Rajaanand Brahma Shah vs State Of Uttar Pradesh & Ors on 16 September, 1966

Equivalent citations: 1967 AIR 1081, 1967 SCR (1) 373

Author: V. Ramaswami

Bench: V. Ramaswami, K. Subba Rao, M. Hidayatullah, S.M. Sikri, J.M. Shelat

PETITIONER:
RAJAANAND BRAHMA SHAH

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH & ORS.

DATE OF JUDGMENT:
16/09/1966

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
RAO, K. SUBBA (CJ)
HIDAYATULLAH, M.
SIKRI, S.M.
SHELAT, J.M.

CITATION:
1967 AIR 1081 1967 SCR (1) 373
CITATOR INFO :
RF 1971 SC 530 (233)
R 1971 SC1033 (8)
F 1977 SC 121 (11)
RF 1977 SC 183 (33,34)
R 1980 SC 91 (17)

ACT:
Land Acquisition Act (1 of 1894), ss. 4, 5A, 6, 17(1) and (4)--Declaration that land acquired for public purpose-When can be challenged-"Arable and waste land", what is-Power of Government under s. 17(4)-When liable to challenge-Grantee of land-Right to minerals and subsoil rights.

HEADNOTE:
In 1950, the State Government issued a notification under s.

4(1) of the Land Acquisition Act, 1894 stating that the appellant's land was needed for the public purpose of limestone quarrying. It was also notified that the case was one of urgency and that under s. 17(4) the provisions of a. 5A would not apply to the land. After the notification under s. 6 was issued, the Collector was ordered under s. 17(1) to take possession of the arable and waste land. The Collector took possession of the appellant'& land. The limestone quarried from the land was utilized by the Government for producing cement, the cement produced was used in the construction of a dam, and when it was sold for profit, the profit formed part of the general revenues of the State. The acquisition proceedings were challenged by a writ petition on the grounds,, that : (i) the acquisition was not for _a public purpose, because, the cement was sold for profit; (ii) the application of s. 17(1) and (4) to the land was illegal since it was neither waste nor arable; and (iii) the appellant was entitled to compensation for sub-soil mines and minerals. The High Court dismissed the petition.

In appeal,

HELD: (i) The appellant's argument must be rejected as he was not :able to show that the action of the Government in issuing the notification -under s. 6 was a colorable exercise of power. [377 C-D]

The declaration of the Government under s. 6(1) that the land was needed for a public purpose would be final and conclusive, except when there was a colourable exercise of the power by the Government in that the purpose was not a public purpose, but a private purpose or no purpose at all. [376 H]

Smt. Somavanti v. The State of Punjab, [1963] 2 S.C.R. 774, followed.

The question whether production of cement as a commercial enterprise is a public purpose within the meaning of the Act was left open, [377 B-C]

(ii) (a) The direction of the State Government under s. 17(1), and the action of the Collector in taking possession of the land under that subsection were ultra vires, because, the acquired land was forest land covered with a large number of trees, and not "arable'or waste land." [380 F]

In the context of s. 17(1) the expression "arable land" must be construed to mean "lands which are mainly used- for sloughing and for raising crops," and the expression "waste land" would mean "land which is unfit 373

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for cultivation or habitation. desolate and barren land with little or no vegetation thereon." The jurisdiction of the State Government depends upon the condition imposed by s. 17(1). and by wrongly deciding the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of it. Where the jurisdiction of an administrative authority depends upon

a preliminary finding of fact, the High Court is entitled in a proceeding for the issue of a writ of certiorari to determine, upon its independent judgment,, whether or not that finding of fact is correct. [380 A-El

(b) The order of the State Government under 8. 17(4) that the provisions of s. 5A were not applicable to the land was illegal, and therefore, the notification of the State Government under s. 6 was ultra vires, and all proceedings taken by the Land Acquisition Officer subsequent to it were without jurisdiction. [381 F; 383 A-B]

Even though the power of the State Government has been formulated under s. 17(4) in subjective terms, the expression of opinion of the State Government can be challenged as ultra vires in a court of law if it could be shown that the State Government never applied its mind to the matter, or, that the action of the State Government was mala fide. Therefore, when the acquired land was not actually waste or arable land, but the State Government formed the opinion that the provisions of s. 17(1) were applicable, the court may draw the inference that the State Government did not honestly form that opinion, or did not apply its mind to the relevant facts. [381 D-F]

(iii) The appellant was the owner of all minerals and sub-soil rights and was therefore entitled to compensation for the minerals including limestone. L390 D]

