Supreme Court of India
K. S. Nanji And Company vs Jatashankar Dossa And Others on 22 March, 1961
Equivalent citations: 1961 AIR 1474, 1962 SCR (1) 492
Author: K Subbarao
Bench: Subbarao, K.

PETITIONER:
K. S. NANJI AND COMPANY

Vs.

RESPONDENT:
JATASHANKAR DOSSA AND OTHERS

DATE OF JUDGMENT:
22/03/1961

BENCH:
SUBBARAO, K.
BENCH:
SUBBARAO, K.
DAYAL, RAGHUBAR

CITATION:
1961 AIR 1474 1962 SCR (1) 492
CITATOR INFO :
D 1973 SC 814 (6)

ACT:
Limitation-Encroachment on coal lands-Suit for damages on ascertainment of boundary-Knowledge of encroachment--Burden of proof-Indian Limitation Act, 1908 (9 of 1908), art. 48-Indian Evidence Act, 1872 (1 of 1872), ss. 3, 101.

HEADNOTE:
The appellants and the respondents were owners of adjoining collieries and the suit out of which the present appeal arose was one brought by the respondents for certain reliefs on the allegation that the appellants had encroached upon their coal mines and removed coal from the encroached portion and that they came to know of the said encroachment and removal of coal after they had received the letter dated August 18, 1941, from the Inspector of Mines. The appellant denied the encroachment and pleaded that the suit was barred by limitation inasmuch as the respondents had knowledge of the encroachment in 1932 then there was a survey by the Department of Mines. The trial judge found on evidence that the proceedings in 1932 had nothing to do with the matter, held that art. 48 of the Limitation Act applied to the suit and that the appellants had failed to prove that the

respondents had knowledge of the sinking of the quarries and pits in the encroached land and decreed the suit. The High Court on appeal accepted the finding of the trial court and although it placed the burden of proving knowledge on the part of the respondents beyond the prescribed time on the appellants, nevertheless proceeded on the assumption that the initial burden to prove that they had knowledge of the said encroachment within the period was on the respondents and affirmed the decree of the trial court.

Held, that the burden of proof had not been misplaced. Under art. 48 of the Indian Limitation Act, which prescribes a three years' limitation from the date of the knowledge, the initial onus is obviously on the plaintiff to prove that date since it would be within his special knowledge. Moreover, under s. 3 of the Act, which makes its obligatory on the court to dismiss a suit barred by limitation, even though such a plea is not set up in defence, it is for the plaintiff to establish that the suit is not so barred.

Lalchand Marwari v. Mahant Rampur Gir, (1925) I.L.R. 5 pat. (P.C.) 312 and Rajah Sahib Perhalad Seim v. Maharajah Rajender Kishore Singh, (1869) 12 M.I.A. 292, referred to.

Under the Indian Evidence Act there is an essential distinc-tion between burden of proof as a matter of law and pleading and as a matter of adducing evidence and under s. 101 of the 493

Act the burden in the former sense is always on the plaintiff and never shifts, but the burden in the latter sense may according to the evidence led by the parties and presumptions of law or fact raised in their favour.

Sundarji Shivji v. Secretary of State for India, (1934) I.L.R. 13 Pat. 752, disapproved.

Kalyani Prasad Singh v. Borrea Coal Co. Ltd., A.I.R. 1946 Cal. 123, Bank of Bombay v. Fazulbhoy Ebrahim, (1922) 24 Bom. L.R. 513 and Talyarkhan v. Gangadas, (1935) I.L.R. 60 Bom. 848,approved.

Held, further, that it is well settled that a map referred to in a lease is a part of the lease. Where, therefore, the map is drawn to scale and clearly demarcates the boundary it is not permissible to ignore it and reconstruct the boundary with reference to the revenue records.

Darapali Sadagar v. jajir Ahmad, (1923) I.L.R. 50 Cal. 394, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 52 of 1957. Appeal from the judgment and decree dated April 22, of 1953, of the Patna High Court in Appeal from Original Decree No. 162 of 1946.

