemplation of Section 28 of the Bengal Estates Acquisition Act, and therefore, the land would be deemed to have been leased to the appellant by the Government.

Rejecting these contentions, and dismissing the appeal,
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HELD: A. In ascertaining whether a document evidences a 'lease' or a 'licence', regard must be had to the substance of the transaction and not merely the words or the form in which it is dressed. [26F] .

The document (Ex. I the Agreement), in the instant case reveals the following characteristics. which show that in

fact and substance, it is a 'lease' and not a 'licence':
[27E, 32C]

(i) A right to "raise" and "take out" and remove sand "lying inside" the land in dispute was granted by the plaintiff to the defendant. The words "raise" and "take out sand" from "inside" the land are wide enough to include not only the "right to carry out all the operations" necessary for extracting sand, but also to take it away and appropriate it. Construed in the context of the document as a whole, these words put it beyond doubt that right to carry out "mining operations" [within the definition in Cl. (d) of s. 3 of the Central Act 67 of 1957] for winning sand and to appropriate it, were granted. [27F-G]

(ii) The rights were granted for a period of 9 years, commencing from April 27, 1950. [27H]

(iii) These rights were granted for a "price" fixed on yearly basis, irrespective of the quantity of sand extracted. The "price" fixed is Rs. 66/- per annum. This consideration is payable in the month of Chaitra every year. In case of default, the First Party (grantee) shall not be entitled "to raise the sand next year" and the Second Party (grantor) shall have a right to recover the arrears of rent together, with interest at 12% by bringing a suit against the First Party. [28A-B]

(iv) "The Second Party will be entitled to take Khas possession of land" "at the end of the stipulated period. This condition, (contained in paragraph 4 of Ex. 1) read along with the other parts of the document necessarily implies that if the First Party continues to pay the "price", as stipulated, (a) he shall be entitled to enter into and remain in exclusive khas possession of the land for the purpose of carrying out the mining operations for the full stipulated period of 9 years and (b) the Second Party (plaintiff) will not be entitled to retake khas possession of the land and revoke the so-called "licence" before the end of the said period of 9 years. [28B-D]

The term "lease" occurring in the definition of "mining lease" given in cl. (c) of s. 3 of the Mines and Minerals (Regulation and Development) Act is not used in the narrow technical sense in which it is defined in s. 105 of the Transfer of Property Act. A mining lease may not meticulously and strictly satisfy in all cases, all the characteristics of a "lease" as defined in the Transfer of Property Act. Nevertheless, in the accepted legal sense, it has always been regarded as a lease in this country. [29E-G]

In the instant case the transaction evidenced by Ex. I not only falls within the definition of a mining lease under Act, 67 of 1957, but also partakes of

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all the essential characteristics of a "lease" defined in s. 105 of the Transfer of Property Act. [30-A-B]

Balakrishna Pal v. Jagannath Marwari, ILR 59 Cal. 1314; approved

Raj Kumar Thakur Girdhari Singh v. Megh Lal Pandey LR 44 I.A. 246; Gowan v. Christie, [1873] LR 2 HL (SC) 278; differed.

The negative definition of "immovable property" given in s. 3, Para 1 of the Transfer of Property Act, 1882, is not exhaustive. Therefore, applying the definition given in s. 3(26) of the General Clauses Act (X of 1897) to the expression used in the Transfer of Property Act, except as modified by the definition in the first clause of s. 3 every interest in immovable property or a benefit arising out of land, will be 'immovable property' for the purpose of s. 105, Transfer of Property Act. [30E-G]

A right to carry on mining operations in land to extract a specified mineral and to remove and appropriate that mineral, is a right to enjoy immovable property within the meaning of s. 105, more so, when it is coupled with a right to be in its exclusive khas possession for a specified period. The right to enjoy immovable property spoken of in s. 105, means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject matter of the lease is mineral land or a sand-mine, it can be enjoyed and occupied by the lessee by working it as indicated in s. 108 of the Transfer of Property Act which regulates the rights and liabilities, of lessors and lessees of immovable property, [30G-H, 31A]

Nageshwar Bux Roy v. Bengal Coal Company, [1930] LR 58 IA 29; applied.