A transfer of the right to the surface conveys a right to the minerals underneath, unless there is an express or implied ration in the grant. In the instant case there was no reservation of mineral rights in favour of the Government, in the two sanads granting the land to the ancestor of the appellant. The land of which the acquired land formed part was permanently settled under the provisions of the Benares Regulation 1 of 1795. There was no material difference between the permanent settlement of Bonares province and that of the provinces of Bengal, Bihar and Orissa and under the latter, the proprietors of estates were recognised to be the proprietors of the soil also. The fact that the assessment to be paid by the grantee was made on the agricultural income cannot derogate from the rights conveyed to the grantee, because, no restriction was placed on the use of the land and the use by the grantee was not limited to agriculture. Moreover, Government never asserted its claim to mineral rights. possessed by the Zamindars. Even the Mirzapur Stone Mahal Act, 1886, and theRules framed thereunder, were meant only for regulating the quarryingof building stone and were not meant to affect the right of the Proprietors to the sub-soil minerals. [385 G; 386 A-B; 387 F-G; 388 H; 390 F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 656 of 1964. Appeal from the judgment and decree dated November 2, 1962 of the Allahabad High Court in Civil Misc. Writ No. 454 of 1955.

B.R. L. Iyengar, S. K. Mehta, V. P. Misra and K. L. Mehta, for the appellant.

C.K, Daphtary, Attorney-General, Shanti-Bhushan Addl. Advocate-General, U.P. and 0. P. Rana, for respondents Nos. 1 and 2.

The Judgment of the Court was delivered by Ramaswami, J. This appeal is brought, by special leave, against the judgment of the Allahabad High Court dated November 2, 1962 dismissing the writ petition No. 454 of 1955 filed by the appellant Raja Anand Brahma Shah. The appellant was the Zamindar of Pargana Agori lying to the south of Kaimur Range in the district of Mirzapur. On October 4, 1950, a notification was issued by the State Government under s. 4(a) of the Land Acquisition Act (hereinafter referred to as the "Act") stating that the area of 409 6 acres in the village of Markundi Ghurma Pargana Agori was needed for a public purpose. The purpose specified in the notification was "for limestone quarry". The notification provided that the case being one of urgency, the provisions of sub-section (1) of s. 17 of the Act applied to the land and it was therefore directed under sub-s. (4) of s. 17 that the provisions of s. 5A of the Act would not apply to the land. On October 12, 1950, a further notification was issued under s. 6 of the Act declaring that the Governor was satisfied that the land mentioned in the notification was needed for public Purposes and directing the Collector of Mirzapur to take order for acquisition of the land under s. 7 of the Act. The Collector of Mirzapvr was ,further directed by the notification under s. 17(1) of the Act, the case being one of urgency, to take possession of any waste or arable land on the expiration of the notice mentioned in s. 9(1), though no award under s. 11 had been made. On November 19, 1950, possession of the land was taken by the Collector of Mirzapur and the same was handed over to the Administrative Officer, Government Cement Factory, Churk. An award was made by the Land Acquisition Officer on January 7, 1952 stating that the amount of compensation was Rs. 23,638/13/7. The appellant thereafter filed an application under s. 18 of the Act for a reference to the Civil Court in regard to the amount of compensation payable. A reference to the Civil Court was accordingly made and the matter is still pending in the Civil Court as Land Acquisition Reference No. 4 of 1952. On May 2, 1955, the Writ Petition giving rise to this appeal was filed by the appellant in the Allahabad High Court. It is alleged by the appellant that the acquisition of the land was not for a public purpose and the acquisition proceedings were consequently without jurisdiction. It was also stated that the State Government had no jurisdiction to apply the provisions of s. 17(1) of the Act to the land in dispute as it was neither waste nor arable land. It was further claimed that the mines and minerals in the land belonged to the appellant and as such he was entitled to compensation for the same. The appellant accordingly prayed for a writ in the nature of certiorari to quash the notifications of the State Government under s. 4 and s. 6 of the Act and all further proceedings in pursuance of that notice in the land acquisition case. The appellant also prayed that the State Government should be, directed to pay compensation to the appellant for all the lime-stone removed from the land. By its judgment dated November 2, 1962 the High Court dismissed the Writ Petition, holding (1) that the petitioner was not the owner of mines and minerals and was not entitled to compensation for them, (2) that the land had been acquired for a public purpose, and (3) that the provisions of s. 17 of the Act were applicable to the case and there was no illegality in the

notifications of the State Government under s. 4 and s. 6 of the Act. The first question to be considered is whether the notification of the State Government under s. 4 of the Act dated October 4, 1950 is liable to be quashed on the ground that the acquisition of the land was not for a public purpose. It was alleged for the appellant that the lime- stone extracted from quarries situated in the land was used by the State Government for the manufacture of cement which was sold for profit in open market and was not used for any public work of construction. It was contended that the manufacture of cement for being sold for profit will not amount to a public purpose and the notification of the State Government under s. 4 of the Act must therefore be held to be illegal. In our opinion, the argument put forward on