K.N. Bhattacharya and P. K. Chatterjee, for appellants. N.C. Chatterjee, A. V. Viswanatha Sastri, R. S. Chatterji and D. N. Mukherjee, for respondents Nos. 2 to 6. 1961. March 22. The Judgment of the Court was delivered by SUBBA RAO, J.-This appeal by certificate granted is directed against the judgment of the High Court of Judicature at Patna dated April 23, 1953, confirming that of the Subordinate Judge, Dhanbad, dated November 30, 1946. The plaintiffs and the defendant are adjoining colliery owners at Kujama. The plaintiffs' land lies immediately to the south of the defendants' land. On August 2, 1,894, Raja of Jharia granted mukarrari lease of the coal and coal mining rights in 300 bighas of land in village Kujama to Satya Karan Banerjee and Girish Chandra Samanta. On June 15,1900, his son, Raja Durga Prasad Singh, granted coal and coal mining rights in respect of 400 bighas out of 592 bighas to one Jugal Kishore Lal. Samanta purchased the leasehold interest of Banerji, and thereafter on November 23, 1900, it appears that Samanta bad surrendered his rights under the previous lease in favour of the Raja and taken a fresh lease of the same 300 bighas on a reduced rent. On June 10, 1901, Jugal Kishore Lal granted a lease of 96 bighas out of his 400 bighas to one D. M. Mathews. On the very same day D. M. Mathews, in his turn, granted a lease to one Walji Kheta in respect of the said 96 bighas. Walji Kheta executed a kabuliat in favour of M. Mathews on October 11, 1901. Walji Kheta represented the defendants. By diverse transfers, the interest of Samanata vested in Bagdigi Kujama Collieries Limited. The plaintiffs case was that as a result of a letter written by the Inspector of Mines on August 18, 1941, the plaintiffs made an inquiry and came to know that the defendants had encroached upon their coal mines on the northern side and removed coal from the encroached portion and had rendered the remaining coal of the encroached portion unworkable. On those allegations, they asked for the following reliefs:

> (a)That the intermediate boundary line between the plaintiffs' coal-land and the defendants' coal-land be ascertained and fixed.
>
> (b)That the area encroached upon by the defendants be ascertained and the defendants be directed to vacate the same,.
>
> (c)That a permanent injunction be issued against the defendants restraining them from encroaching upon the plaintiffs' coal-land and cutting and removing coal therefrom.
>
> (d)That an enquiry be made and the quantity of coal cut and removed by the defendants from the plaintiffs' coal-land as also the quantity of the coal rendered unworkable be ascertained and a decree for the value thereof by way of damages be granted to the plaintiffs against the defendants.

The defendants denied that they had encroached upon the plaintiff-,' coal-land and stated that the suit was barred by limitation. They further pleaded that the plaintiffs would not be entitled to any damages. The learned Subordinate Judge held that the defendant had encroached upon the plaintiff' coal-land, that the suit was not barred by limitations and that they would be entitled to the reliefs prayed for. On appeal, the High Court of Patna accepted all the findings of the learned Subordinate Judge and dismissed the appeal. Hence the present appeal. The first question that arises for consideration is whether the defendants had encroached Upon the plaintiffs' coal- land. The answer

to this question depends upon the correct, delineation of the boundary line between the plaintiffs' leasehold and the defendants' leasehold. It is common case that the southern boundary of the appellants' leasehold is conterminous with the northern boundary of the respondents' lease-hold.

Learned counsel for the appellant contends that the said boundary should be fixed solely with reference to the boundaries given in the lease of 1894, whereas learned counsel for the respondents contends that no plan has been annexed to the said lease and, therefore, the boundary could more satisfactorily and definitely be fixed with reference to the plans annexed to the subsequent lease deeds executed in favour of the successors-in-interest of the appellant and the respondents. To appreciate the rival contentions it is necessary to consider the various lease deeds in some detail.