H. V. Low & Co. Ltd. v. Joyti Prasad Singh Deo, [1931] ILR 59 Cal. 699; LR 58 IA 392. differed from.

Commissioner of Income Tax, Bihar and Orissa v. Kumar Kanakhaya Narain Singh, ILR (XX) Patna 13; approved.

The true character of the transaction evidenced by the document (Ex. 1) being that of a 'lease' and not a 'licence,' Section 6(1)(i) of the West Bengal Estates Acquisition Act, 1953 will not cover the appellant's case and give him a right to retain the land in dispute, even if section 28 of that Act was out of the way. [32C-D.]

B. The definition of "mining operations" and "mine", in the Central Act 67 of 1957 are very wide. The expression "winning of mineral" in the definition of "mining operations" is spacious enough to comprehend every activity by which the mineral is extracted or obtained from the earth, irrespective of whether such activity is carried out on the surface or in the bowels of the earth. Mines and minerals need not always be sub-soil and there can be minerals on the surface of the earth. [24G]

B. Dass v. State of U.P. [1976] 3 S.C.R. 869, reiterated.

It is true that in the definition of "mine", the term "excavation" in the ordinary dictionary sense means "hole", "hollow" or "cavity made by digging out". But the word "any" prefixed to "excavation" in the context of the phrase "for the purpose of searching for or obtaining mineral" gives it

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much more extensive connotation, so that every "excavation", be it in the shape of an open cast cavity or a sub-terranean tunnelling, will fall within the definition of 'mining operations'. The essence of 'mining operations' is that it must be an activity for winning a mineral, whether on the surface or beneath the surface of the earth. [24H, 25A-B]

In the instant case, the land in dispute has large deposits of sand, which is a minor mineral. The sand was admittedly being excavated and removed by the respondent lessee. The land was, thus, at the date of vesting, "comprised in or appertained to a 'mine' within the meaning of s. 28 of the West Bengal Estates Acquisition Act, 1953. [25B-C]

C. The phrase "being directly worked by him" in s. 28 of the West Bengal Estates Acquisition Act, 1953, will not take in a case where the mine was being worked through a lessee or licensee to whom the right to conduct mining operations and to take away the mineral had been granted by the intermediary in consideration of receiving a periodic rent, royalty or a like amount. [25E-F]

The word "directly" means "in a direct way, without a person or thing coming between", immediately as directly responsible. The use of the expression "directly" in the context of the word "worked", followed by the words "by him" unmistakably shows that the legislative intent was to allow only those intermediaries to retain land comprised in or appertaining to a mine, as lessees under the State, who immediately before the date of vesting, were working the mine under their immediate control, management and supervision. [25C-E]

Section 28 of the West Bengal Estates Acquisition Act, 1953 denies the right to retain the land comprised in a mine or appertaining to a mine, if, at the material date, it was not being directly worked by the intermediary but through a licensee, or other agency to whom the right to conduct mining operations had been granted by the intermediary. In that respect, the provisions of s.28 are contrary to those of s. 6(1)(i), which give to an intermediary a right to retain land held by him in khas for the purpose mentioned therein through a licensee. In this situation, according to the legislative mandate in s. 27, the provisions of s. 6(1)(i) must yield to those in s. 28. [26 B-C]

Thus, even on the assumption that the respondent was at the material date, holding the land in Khas through a licensee and fulfilling all other conditions which entitled him to retain under section 6 (1) (i), then also, the case being in conflict with section 28, the latter section would prevail over the former.

[26D & 32E]

JUDGMENT :

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2218 of 1969.

Appeal by Special Leave from the Judgment and Decree dated 14-3-1969 of the Calcutta High Court in appeal from Appellate Decree No 718 of 1962.

D. N. Mukherjee and N. R. Chaudkary for the Appellant. Purshottam Chatterjee, P. K. Chatterjee and Rathin Das, for the Respondents.

The Judgment of the Court was delivered by SARKARIA, J.-This appeal by special leave is directed against a judgment, dated March 14, 1969, of the High Court at Calcutta.