-behalf of the appellant cannot be accepted. It is manifest that the declaration made by the State Government in the notification under s. 6(1) of the Act, that the land was required for a public purpose, is made conclusive by sub-s. (3) of s. 6 and it is, therefore, not open to a court to go behind it and try to satisfy itself whether in fact the acquisition was for a public purpose. It was pointed out by this Court in Smt. Somavanti v. The State of Punjab(1) that it was for the Government to be satisfied, in a particular case, that the purpose for which the land was needed was a public purpose and the declaration of the Government under s. 6(1) of the Act will be final subject, however, to one exception, namely in the case of colourable exercise of the power, the declaration is open to challenge at the instance of the aggrieved party. The power conferred on the Government by the Act is a limited power in the sense that it can be exercised only where it is for a public purpose (leaving aside, for the moment, where the acquisition is for a company under Part VII of the Act). if it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all, the action of the Government would be colourable as being outside the power conferred upon it by the Act and its declaration under s. 6 of the Act will be a nullity. On behalf of the respondents the argument was stressed that the lime-stone was utilised for being (1) [1963] (2) S.C.R. 774.

used in the cement factory established in the Public Sector at Churk. It was argued that the production of cement was important in national interest, particularly when the cement was used in the, construction of the Rihand dam. It is conceded on behalf of the respondents that the allegation of the appellant that cement was, being sold in market for profit was not clearly controverted by the, counter- affidavit by the State but it was said that even on the, assumption that the cement was sold for profit the use of the lime-stone in the production of the cement was in public interest, because the profit from the sale of cement benefited the General Revenues of the State. It is not necessary for us to express any concluded opinion as to whether the production of cement as a commercial enterprise is a public purpose within the meaning of the Act for we consider that the principle of the decision of this Court in Smt. Somavanti v. The State of Punjab (1) applies to this case and the argument of the appellant must be rejected because he has not been able to show that the action of the Government in issuing the, notification under s. 6 of the Act is a colourable exercise of power..

We then proceed to consider the argument of the appellant that the notification under s. 4 of the Act is illegal since the land in dispute is neither waste nor arable land and the jurisdiction of the. State Government to act under s. 17(1) and s. 17(4) of the Act depends upon the preliminary condition that the land to be acquired is waste or arable land. The argument was stressed that since the jurisdiction

of the State Government depends upon the preliminary finding of fact that the land is waste or arable, the High Court is entitled, in a proceeding for a writ of certiorari, to determine, upon its independent judgment, whether or not that finding of fact is correct. It is necessary, at this stage, to set out the relevant provisions of the Act. Section 4(1) of the Act states:

> "4.(1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality."

Section 5A provides for the hearing of objections and reads.

> "5A. (1) Any person interested in any land which has been notified under section 4, sub- section (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.
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> (1) [1963]2 S.C.R. 774.
>
> (2)Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such ,objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision, of the appropriate Government, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the appropriate Government on the objections shall be final.

'Section 6 provides:

> "6. (1) Subject to the provisions of Part VII of this Act when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, subsection (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Govern 'mentor of some officer duty authorised to certify 'its orders:
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> Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.
>
> (2)The declaration shall be published in the Official Gazette, and shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected. (3)The said declaration shall be

> conclusive evidence that theland is needed for a public purpose or for a Company, asthe case may be; and, after making such declaration theapprop riate Government may acquire the land in manner hereinafter appearing."

Section 16 relates to the power of the Collector to take possession of the land. It reads:

> "16. When the Collector has made an award under section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances."

Section 17 confers special powers in cases of urgency and reads, as follows:

> "17 (1) In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.
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> (2)Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, the Collector may, immediately after the publication of the notice mentioned in sub-

section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances:

> (3)In the case of any land to which, in the opinion of the appropriate Government, the provisions of subsection (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, subsection (1)."

On behalf of the appellant Mr. lyengar referred to the Inspection Note of the Collector dated December, 15, 1951 at page 91 of the Paper Book. It was pointed out that the Collector noticed that there were one lac of trees in the acquired land and there were trees of "Tendu, Asan, Sidh, Bijaisal, Khair, bamboo clumps, Mahuwa and Kakora contained in the area." It was contended that the land in dispute was "forest land" covered by a large number of trees and cannot be treated as "waste land or arable land" within s. 17(1) or (4) of the Act. In our opinion, the argument put forward on behalf of the appellant is well-founded and must be accepted as correct and in view of the facts mentioned in the affidavits and in the Inspection Note of the Collector dated December 15, 1961 we are of the

opinion that the land sought to be acquired is, M15Sup.CI/66-11 not "waste land" or "arable land" within the meaning of S. 17(1) or (4) of the Act. According to the Oxford Dictionary "arable land" is "land which is capable of being ploughed or fit for tillage." In the context of S. 17(1) of the Act the expression must be construed to mean "lands which are mainly used for ploughing and for raising crops" and therefore the land acquired in this case is not arable land. Similarly, the expression "waste land" also will not apply to 'forest land'. According to the Oxford Dictionary the expression "

waste" is defined as follows:

"Waste-(from Latin. vastus-waste, desert, unoccupied; Uncultivated, incapable of cultivation or habitation; producing little or no vegetation; barren, desert."