On August 2, 1894, Raja Jaimangal Singh executed the lease deed (Ex. 1) in respect of 300 bighas in favour of the respondents' predecessor-in-interest. In that lease deed the northern boundary is described to be the remaining portion of mauza Kujama and the western boundary is described as Chatkari Jorh. The foot note to the lease reads, "measuring 1101 feet in length running north and south by the side of the said Chatkari Jorh and area being 300 bighas by such measurement". No plan was annexed to this lease deed. On June 15, 1900, Jugal Kishore Lal, the predecessor-in-interest of the appellant, had obtained a lease (Ex. C) of 400 bighas from Raja Durga Prasad Singh, the son of the previous Raja. The southern boundary of this leasehold is given as the northern boundary limit of the leasehold land of Girish Chandra Samanta and others and the western boundary is shown as the eastern boundary of Chatkari Jorh as per the map annexed. This lease deed clearly shows that the southern boundary of this plot is conterminous with the northern boundary of the leasehold land in favour of Samanta. It may also be noticed at this stage that the map annexed to this lease deed has not been filed by the appellants. It appears that Samanta purchased the interest of Banerji in the leasehold of 1894 and thereafter at the request of Samanta, on November 23, 1900, Durga Prasad Singh gave a fresh lease of the same holding to Samanta and incorporated a map in that lease, i.e., Ex. 3(b). There, the northern boundary of the leasehold is described as the leasehold of Rajkumar Jugal Kishore Lal Singh Bahadur. The plan, Ex. 3(b), annexed to this lease deed shows the boundary line between the two leaseholds. The said plan is drawn to scale and the boundary line is drawn between point A marked in the plan and point B marked therein. As the plan is a part of the lease deed, it is clear from the plan that the northern boundary of the leasehold of Samanta is the said line. On June 10, 1901, Jugal Kishore Lal, that is, the predecessor- in-interest of the appellant demised a plot of 96 bighas carved out from his leasehold to Mathews under a deed Ex. C(1). Mathews in turn demised under Ex. D the said land of 96 bighas to Walji Khetan representing the appellant. In both these documents the southern boundary is shown as the northern boundary of the leasehold land of Samanta. One interesting feature is that a map has been referred to in each of the documents and the said map shows that the line drawn from point A to point B is the boundary between the two leaseholds. It may be mentioned that the said boundary line is exactly the same as that found in Ex. 3(b). These documents to which the defendants' predecessors were parties contain a clear admission that the boundary line between the two leaseholds i.e., between appellant's and that of the respondents' is the line between A and B shown in plan Ex. 3(b). We have no doubt that if the plan annexed to Ex. C was produced by the appellant, it would have also established that the dividing line between the two leaseholds is that found in Ex. 3(b). The appellant, in our view, has suppressed the said plan and, therefore, in the

circumstances, we are justified to draw an inference that, if produced, it would be against appellant's contention. From the aforesaid documentary evidence we hold, agreeing with the courts below, that the southern boundary of the appellant's holding, which is conterminous with the northern boundary of the respondents' holding, is the line between points A and B shown in Ex. 3(b). The next question addressed by the courts below is how to ascertain the point A. The argument of learned counsel for the appellant is that the map translated into words indicates that the correct boundary should be a line drawn from the true meeting point of the four villages Pandebera, Jharia Khas, Lodhna and Kujama at a bearing of 82.15', whereas the contention of the respondents is that the line actually drawn on the lease map correctly lays down the northern boundary of the respondents' leasehold. It is settled law that a map referred to in a lease should be treated as incorporated in the lease and as forming part of the document: see Darapali Sadagar v. Najir Ahamed (1). As in this case the map is drawn to scale and incorporated in the lease deed, it is not permissible to ignore the starting point of the boundary line and adopt instead any scientific point based on survey. The Commissioner appointed by the court tested the position of the six trijunction pillars shown in the map of lease dated November 23, 1900, and found that two of the trijunction pillars were in their correct positions. On the basis of these two trijunction pillars, the Commissioner relaid, by the process of superimposition, the northern boundary line of the leasehold property, The point A in the map so laid does not tally with the point where the aforesaid four villages actually meet. He pointed out that the correct (1)(1923) I.L.R- 50 Cal- 394-