The appellant had the interest of a Darpatnidar in the land in suit, measuring 9 acres (27 bighas). The plaintiff by a lease-deed (Ex.A) dated July 10, 1941, granted to the defendant-respondents a lease of this land for the purpose of raising and taking sand out of the land for a period of 9 years ending on July 13, 1949. In this lease deed, the property was described to be Patni Mahal. Under the terms of this lease, the lessee had an option of renewal for another 9 years. Subsequently on April 27, 1950, appellant made a similar grant (Ex.I) for another 9 years expiring on April 13, 1959 but this grant was called a "licence".

The respondents did not pay the licence fee for the period from 1362 (14-4-1955) to 1365 B.S. The plaintiffs thereupon issued notice, dated March 31, 1966, terminating the licence and then filed Suit No. 37 of 1960 for ejectment of the respondent in the Court of the Munsif, Second Court, Chandernagore.

The suit was resisted by the defendant-respondents, inter alia, on the ground that the land had vested in the State under the West Bengal Estates Acquisition Act, 1953 (hereinafter referred to as the Acquisition Act); that they were tenants, and not licensees, under the plaintiff and after the date of vesting with effect from April 14, 1955, became direct tenants under the State in respect of suit land and were paying rent to the State.

The Trial Court dismissed the suit holding:

(i) that the defendants were not licensees, but were tenants; and (ii) that the plaintiff was not in khas possession on the date of the vesting (April 14, 1955); so he could not retain the land under Section 6(1) (i) of the Act. In the result, the suit was dismissed.

The first appellate Court reversed the decision of the trial court and decreed the suit with the finding that the grant being a licence, the plaintiff-intermediary was entitled to retain the holding under Section 6 (1) (i) of the Act.

Allowing the Second Appeal by the defendants, the High Court held:

(a) that if the lease (Ex.A), being a lease for 9 years, was void under Section 107 of the Transfer of Property Act, it would still operate as a lease from month to month;

(b) it was not a licence; and

(c) section 28 of the Act applied and, as the plaintiff was not directly working the mine in the land, he could not retain it.

Aggrieved, the plaintiff has come in appeal by special leave to this Court.

The principal question that falls to be determined is:

whether Section 6 or Section 28 of the Acquisition Act governs the case ? The High Court has held that it is Section 28, and not Section 6, which is applicable; while the appellant contends that Section 6 is applicable by virtue of which he is entitled to retain the holding.

Section 6, so far as relevant for our purposes, is in these terms:

"6. Rights of intermediary to retain certain kinds-

(1) Notwithstanding anything contained in Sections 4 and 5, an intermediary shall, except in the cases mentioned in the proviso to sub-section (2) but subject to the other provisions of that sub-section, be entitled to retain with effect from the date of vesting;.....

(i) Where the intermediary is... an institution established exclusively for a religious or a charitable purpose, or both, or is a person holding under a trust or an endowment or other legal obligation exclusively for a purpose which is charitable or religious or both-land held in khas by such .. institution or person, not being a tenant, by leave or licence of such.. institution or person."

The contention of the learned counsel for the appellant is that since the suit land was held by the appellant- intermediary in khas for a religious purpose through a licensee-the defendant being a licensee, and not a tenant-he would be entitled to retain and hold this land from the date of vesting by virtue of clause (i) of sub-section (1) of Section 6.

The other relevant provisions are in Chapter IV of the Acquisition Act. They are as follows:

"Sec. 27. Provisions of Chapter IV to override other provisions of the Act.-The provisions of this Chapter shall have effect notwithstanding anything to the contrary elsewhere in this Act."

"Sec. 28. Right of intermediaries directly working mines.-So much of the land in a notified area held by an intermediary immediately before the date of vesting (including sub-soil rights therein, but excluding rights in hats and bazars not in the khas possession of the intermediary and land comprising forests, if any) as was comprised in or as appertained to any mine which was being directly worked by him immediately before such date shall with effect from such date be deemed to have been leased by the State Government to such .. intermediary. The terms and conditions of such lease shall be as agreed upon between him and the State Government, or in default of agreement as may be settled by the Mines Tribunal:

Provided that all such terms and conditions shall be consistent with the provisions of any Central Act for the time being in force relating to the grant of mining leases."

