

U Po Naing - - - - - *Appellant*

v.

The Burma Oil Company, Limited - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH FEBRUARY, 1929.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD CARSON.

SIR CHARLES SARGANT.

[*Delivered by the LORD CHANCELLOR.*]

This is an appeal from the Court of Appeal in Burma which reversed a decision of the Court of first instance in favour of the present appellant, who is the plaintiff in the action.

The action is brought to recover compensation for the use by the respondents of a quantity of gas which had been taken by the respondents from a certain oil well site of which they were in possession under a lease granted by the appellant. It appears that in Upper Burma, under the Upper Burma Land and Revenue Regulation of 1889, the right of private ownership in land is recognised, but it is expressly provided in section 31 that the right to all minerals, coal and earth oil, shall be deemed to belong to the Government, and the Government shall have all powers necessary for the proper enjoyment of its right thereto.

The facts proved are, that the appellant was before the year 1912 in possession of oil well sites in Upper Burma. By a grant dated the 25th April, 1912, after reciting the fact that the appellant was in possession of the well site in question, the Government granted to the appellant a right to win and get earth oil from the said well site in such manner as he or his assignees might

think fit, and to dispose of all earth oil to be gotten therefrom subject to the payment of a royalty to the Government.

By an indenture dated the 5th June, 1918, the appellant granted a lease to the respondents for a period of 25 years, and the question to be determined turns very largely upon the construction to be placed upon that lease. The lease recites that the appellant is the owner of certain oil well sites including the one now in question, and that he has obtained from the Government a grant of the right to win oil from the said oil well sites; and it proceeds to declare that the appellant hereby leases to the respondents his oil well sites and the right to win the oil therefrom for a period of 25 years from the date thereof. By clause 2 the indenture provides that during the period of the lease the said oil well sites and the grants for the same shall be made over to the possession of the lessees and the said possession shall not be withdrawn by the lessor. After the execution of the indenture, the respondents proceeded to sink wells for the purpose of obtaining oil upon this site as well as others included in the lease. No oil in any commercial quantity was obtained, but gas came from the well so drilled, and the respondents gave up the search for oil and by pipes were able to enclose the gas and use it for their own purposes in and about the neighbourhood of the site. After this had been going on for some six years, the appellant brought this action claiming compensation for three years' user of the gas so taken. The Trial Judge reached the conclusion that on the construction of the lease it was clear that oil included gas, and accordingly he held that since the respondents had agreed to pay a royalty on oil taken from the site, they must pay compensation for the gas which they had used.

In the Court of Appeal that decision was reversed. The Court held that the Trial Judge was wrong in thinking that oil included gas, and they came to the conclusion that the appellant had no property in the gas, and on that ground they decided that he could not claim compensation for its use by the respondents. In their Lordships' opinion it is quite clear that oil does not include gas and, therefore, that the decision of the Judge of first instance cannot be supported on the ground upon which it is based.

Before their Lordships' Board, Mr. Dunne, for the appellant, argued that the lease of June, 1918, upon its true construction was merely a lease to the respondents of the right to win oil from the site, and he argued, therefore, that any gas which was obtained in the course of that operation and any gas which was obtained from the site after that operation had been given up was the property of the appellant, and that if the respondents chose to make use of it, they must pay compensation for that use. In their Lordships' opinion this is to place far too narrow a construction upon the terms of the indenture of lease. That indenture in terms expressly recites the ownership of the sites

and of the grant as being two separate things and proceeds in its terms expressly to lease to the respondents both the sites and the right to win oil therefrom and to transfer to the respondents the sites as well as the grant of the right to win oil from them. In their Lordships' judgment the respondents were from the date of that indenture in possession of the site itself and not merely holders of the Government grant. In those circumstances it seems to their Lordships clear that unless it can be said that the gas was always the property of the appellant, it never became his property at any material date. No authority could be produced for the view that gas under the soil before it had been tapped or released was the property of the appellant, and it seems to their Lordships difficult to reconcile any such view with the well-known authorities as to underground water not flowing in any defined channel. No doubt it is true that the gas could be reduced into possession, and when reduced into possession it became the property of the person who had so reduced it. But in their Lordships' judgment the gas was not reduced into possession by the appellant but by the respondents who had dug the well and who took the gas as it came out of the well and used it. This seems to be sufficient to dispose of the case without discussing whether or not section 31 of the Upper Burma Land and Revenue Regulation on its true construction reserves the right to gas to the Government as seems to have been the view of the Courts below.

A further argument was based upon the provisions of section 108, subsection (o) of the Transfer of Property Act, 1882, which provides that the lessee of property must not use the property for a purpose other than that for which it was leased. In their Lordships' judgment it is not necessary exhaustively to discuss the limits of that provision, but there seems to be nothing inconsistent with its terms in the use of gas which is necessarily set free by reason of the sinking of the oil well for the respondents' own purposes without doing any damage or any injury to the property leased.

For those reasons their Lordships are of opinion that the appeal fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

U PO NAINO

v.

THE BURMA OIL COMPANY, LIMITED.

DELIVERED BY THE LORD CHANCELLOR

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