point where the said four villages met would be 1680 feet only from the trijunction pillar of Lodhna, Kujama and Madhuban, whereas the point A was at a distance of 1750 feet from the said trijunction pillar. But learned counsel for the appellant contends that according to Ex. 3 the western boundary should be according to the revenue plan and, therefore, point A should be fixed at a distance of 1680 feet from the trijunction pillar, as that is the distance according to the revenue plan. But a perusal of Ex. I shows that there is no reference in regard to the western boundary to revenue records. That apart, even if 1680 feet is taken as the distance between the injunction pillar and point A in 'the map, it demonstrates that the measurement given in Ex. 3 was incorrect, for, there the distance was shown only as 1101 feet. But a more serious objection to the argument is that it is not permissible for a court to reconstruct the plan with reference to revenue records when the plan is self contained and drawn to scale. To summarize: the question is whether the disputed extent is part of the respondents' holding or that of the appellant's holding. The map, Ex. 3(b), annexed to the lease deed executed in favour of the respondents' predecessor-in- interest clearly demarcates the boundary line between the holdings of the appellant and the respondents, and according to that plan the disputed extent falls within the boundary of the respondents' holding. The lease of the appellant's predecessor, i.e., Ex. C, also refers to a map, but the appellant withheld it. In the sub-leases created by the appellant, maps were annexed and the boundary therein is in accord with that in Ex. 3(b). Those documents contain clear admissions supporting the case of the respondents. No reliance can be placed upon the recitals in Ex. 1, as it is demonstrated that the extent given in respect of the western boundary is incorrect. On the aforesaid material both the courts have held that the disputed extent of land is part of the holding of the respondents.

It is well settled that a map referred to in a lease should be treated as incorporated in the lease and as forming part of the said document. In this case the maps accepted by us are drawn to scale and

the boundary is clearly demarcated. The courts were, therefore, certainly right in accepting the boundaries drawn in the plan without embarking upon an attempt to correct them with reference to revenue records. The question really is one of fact and we accept the finding.

The next question is whether the suit was barred by limitation. The encroachment by the appellant on the respondents' colliery and the removal of coal therefrom are alleged to have taken place in or about the year 1932. The respondents in the plaint averred that they came to know of the said encroachment and removal of coal by the appellant after they received the letter dated August 18, 1941, from the Inspector of Mines and before that they had absolutely no knowledge or information whatsoever regarding thereto. The appellant denied the said allegation and stated that the respondents all along knew and had been aware that the portion of coal-land in question belonged to and was the property of the appellant. In particular the appellant alleged that the respondents must have the knowledge of it since 1932 when there was a survey by the Department of Mines. On the said pleadings issue 3 was framed which reads, "Is the suit barred by limitation?" The learned Subordinate Judge found, on the evidence, that the proceedings in 1932 had nothing to do with the delineation of the boundary line between the two holdings. He held that Art. 48 of the Limitation Act applied to the suit and that the appellant had failed to prove that the respondents had knowledge of the sinking of the quarries and pits in the encroached land. On appeal the High Court accepted the finding. Though the High Court held that the burden of proof to establish knowledge on the part of the respondents beyond the prescribed time was on the appellant, it has given the finding on the assumption that the initial burden was on the respondents to prove that they had knowledge of the said encroachment only within three years thereof. There are, therefore, concurrent findings of fact on the question of knowledge. But learned counsel for the appellant contended that the finding is vitiated by the burden of proof having been wrongly thrown on the appellant. This submission is not accurate, for, as we have pointed out, the High Court arrived at the finding of fact on the assumption that the initial burden of proof was on the respondents.

It is common case that art. 48 of the Limitation Act governs the period of limitation in respect of the present suit. It reads:

Description of suit.	Period of limitation	Time from which period begins to run.
For specific moveable property lost, acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongful taking or detaining the same.	Three years.	When the person having the right to the possession of the property first learns in whose possession itis.