Section 2(j) of the Mines Act, 1952, defines 'Mine' to mean "any excavation where any operation for the purpose of searching for obtaining mineral has been or is being carried on and includes.. "

"Minor Minerals" as defined in clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, (No. 67 OF 1957) include "ordinary sand". Clause (c) of the same Section defines "mining lease" as a "lease granted for the purpose of undertaking mining operations, and includes a sub-lease granted for such purpose." Clause (d) of the same Section defines "mining operations" to mean "any operations undertaken for the purpose of winning any minerals."

Before the High Court, it was common ground between the parties that the land in dispute has a sub-soil deposit of sand and the rights granted to the respondent, under the document (Ex. I); styled as a 'licence', were "to raise" and "take" away that deposit of sand. Before us, an attempt was made to deviate from that stand by contending that the deposits of sand are on the surface in the shape of sand- dunes and for removing the same no excavation or mining operations are necessary.

The contention must be repelled. The definition of "mining operations" and "mine", noticed above, are very wide. The expression "winning of mineral" in the definition of 'mining operations' is spacious enough to comprehend every activity by which the mineral is extracted or obtained from the earth irrespective of whether such activity is carried out on the surface or in the bowels of the earth. As pointed out by this Court in B. Dass v. State of Uttar Pradesh⁽¹⁾, it is wrong to assume that mines and minerals must always be sub-soil and that there can be no minerals on the surface of the earth.

It is true that in the definition of "Mine", the term "excavation", in the ordinary dictionary sense, means "hole", "hollow" or "cavity made by digging out". But the word "any" prefixed to "excavation"

(1) [1976] 3 S.C.R. 869.

in the context of the phrase "for the purpose of searching for or obtaining mineral" gives it a much more extensive connotation, so that every "excavation", be it in the shape of an open-cast cavity or a

subterranean tunnelling, will fall within the definition of 'Mine'. Similarly, it is not a requirement of the definition of 'mining operation' that the activity for winning the mineral, must necessarily be an under ground activity. The essence of 'mining operations' is that it must be an activity for winning a mineral, whether on the surface or beneath the surface of earth. Thus considered, the land in dispute having large deposits of sand, which is a minor mineral, was admittedly being excavated and removed by the defendant, was at the date of vesting "comprised in or appertained to a mine" within the meaning of Section 28.

Having seen that the land in dispute is a 'mine' in which 'mining operations' were being carried on, the further question to be considered is, whether this mine was "being directly worked" by the appellant intermediary? The word "directly", according to Webster's New World Dictionary means "in a direct way, without a person or thing coming between"; "immediately: as directly responsible". The use of the expression "directly" in the context of the word "worked", followed by the words "by him", unmistakably shows that the legislative intent was to allow only those intermediaries to retain land comprised in or appertaining to a mine, as lessees under the State, who immediately before the date of vesting, were working the mine under their immediate control, management and supervision. Thus construed, the phrase "being directly worked by him" in the Section will not take in a case where the mine was being worked through a lessee or licensee to whom the right to conduct mining operations and to take away the mineral had been granted by the intermediary in consideration of receiving a periodic rent, royalty or a like amount.

It was contended by the learned counsel for the appellant, that this interpretation of the phrase "directly worked by him", is inapplicable to an intermediary who is an idol because an idol, albeit a juristic person, has no power to work the mine through a lessee or licensee.

The argument is ingenious but untenable. The idol held the suit land comprised in the mine as an intermediary, only in the juristic sense, but, in fact he was exercising his rights in the suit land, through his human representative, the Shebait, Mohanta Srimat Dandi Swami. The Shebait could in that representative capacity, directly work the mine himself. But, instead of doing so, he, on April 27, 1950 granted the right of carrying on mining operations in the land and taking away the mineral, on payment of an annual sum for a period of 9 years to 3-196SCI/79 the respondents. Thus, irrespective of whether this transaction or grant, dated April 27, 1950, was a lease or a license, the fact remains that immediately before the date of vesting, the mine in the suit land, was not being "directly worked" by the intermediary within the contemplation of Section 28.