The expression "waste land" as contrasted to "arable land"

would therefore mean "land which is unfit for cultivation or habitation, desolate and barren land with little or no vegetation thereon." It follows therefore that S. 17(1) of the Act is not attracted to the present case and the State Government had therefore no authority to give a direction to the Collector to take possession of the lands under S. 17(1) of the Act. In our opinion, the condition imposed by s. 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under s. 17(1) of the Act. It is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of certiorari to determine, upon its independent judgment, whether or not that finding of fact is correct [See R. V. Shoreditch Assessment Committee(1) and White and Collins v. Minister of Health(2).] We are accordingly of the opinion that the direction of the State Government under s. 17(1) and the action of the Collector in taking possession of the land under that sub- section is ultra vires.

It was also contended for the appellant that the order of the State Government under S. 17(4) of the Act that the provisions of s. 5A of the Act were not applicable to the land was illegal because the land was not waste or arable land to which the provisions of s. 17(1) were applicable. It was urged that by issuing the impugned notification the State Government deprived the appellant of a valuable right i.e., of filing an objection under S. 5A of the Act and therefore the entire proceedings taken by the Land Acquisi- tion officer after the issue of the notification under S. 4 were defective in law. On behalf of the respondents the submission was made that the condition precedent for the application of S. 17 (4) of the (1) [1910] 2 K.B. 859.

(2) [1939] 2 K.B. 833.

Act was the subjective opinion of the State Government that the provisions of sub-s. (1) are applicable to the, land in question. If therefore the State Government had come to the conclusion that the provisions of sub-s. (1) were applicable to the land because the land was waste or arable land, the subjective opinion of the State Government cannot be challenged in a court of law except on the ground of colourable exercise of power. It was also contended that the declaration of the State Government in the impugned notification that in its opinion the provisions of sub-s. (1) are applicable, must be taken as normally conclusive. It is true that the opinion of the State Government which is a condition for the exercise of the power under s. 17(4) of the Act, is subjective and a Court cannot normally enquire whether there were sufficient grounds or justification for the opinion formed by the State Government under S. 17(4). The legal position has been explained by the Judicial Committee in King Emperor v. Shibnath Banerjee(1) and by this Court in a recent case-Jaichand Lai Sethia v. State of West Bengal & Ors.(2) But even though the power of the State Government has been formulated under s. 17(4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as ultra vires in a Court of Law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is nwlafide. If therefore in a case the land under acquisition is not actually waste or arable land but the State Government has formed the opinion that the provisions of sub-s. (1) of s. 17 are applicable, the ,Court may legitimately draw an inference that the State Government ,did not honestly form that opinion or that in forming that opinion the State Government did not apply its mind to the relevant facts bearing on the question at issue. It follows therefore that the notification of the State Government under S. 17(4) of the Act directing that the provisions of s. 5A shall not apply to the land is ultra vires. The view that we have expressed is borne out by the decision of the Judicial Committee in Estate and Trust Agencies Ltd. v. Singapore Improvement Trust(1) in which a declaration made by the Improvement Trust of Singapore under S. 57 of the Singapore Improvement Ordinance 1927 that the appellants' property was in an insanitary condition and therefore liable to be demolished was challenged. Section 57 of the Ordinance stated as follows:

> "57. Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a: dwelling place is of such a construction or is in such a condition as to be unfit for (1) 72 I.A. 24t.
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> (2) Criminal Appeal No. II 0 of 1966-decided on July 27, 1966. [1966] Supp.
>
> S.C.R. (3) [1937] A.C. 898.

human habitation, the Board may by resolution declare such building to be insanitary".

The Judicial Committee set aside the declaration of the Improvement Trust on two grounds; (1) that though it was made in exercise of an administrative function and in good faith, the power was limited by the terms of the said Ordinance and therefore the declaration was liable to a challenge if the authority stepped beyond those terms and (2) that the ground on which it was made was other than the one set out in the Ordinance. In another case-Ross Clunis v. Papadopovllos(1)-the appellant challenged an order of collective fine passed under Regulation 3 of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 which provided that if an offence was committed

within any area of the colony and the Commissioner "has reason to believe" that all or any of the inhabitants of that area failed to take reasonable steps to prevent it and to render assistance to discover the offender or offenders it would be lawful for the Commissioner with the approval of the Governor to levy a collective fine after holding an inquiry in such manner as he thinks proper subject to satisfying himself that the inhabitants of the area had been given an adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon. It was contended on behalf of the appellant that the only duty cast on the Commissioner was to satisfy himself of the facts set out in the Regulation, that the test was a subjective one and that the statement as to the satisfaction in his affidavit was a complete answer to the contention of the respondents. In rejecting the contention the Judicial Committee observed as follows:

> "Their Lordships feel the force of this argument, but they think that if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, a court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts."