_____ The article says that a suit for recovery of specific movable property acquired by conversion or for compensation for wrongful taking or detaining of the suit property should be filed within three years from the date when the person having the right to the possession of the property first learns in whose possession it is. The question is, on whom the burden to prove the said knowledge lies? The answer will be clear if the article is read as follows: A person having the right to the possession of a property wrongfully taken from him by another can file a suit to recover the said specific moveable property or for compensation therefore within three years from the date when lie first learns in whose possession it is. Obviously where a person has a right to sue within three years from the date of his coming to know of a, certain fact, it is for him to prove that he had the knowledge of the said fact on a particular date, for the said fact would be within his peculiar knowledge. That apart, s. 3 of the Limitation Act makes it obligatory on a court to dismiss a suit barred by limitation, although limitation has not been set up as a defence, indicating thereby that it is the duty of a plaintiff to establish, at any rate prima facie, that the suit is within time. It is the obligation of the plaintiff to satisfy the court that his action is not barred by lapse of time: see Lalchand Marwari v. Mahanth Rampur Gir (1) and Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Sing (2) . Looking from a different perspective, we arrive at the same result. Under the Evidence Act there is an essential distinction between the phrase "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. Under s. 101 of the Evidence Act, the burden in the former sense is upon the party who comes to court to get a decision on the existence of certain facts which he asserts. That burden is constant throughout the trial; but the burden to prove in the sense of adducing evidence shifts from time to time having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other. In the present case the burden of proof in the former sense is certainly on the respondents. But the question is whether they have adduced evidence which had the effect of shifting the onus of proof to the appellant. On behalf of the respondents, their Colliery Manager was examined as P. W. 2. He stated in his evidence that the appellant had encroached upon the South Kujamal Colliery in Seam Nos. 10, 11 and 12 and another special seam, known as 4 feet seam and that in August, 1941, be came to know about the encroachment for the first time when the Mines Department forwarded a plan of the joint workings of the two collieries of the parties. He also stated that he had no knowledge of the encroachment before. In the cross- examination, two suggestions were made to him, namely, that in 1932 there was a survey of the plaintiffs' and defendants' coal-land by the Mines Department and that Seam Nos. 11 and 12 were (1) (1925) I.L.R. 5 Pat. 312.

(2) (1869) 12 M.I.A. 292.

worked by the appellant by open quarry system. He denied that he had any knowledge of the said two facts. The evidence of this witness has been accepted by the learned Subordinate Judge, and the High Court also accepted his evidence, though in its view it was not very satisfactory. This evidence, therefore, prima facie, proves that the respondents had knowledge of the encroachment only in 1941. Let us now consider some of the decisions cited at the Bar. A division beach of the Patna High Court in Sundarji Shivji v. Secretary of State for India (1) held that "when a defendant in an action based on tort seeks to show that the suit is not maintainable by reason of the expiry of the statutory period of limitation, it is upon him to prove the necessary facts". There the suit was for conversion of

property, and the learned Judges applied art. 48 of the Limitation Act to the said suit. After noticing the words in the last column of the article, the learned Judges proceeded to observe thus:

> " The starting date of limitation in the case of conversion is the date when the person who has the right to possession first learns of the act of conversion."

Adverting to the burden of proof, the learned Judges observed:

> "There is nothing in the pleadings which would show precisely at what period tile plaintiff or the plaintiff's agent, which is the same thing, became aware of the sale and its wrongfulness, that is to say, became aware of the fact of conversion. The defendant was unable to provide us with any materials to fix that date and therefore his plea of limitation fails altogether, because he is unable to show a date outside the period of three years which would entitle him to succeed."