The provisions of Section 6(1) (i) of the Acquisition Act, extracted earlier, give to an intermediary a right to retain land held by him in khas for the purposes mentioned therein, through a licensee. Section 28, as construed by us, denies the right to retain the land comprised in a mine or appertaining to a mine, if, at the material date, it was not being directly worked by the intermediary but through a licensee, or other agency to whom the right to conduct mining operations had been granted by the intermediary. In that respect, the provisions of Section 28 (in Chapter IV) are contrary to those of Section 6(1) (i). In this situation, according to the legislative mandate in Section 27, the provisions of Section 6(1)(i) must yield to those in Section 28.

Assuming arguendo, that the plaintiff was at the material time, holding the land in khas through a licensee and fulfilled all other conditions which entitled him to retain under Section 6(1) (i), then also, this case being in conflict with Section 28, the latter Section would prevail over the former.

In this view of the matter, it is not, strictly speaking, necessary to resolve the controversy as to whether the transaction (Ex. I) dated April 27, 1950, was a lease or a license. But, as in the Courts below, and here also, a good deal of argument was addressed on this point, we propose to go into the same.

It is well-settled that in ascertaining the real character of a document, regard must be had to the substance of the transaction and not merely the words or the form in which it is dressed. The Agreement (Ex. I), which is named as a licence, is to be construed in the light of this cardinal canon.

The Agreement (Ex. I) is not a very lengthy document. The material part of this document may be extracted as below:

"This deed of Agreement is executed to the effect following:-

..... We the First Party, have been carrying on the business of sand near Haripal Station. Sand was necessary for carrying on the said business and the said sand Lying inside the land described in the schedule below should be taken out and proposal having been made to the second parties for the purpose of business, the second parties agreed to take settlement to the effect that we can take out the sands of the said lands and become bound by the agreement on the following terms and conditions of taking out the sand from the said land only. TERMS AND CONDITIONS

1. The sand which is in the said land belongs to the own share of the First Party and should be taken out within the month of Chaitra from 1357 to 1365.
2. Save and except the raising of the said sand there will be no right, title and interest in the land with the First Party. No right, title and interest will accrue to the First Party in respect of the land.
3. The First Party for the purpose of raising sand, will pay Rs. 66/- (Rupees sixty six) per annum as the price of the said sand. If the Government fixes any new amount of demand, then, save and except this, they will take the said amount of Rs.

66/- and/or the Second Party will not be entitled to claim the same. If the amount is not paid within the month of Chaitra every year, then the parties will not be entitled to raise the sand next year, and for realisation of the said amount of Rs. 66/-, Second Party can bring a suit against the First Party, and will get the arrears of interest at the rate of 12%.

4. At the end of the stipulated period, the Second Party will take khas possession of the said land; and the licence of the First Party will be revoked...."

(Emphasis added) From what has been extracted above, the following characteristics of the transaction are clear: F

(i) A right to "raise" and "take out" and remove sand "lying inside" the land in dispute was granted by the plaintiff to the defendant. The words "raise" and "take out sand" from "inside" the land are wide enough to include not only the "right to carry out all the operations" necessary for extracting sand, but also to take it away and appropriate it. Construed in the context of the document as a whole, these words put it beyond doubt that rights to carry out mining operations"

[within the definition in clause (d) of Section 3 of the Central Act 67 of 1957] for winning sand and to appropriate it were granted.

(ii) The rights were granted for a period of 9 years, commencing from April 27, 1950.

(iii) These rights were granted for a "price" fixed on yearly basis, irrespective of the quantity of sand extracted. The "price" fixed is Rs.

66/- per annum. This consideration is payable on the month of Chaitra every year. In case of default, the First Party (grantee) shall not be entitled "to raise" the sand "next year" and the Second Party (grantor) shall have a right to recover the arrears of rent together with interest at 12% by bringing a suit against the First Party.

(iv) "The Second Party will be entitled to take khas possession of the land" "at the end of the stipulated period". This condition, (contained in paragraph 4 of Ex.I) read along with the other parts of the document, necessarily implies that if the First Party continues to pay the "price", as stipulated,

(a) he shall be entitled to enter into and remain in exclusive khas possession of the land for the purpose of carrying out the mining operations for the full stipulated period of 9 years and (b) the Second Party (plaintiff) will not be entitled to retake khas possession of the land and revoke the so-called "license" before the end of the said period of 9 years.