In another casc-R. V. A ustralian Stevedoring Industry Board(2) -the High Court of Australia was called upon to review the conduct of a board empowered to cancel the registration of an employer of dock labour if "satisfied" that he was unfit to be registered or had so acted as to interfere with the proper performance of Stevedoring work. It was held by the High Court that it was entitled to award prohibition against the board if the board was acting without any evidence to support the facts upon which its jurisdiction depended, or if it was adopting an erroneous test of the employer's liability to cancellation of his registration, or if it appeared likely to go outside the scope of its statutory discretion.

(1) [1938] 1 W.L.R. 546.

(2) (1952) 88 C.I.R. 100.

We accordingly hold that the appellant has made good his submission on this aspect of the case and the notification of the State Government under s. 6 of the Act dated October 12, 1950 is ultra vires and therefore all the proceedings taken by the Land Acquisition Officer subsequent to the issue of the notification under S. 6 must be held to be illegal and without jurisdiction.

We shall pass now to consider the question whether the appellant had sub-soil and mineral rights in the areas in dispute and whether the appellant was entitled to compensation for the minerals including lime-stone in that area.

It is necessary to set out at this stage the history of Agori Zamindari. The ancestors of Raja Anand Brahma Shah had owned the paraganas of Agori and Barhar since the 13th century. About the year 1744 A.D. Shambhu Shah the then Raja was driven out of his domains by Raja Balwant Singh of Banaras, but after about 30 years Adil Shah, grandson of Shambhu Shah was able to regain possession over the territories after driving out Raja Chet Singh, son of Raja Balwant Singh, with the help of the British East India Company. On October 9, 1781, Raja Adil Shah was granted a Sanad by

Mr. Warren Hastings the then Governor General of India restoring to him the Zamindari of Pargana Agori and Pargana Barhar with all the rights which his ancestors had before Shambhu Shah was driven out of his domains. By a second Sanad dated October 15, 1781 the Raja was granted a Jagirultamgha of certain Mahals including Pargana Agori in lieu of Rs. 8,001/per annum. It was stated for the respondent-State that the second sanad was cancelled by a resolution of the Governor in Council dated April, 1788. But a third sanad was executed in favour of the Raja on December 10, 1803 granting the whole Jagir permanently and making the Raja "immovable Jagirdar of Mahal and everything appertaining thereto to belong to him."

On behalf of the appellant reference was made to the sanad granted by Mr. Warren Hastings dated October 9, 1781 by which the Pargana of Agori was restored to Raja Adil Shah with all ancient and former rights in the Raj. The Sanad reads as follows:

> "Know ye the present and future mutsuddies, Zamindars Chowdharies, canoogoes, Residents, Mahtees, ryots, cultivators and other inhabitants of pargunnah ageuree Burhas in the Sirkar of Chunnar, Soubah of Behar, that in consequences of the service of Lal Adil Shah in favour of the Hon'ble Company three Lacs and forty thousand drums which amounts to eight thousand and one rupees per annum, is granted to him as an Ultumgah Jagger from the Kharief 'Illegible' Fussley year 1189 together with the mohala, sayar rukbah, plains or meadows thereof and exclusive of the deotter, Bhrmotter, Krishuarpen 38 4 lands, places of worship habitations of Brahmans, and faquire and the Aymah, Mauffy and nomooly free rent free lands that he the said Adil Singh having the welfare of Government constantly in view, is to appropriate the produce thereof to his own use, year after year to be ever prompt to secure and promote the prosperity of the Hon'- ble Company to attend and on no account be inattentive to the police, keep contented and satisfied all the Ryots, inhabitants and residents of the said Mahal to study and advance the welfare of the inhabitants to effect the Augmentation of cultivation of the whole Perganah.
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> Be it known to you Adil Singh Zamindar of Parganah Agori as it appears from your statement that the above Parganah is your ancient and hereditary estate and that some years ago Raja Balwant Singh forcibly dispossessed you and took possession of it himself. On a view therefore of your ancient right the Purganah is restored to you and you are required to bring it into cultivation obeying the orders of the Aumil and having the interest of Raja Mahipat Narain constantly in view. There in fail not dated 20th Shawaul 1195 Hidgree or the October 1781 E.E.".