With great respect to the learned Judges, we hold that this case had not been correctly decided. The burden of proof, as we have explained earlier is on a plaintiff who asserts a right, and it may be, having regard to the circumstances of each case, that the (1) (1934) I.L.R. 13 Pat, 752, 760.

onus of proof may shift to the defendant. But to say that no duty is cast upon the plaintiff even to allege the date when they had knowledge of the defendant's possession of the converted property and that the entire burden is on the defendant is contrary to the tenor of the article in the Limitation Act and also to the rules of evidence. A division bench of the Calcutta High Court in Kalyani Prasad Singh v. Borrea Coal Co. Ltd. (1) did not accept the view of the Patna High Court, but followed that of the Bombay High Court in the Bank of Bombay v. Fazulbhoy Ebrahim (2). In the context of the application of art. 48 of the Limitation Act, the learned Judges of the Calcutta High Court observed thus:

> "The burden of proof rests upon the party who substantially asserts the affirmative of the issue..... We are of opinion that the onus is upon the plaintiff in these suits to prove that the knowledge of his father wag within three years of the suit."

In Talyarkhan v. Gangadas (3), Rangnekar, J., formulated the legal position thus:

> "The onus is on the plaintiff to prove that he first learnt within three years of the suit that the property which he is seeking to recover was in the possession of the defendant. In other words, he has to prove that he obtained the knowledge of the defendant's possession of the property within three years of the suit, and that is all. If he proves this, then to succeed in the plea of limitation the defendant has to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to the suit."

We accept the said observations as representing the correct legal position on the subject.

The appellant gave evidence to show that the encroachment was prior to 1932, but there is no acceptable evidence on their part to establish that the respondents came to know of the removal of coal by the appellant or their possession of the coal removed beyond three years prior to the suit. Learned counsel (1) A.I.R. 1946 Cal. 123,127-

(2) (1922) 24 Bom. L.R. 513--

(3) (1935) I.L.R. 60 Bom. 848, 860.

took us through the correspondence that passed between the parties and the Mining Department in 1932. But it does not prove that the respondents had knowledge of the fact that the appellant had encroached upon any portion of their coal mines. Emphasis is also laid upon the fact that there was quarry system of working in the mines and a contention is advanced that quarrying is done openly and, therefore, the respondents must have had knowledge of the said fact. But the courts found from Commissioner's maps that in the encroached portion, there were only underground workings and that the quarries were mostly outside the encroached area. The learned Subordinate Judge and the High Court refused to base any finding on mere probabilities without clear evidence to sustain them. We cannot therefore hold that the findings of the courts are vitiated by an error of law by the burden of proof having been wrongly thrown on the appellant. We accept the findings of the High Court that the respondents had knowledge of the appellant's encroachment of their coal mines only in the year 1941 which was within three years of the date of the filing of the suit.

The only other outstanding question that remains for consideration is that covered by Issue No. 7. In paragraph 11 of the plaint, the plaintiffs allege that under the Indian Mines Act and the Rules and Regulations made thereunder the plaintiffs are bound to keep a barrier of 25 feet to the south of the defendant's working and, therefore, the coal that is still left in the encroached area is not by any means accessible to the plaintiffs and being thus wholly unworkable is entirely lost to them for ever. In the written statement the defendants did not deny the fact that the coal still left in the encroached area was lost to the plaintiffs, but only stated that it was purely a question of statutory obligation on the part of the plain. tiffs with which the Defendant had nothing to do. The learned Subordinate Judge accepted the case of the plaintiffs and held that the coal that was left in the encroached area was entirely lost to them by being rendered unworkable. The High Court accepted the finding.

Learned counsel for the appellant contends that under the Rules the respondents could request the mining authorities to exempt them from the operation of rule 76 of the Indian Coal Mines Regulation, 1946, and if exemption was granted, they could remove the coal left by the appellant in the encroached area. This possibility of the respondents getting an exemption from the operation of the rule was not raised either before the learned Subordinate Judge or before the High Court. Nor can we hold in favour of the appellant on the basis of such a possibility. We, therefore, accept the concurrent finding of fact arrived at by the courts below in respect to this issue.

No other point was raised. The appeal fails and is dismissed with costs.

Appeal dismissed.