It is contended on behalf of the appellant that, according to Condition 2 of the Agreement (extracted above), "except the raising of the sand", no right, title and interest in the land was given to the defendant. It is submitted that in view of this express condition, the transaction was only a 'licence'. Relying on Paragraph 899 of Halsbury's Laws of England, 3rd Edition, Vol. 26, it is maintained that, in any case, it is not a 'lease' as defined in Section 105 of the Transfer of Property Act, but only a contract to sell sand, the price being payable in yearly instalments. It is emphasised that the essential characteristic of a "lease" is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of user disappear. Reference has also been made to the dictum of the Judicial Committee of the Privy Council in *Raj Kumar Thakur Giridhari Singh v. Megh Lal Pandey*(I), and the decision of the House of Lords in *Gowan v.*

Christie(2).

We are unable to accept these contentions. Para 899 of Halsbury's Laws of England (ibid) reads, thus:

"A lease may be granted of land or any part thereof, and since minerals are a part of the land it follows that a (1) L. R 44 I.A.246.

(2) [1873] L. R. 2. H. L. (Sc.) 278.

lease can be granted to the surface of the land and the A minerals below, or of the surface alone, or of the minerals alone. It has been said that a contract for the working and getting of minerals alone though for convenience called a mining lease, is not in reality a Lease, at all in the sense in which one speaks of an agricultural lease, and that such a contract, properly considered, is really a sale of a portion of the land at a price payable by instalments, that is, by way of rent or royalty, spread over a number of years." This statement of the law in England, appears to be founded on the observations of Cairns, L. J. in *Gowan v. Christie* (ibid) and *Gozens Hardy, L.J. in Aldam's Settled Estate*(1).

In *Raj Kumar Thakur Giridhari Singh* (ibid), Lord Shaw, delivering the opinion of the Board, said that "it must be born in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear". Counsel for the appellant has adopted this very argument. But this observation should not be torn out of the context. Lord Shaw had further observed: "In order to cause the latter speciality to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased". Thus, Lord Shaw had himself pointed out that minerals may be made a part of the subject-matter of a lease, and in such a case the lease would permit the idea of the partial consumption of the subject-matter of the lease.

It is important to bear in mind that the term "lease" occurring in the definition of "mining lease" given in Section 3(c) of Act 67 of 1957 does not appear to have been used in the narrow technical sense in which it is defined in Section 105 of the Transfer of Property Act. But, as rightly pointed out by a Bench of the Calcutta High Court in *Fala Krishna Pal v. Jagannath Marwari*(2), a settlement of the character of a mining lease is everywhere in India regarded as 'lease'. A mining lease, therefore, may not meticulously and strictly satisfy in all cases, all The characteristics of a 'lease' as defined in the Transfer of Property Act. Nevertheless, in the accepted legal sense, it has always been regarded as a lease in this country.

In *Fala's case* (ibid) Mukerji, J., speaking for the Bench, held that a coal mining settlement may be regarded as satisfying the requirements of Section 105 and treated as a lease because under such H (1) [1902] 2 Ch. 46 at page 56.

(2) I. L. R. 59 Cal. 1314.

settlement some portion, however small, of the surface has to be used for carrying on the mining operations and taking the coal out.

Be that as it may, in the instant case, as shall be presently discussed, the transaction evidenced by Ex. I, not only falls within the definition of a "mining lease" under Act 67 of 1957, but also partakes of all the essential characteristics of a 'lease' defined in Section 105 of the Transfer of Property Act.

Section 105, Transfer of Property Act, defines a 'lease' of immovable property as-

"a transfer of a right to enjoy such property, made for a a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

In the second paragraph of the Section, it is expressly stated that the price so paid in consideration of the transfer is called "the premium, and the money, share, service, or other thing to be so rendered, is called the rent."