The appellant further relied upon the Sanad dated December 10" 1803 which confirmed all the rights granted in the 1781 Sanad and made the grant in perpetuity. The Sanad appears on page 79 of the Paper Book and reads as follows:

> "Know, ye, the present and future Mutsuddies in office; the zamindars, the chowdhuries, the Residents, the Mahtoos, the Ryots, the cultivators, and the inhabitants of Aggri Barhar of Sirkar Chunar in subah Allahabad, that in conformity

to the orders of His Excellency the most Noble Richard Marquis Wellesley, Knight of the I llustrious order of Saint Patrick, Governor General in Councilissued on the 4th November 1803 on a consideralion ofthe good services rendered to the Hon'ble Company by Raja Run Bahadur Shah, and his consequent merits, lands in the above Purgunnah producing Rs. 4,000/to form a Jagir of three lacs twenty thousands and forty dams which make eight thousand and one rupees per annum, as hereunder particularized of which a jagir of 4,001 rupees continues in the possession of the said Rajah Run Bahadur Shah agreeably to sanad dated 7th October, 1789, English Era, have been given to him the said Rajah as an ultumgah Jagger, from the Fussul Khareef of the fasli year 121 1, corresponding with the English era 1803, together with the maul, Suyer, Ruchhah, plains or meadows thereof, and exclusive of Deuuttar, Burmotter and Krishnarpur lands places of worship, habitations of Brahmans and Faquirs, ayumah, maufy, mamully etc., rent free lands, that the said Rajah is to appropriate the produce of the aforementioned jageer to his own use year after year, to be ever prompt to secure and promote the prosperity of the Hon'ble Company to attend strictly and conform to the rules and customs of Jagirs, to be on no account in-attentive to, or neglectful of the police, to keep content and satisfied by good treatment, all the Ryots inhabitants, and residents of the said mahals to study and advance that the welfare of the inhabitants of the place to exert effectually and augment the cultivation of the whole pergana.

That you are to consider him the Rajah, immovable jagerdar of the mahal and every thing appertaining thereto, to belong to him be interested in his welfare and not demand on new sanad annually herein fail not but conform to the injunctions above given within the 11th day of the month of Poos 1211 Fussily; Corresponding with the English era 1803.

Endorsement Of the hereunder particularized Jagger, perganah Agori Burhar, producing Three lacs, twenty,thousand and forty which make eight thousand and one rupee annually. Without fluctuations, land producing four thousand one rupee is already in the possession of Rajah Run Bahadur Shah agreeably to a Sanad dated 7th October 1789 and the remaining jageer of 4 thousand rupees have been already given and granted to him from the year 1211 Fussly together with the Raqbah plains meadows, and jungles thereof as an ultamagh jageer. Total villages 209 producing 8001 rupees."

In our opinion, a reading of the two Sanads supports the case of the appellant that there is no reservation of mineral rights in favour of the Government. The expression used in the Sanad of 1803 A.D. is "You ought to consider him the Raja of immovable Jagir and of Mahal and everything appertaining thereto belongs to him." In effect, the grant to the Raja in the two Sanads is a grant of the lands comprised in the Mahal of Agori and everything appertaining thereto and as a matter of construction the grant must be taken to be not only of the land but also of everything beneath or within the land. Prima facie the owner of a surface of he land is entitled ex jure to everything beneath the land and in the absence of any reservation in the grant minerals necessarily pass with

the rights to the surface (Halsbury's Laws of England, 3rd Edn., Vol. 26, p. 325). In other words, a transfer of the right to the surface conveys right to the minerals underneath unless there is an express or implied reservation in the grant. A contract therefore to sell or grant a lease of land will generally include mines,quarries and minerals beneath or within it (Mitchell v. Mosley(1). It is manifest that when the sanad was executed in favour of theRaja the Government made over the land with all its capabilities to the Raja and merely imposed on him a fixed sum of revenue in lieu of all the rights the Government had as a proprietor of the soil. When neither of the parties knew undiscovered minerals underneath the land and the idea of reservation never entered their minds it cannot be held that there was any implied reservation in the grant. Nor can afterwards a distinction be drawn between the various rights that may exist on the land for the purpose of qual fying the original grant and importing into it what neither party could have imagined. It was argued on behalf of the respondents that the assessment was made on the agricultural income, but this circumstance cannot derogate from the rights conveyed to the Raja in the two Sanads because no restriction was placed on the use of the land and the use by the Raja was not limited to agriculture.

The view that we have expressed as to the interpretation and the legal effect of the Sanads is supported by Regulation VIII of 1793 which reenacted with modifications and amendments the Rules for the Decennial Settlement of the public revenue payable from the lands of the zemindars, independent tallest, and other actual proprietors of land in Bengal, Bihar and Orissa. Section IV of this Regulation provided that the settlement, under certain restrictions and exceptions specified in the Regulation, shall be concluded with the actual proprietors of the soil, of whatever denomination, whether zemindars, talukdars or chaudhris. It is clear that the zemindars with whom settlement took place, were recognised as the actual proprietors of the soil. The settlement of revenue so made was made permanent by s. IV of Regulation 1 of 1793. This Regulation enacted certain Articles of a Proclamation dated March 22, 1793. Section 1 of this Regulation states that the various articles of the Proclamation were enacted into a Regulation and that those articles related to the limitation of public demand upon the lands, addressed by the Governor-General in Council to the zemindars, independent talukdars and other actual proprie- tors of land paying revenue to Government in the Provinces of Bengal, Bihar and Orissa. By Section IV it was declared to the zemindars, independent talukdars and other actual proprietors of land, with or on behalf of whom a settlement had been concluded (1) (1914]1 Ch. 438,450.