The definition of 'immovable property' given in Section 3, Para I of that Act is in the negative, and is not exhaustive. Therefore, the definition given in Section 3(26) of the General Clauses Act (X of 1897) will apply to the expression used in this Act, except as modified by the definition in the first clause of Section 3. According to the definition given in Section 3(26) of the General Clauses Act, "immovable property" shall include land, benefits to arise out Or land, and things attached to the earth, or permanently fastened to anything attached to the earth". In short, the expression 'immovable property' comprehends all that would be real property according to English Law and possibly more. (See 1 I.A. 34). Thus, every interest in immovable property or a benefit arising out of land, will be 'immovable property' for the purpose of Section 105, Transfer of Property Act.

A right to carry on mining operations in land to extract a specified mineral and to remove and appropriate that mineral, is a 'right to enjoy immovable property' within the meaning of Section 105; more so, when-as in the instant case-it is coupled with a right to be in its exclusive khas possession for a specified period. The 'right to enjoy immovable property' spoken of in Section 105, means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is mineral land or a sand-mine, as in the case before us, it can only be enjoyed and occupied by the lessee by working it, as indicated in Section 108, Transfer of Property Act, which regulates the rights and liabilities of lessors and lessees of immovable property.

In the view we take, we are supported by the observations of the Judicial Committee in Nageshwar Bux Roy v. Bengal Coal Company(1). Delivering the opinion of the Board, Lord Macmillan said:

"In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not

possible to take actual physical possession at once of a whole mineral field: it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial."

In *H. V. Low & Co. Ltd. v. Jyoti Prasad Singh Deo*(2), the law, as laid down in *Gowan's case* (ibid), was strongly relied upon by the appellants, therein. Negating this contention, the Judicial Committee pointed out that the rights and liabilities of lessor and lessee are defined in Section 108 of the Transfer of Property Act, and the appellant had not shown that the respondent had failed, or was not in a position to perform the duties incumbent on a lessor under Section 108 of the said Act.

The discussion will not be complete without noticing, the decision of the Patna High Court in *Commissioner of Income Tax, Bihar & Orissa v. Kumar Kanakhaya Narain Singh*(3), which is ill point. In that case. after an exhaustive survey of all the decisions on the subject, (including some of those which have been cited before us) a Full Bench consisting of three eminent Judges, held that coal-mining settlements whereby certain rights of entering upon the land of the settlor, sinking shafts etc. and winning and taking away the coal are granted in consideration of receiving a salami and annual sums computed on the amount of coal raised and the amount of coke manufactured, subject always to a minimum annual sum which was always payable irrespective of what coal was raised or coke manufactured, were not "a sale of coal", but could be regarded as 'leases' within the meaning of Section 105 read with Section 108, Transfer of Property Act, or with-

(1) [1930] L. R. 58 I. A. 29.

(2) [1931] 1. L. R. 59 Cal. 699; L. R. 58 I. A. 392. (3) 1. L. R. (XX) Patna 13.

in the legal acceptance of the term "lease" in this country. This decision of the High Court was affirmed by the Judicial Committee, and the appeal filed by Kumar Kanakhaya was dismissed. (See L.R. 70 I.A. 180).

The ratio of the Patna case applies with greater force to the facts of the case before us, because, herein, (a) the annual fixed payment had no relation, whatever, with the quantity of sand extracted and appropriate(i, and, what is more important, (b) the defendant was given a right to enter into and remain in khas possession of the mineral field for the stipulated period of 9 years. The transaction (Ex. I), though labelled as a licence, has all essential elements of a 'lease' ever. under Section 105 of the Transfer for Property Act. In short, stripped of the form in which it is draped, the Agreement (Ex. I), in substance and in fact, is a 'lease' in the accepted legal sense of the term and not a 'licence' as defined in Section 52 of the Indian Easements Act. If this be the correct construction of the document, and we think it is so it is doubtful whether Section 6(1)

(i) could cover the appellant's case and give him a right to retain the land in dispute even if Section 28 was out of his way.

In sum, we may reiterate that even on the assumption that the respondent was a licensee, the appellant will not be entitled to retain the holding because he was not directly working the mine

immediately before the date of vesting, and as such, will not be entitled to retain, due to the overriding operation of Section 28.

For all the foregoing reasons, the appeal fails and is dismissed. In the circumstances of the case, however, there will be no order as to costs.

V.D.K.

Appeal dismissed.