under the Regulations mentioned earlier, that at the expiration of the term of settlement no alteration would be made in the assessment which they had respectively engaged to pay, but that they and their heirs and lawful successors would be allowed to hold their estates at such assessment for ever.

The preamble to Regulation 11 of 1793, which abolished the Courts of Mal Adalat or Revenue Courts and transferred the trial of suits cognizable in those Courts to the Courts of Diwani Adalat, stated, in connection with the proposed improvements in agriculture as follows:

> "As being the two fundamental measures essential to the attainment of it, the property in the soil has been declared to be vested in the landholders, and the revenue payable to Government from each estate has been fixed for ever..... The

> property in the soil was never before formally declared to be vested in the landholders, nor were they allowed to transfer such rights as they did possess, or raise money upon the credit of their tenures, without the previous sanction of Government."

The preamble to Regulation 1 of 1795 which relates to the Province of Benares states that "the Governor-General in Council having determined, with the concurrence of the Rajah of Benares, to introduce into that province, as far as local circumstances will admit, the same system of interior administration as has been established in the provinces of Bengal, Bihar, and Orissa, and the limitation of the annual revenue payable from the lands forming an essential part of that system, as stated in the preamble to Regulation 11, 1793."

It appears that Pargana Agori was permanently settled under the provisions of the Benares Regulation 1 of 1795 and there was no material difference between the permanent settlement of Benares province and that of the Provinces of Bengal, Bihar and Orissa.

It is thus clear from the above Regulations that the zemindars, the proprietors of estates, were recognized to be the "proprietors of the soil" and the permanent settlement of the zemindaris proceeded upon that basis. Such a view was also expressed by the Judicial Committee in Ranjit Singh v. Kali Dasi Debi(1) at page 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 (1)44 I.A. 11 7.

the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the zemindars, independent talukdars and other actual proprietors of the soil', see Regulation 1, 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."

The rights of the zemindars to the sub-soil minerals under their land were derived from their being proprietors of the soil and has been recognised in a number of cases between the zemindars and persons holding land under a tenure from them. It has been held in those cases that, in the absence of the right to sub-soil minerals being conferred on the tenure holder under the terms of the tenure held by him, he does not get any right to them. In Hari Narayan Singh v. Sriram Chakravarti(1) it has been held by the Judicial Committee that where a village is shown to be a mal village of the plaintiff's zamindari estate, the plaintiff must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them. In the course of its judgment the Judicial Committee quoted with approval the following passage from Field's "Introduction to the Bengal Regulations", p. 36 where he says:

> "The zamindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zamindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship."

The same view has been expressed in Durga Prasad Singh v. Braja Nath Bose(2). In Sashi Bhushan Misra v. Jyoti Prasad Singh Deo(3) Lord Buckmaster stated with regard to the above two cases:

> "Those decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

It is true that the Government was not a party to these decisions of the Judicial Committee but the fact that the Government never asserted its claim to mineral rights possessed by the zemindars is a circumstance which supports the interpretation of the Sanads which we have already expressed.

(1) 37 I.A. 136.

(2) 39 I.A. 133.

(3)44 I.A. 46.

There are other documents which support the view that the mineral rights and sub-soil rights in the area belonged to the appellant. Annexure H is a copy of the Wajibularz relating to Mauza Kota and Annexure is a copy of the Wajibularz of other villages Sali, Dokhli, Kaira and Rajpur Pargana Singrauli, district Mirzapur in respect of the settlement of 1247 fasli and 1257 fasli respectively. In Annexure H there occurs the following passage:

> "In this village there are Jungles and hills where all the said items such as dhup, shekae, catechu and coal are found. A sum of Rs. 1/4/- per tauga (ace) for producing dhup and shellac and Rs. 1/8/- per bhatti from catechu manufacturers is taken and one Mr. Burke has been given theka of coal by me at Rs. 20/- per annum for unlimited period."

In Annexure I the following passage is found:

> "A coal mine situate in Mauza Kota, Pargana Singrauli, was given to Mr. Burke under a perpetual lease in this way that he should remain in possession thereon during his life time on payment of the amount of Jama and that Mr. Burke aforesaid should all along remain in. possession thereon so long as he continued to pay Rs. 20/- the fixed amount of Jama annually in a lump sum either in the month of Aghan or in Jeth. In case he fails to pay the same, I have power to file a suit in the Civil Court to realise the amount from Mr. Burke aforesaid. Mr. Burke aforesaid has not the right to transfer

> the same. He should remain in possession thereon as long as he wishes to on payment of fixed amount of Jama."

There are also subordinate leases produced on behalf of the appellant to show that the right to minerals was always enjoyed by the appellant and not by the lessees; for instance, Annexure A-5 at page 125 of the Paper Book is a deed of agreement executed by Abtal Deo on September 4, 1852. Para 4 of this agreement states:

> "4. In this village, no Sayer item is produced; but whatever little or more fish mangoes and Mauh are available we the occupants of the village enjoy and shall continue to enjoy the same. If something viz., iron ore, copper or treasure trove are discovered in this Mahal, the Raja Saheb shall be entitled to it. No other person should plant a new grove without the written permission of the Raja. If any one does so he shall be liable to pay Rs. 10/- per bigha and shall continue to pay annual Phota as heretofore."

There are similar clauses in the agreements-Annexures A- I to A-4 and A-6 to A-13. Reference was also made on behalf of the appellant to the letter of Mr. Thornton dated October 5, 1850 to the Secretary to the Suddar Board of Revenue, Annexure F wherein he states that "In the settled portion of the Mirzapur district, the Government lays no claim to the soil which includes any mineral products that may be discovered". There is also a letter Annexure G dated August 21, 1850 from Mr. Roberts, Deputy. Collector, Mirzapur' to the Commissioner of Banaras Division. In this letter, Mr. Roberts expressed the view that the right to minerals was vested in the proprietary owner of the soil and that ,the sovereign was only entitled to a portion of the revenue thereon and that 'in Bengal' the proprietors 'of estates lease or assign the right of mining without any interference on the part of the Government".

It is manifest that the view that we have expressed as to the interpretation of the two Sanads dated October 9, 1781 Annexure A-and December 10, 1803-Annexure B is supported by the subsequent events, proceedings and conduct of the parties over a long period of time. We are, therefore, of the opinion that the appellant is the owner of all minerals and sub-soil 'rights of Pargana Agori and the view taken by the High Court on this aspect of the case must be overruled. On behalf of the respondents, reference was made to the Mirzapur Stone Maha Act (U.P. Act V of 1886) and it was pointed out that under s. 5 of that Act "no proprietor was entitled to place any prohibition or restriction, or to demand or receive any sum by way of rent, -premium, duty or price, in respect of the opening quarry, or the quarrying of stone, in the land, or in respect of the, storing of stone at the quarry or the transport of stone over the land". But there is nothing in this statute which takes away the right of the zemindar to the minerals. It appears from the perusal of the Act and the Rules framed thereunder that the Mirzapur Stone Mahal Act was meant only for regulating the quarrying of building stone and was not meant to affect the right of the proprietors to the sub-soil minerals. For the reasons already expressed we hold that the State ,Government has no jurisdiction to apply the provisions of s. 17 (1) and (4) of the Act to the land in dispute and to order that the provisions of s. 5A of the Act will not apply to the land. We are further of the opinion that the State Government had no jurisdiction to order the Collector of Mirzapur to take over possession of the land under s.

17(1) of the Act. The notification dated October 4, 1950 is therefore illegal. For the same reasons the notification of the State Government under s. 6 of the Act, dated October 12, 1950 is ultra vires.

We accordingly hold that a writ in the nature of certiorari should be granted quashing the notification of the State Govern-

ment dated October 4, 1950 by which the Governor has applied s. 17(1) and (4) to the land in dispute and directed that the provisions of s. 5A of the Act should not apply to the land. We further order that the notification of the State Government dated October 12, 1950 under s. 6 of the Act and also further proceedings taken in the land acquisition case after the issue of the notification should be quashed including the award dated January 7, 1952 and the reference made to civil Court under s. 18 of the Act.

In Writ Petition No. 454 of 1955 the appellant had prayed also for a writ in the nature of mandamus commanding the respondents to restore to him the possession of the lands in dispute, but in our judgment in The State of Uttar Pradesh v. Raja Anand Brahma Shah and vice-versa(1) pronounced today we have held that the intermediary interest of the appellant in respect of Pargana Agor had validly vested in the State of U.P. by notifications issued on June 30, 1953 and July 1, 1953 under the U.P. Zamindari Abolition and Land Reforms Act, 1951 (as subsequently amended by the U. P. Zamindari Abolition and Land Reforms (Amendment) Act, 1963U.P. Act No. 1 of 1964). In view of this decision the claim of the appellant for restoration of possession of the land must be rejected.

We accordingly allow this appeal to the extent indicated above and set aside the judgment of the Allahabad High Court dated November 2, 1962. We do not propose to make any order as to costs.

V. P. S. Appeal allowed, (1) [1967] 1 S. C. R. 362.