

Privy Council Appeal No. 23 of 1943

Patna Appeal No. 18 of 1941

The Secretary of State - - - - - *Appellant*

v.

Ambalal Khora and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1944

Present at the Hearing :

LORD RUSSELL OF KILLOWEN

LORD MACMILLAN

LORD SIMONDS

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* LORD SIMONDS]

This appeal, which is from a judgment dated the 8th May, 1941, of the High Court of Judicature at Patna, arises out of a dispute between the appellant, the Secretary of State for India as representing the Government of Bihar and Orissa and also the East Indian Railway Administration, and the respondents, the owners of a colliery known as the Khas Jheria Colliery, in regard to the compensation payable by the former to the latter for coal, the working of which was prevented or restricted under the Land Acquisition (Mines) Act (No. XVIII of 1885), which will be referred to as "the Act of 1885."

In the long drawn out litigation between the parties a number of questions have been raised which are no longer at issue. The single question now remaining for decision depends on the construction of an agreement made on the 11th June, 1913, between the East Indian Railway Company and the predecessor in title of the respondents, by which the rights of the parties in respect of the working of coal or of compensation for leaving it unworked were adjusted and defined.

Inasmuch as this agreement specifically refers to the Act of 1885 which would itself but for the agreement between the parties have defined their rights, it is necessary to refer to its provisions.

By S. 3 (1) it is provided that when the Lieutenant-Governor makes a declaration under S. 6 of the Land Acquisition Act, 1870, that land is needed for a public purpose or for a company, he may, if he thinks fit, insert in the declaration a statement that the mines of coal, ironstone, slate or other minerals lying under the land or any particular portion of the land except only such parts of the mines or minerals as therein mentioned are not needed and by S. 3 (3) it is provided that if any such statement is inserted in such declaration the mines in question under the land or portion of the land so specified except as aforesaid shall not vest in the Government when the land so vests under the said Act.

By S. 7 it is provided that if the person for the time being entitled to work or get any mines or minerals lying under any land so acquired is desirous of working or getting the same he shall give the Lieutenant-Governor notice in writing of his intention so to do sixty days before the commencement of working.

By S. 5 (1) provision is made for inspection by the Lieutenant-Governor after such notice and by S. 5 (2) it is provided that if it appears to the Lieutenant-Governor that the working or getting of the mines or minerals or any part thereof is likely to cause damage to the surface of the land or any works thereon he may publish a declaration of his willingness either (a) to pay compensation for the mines or minerals still unworked or ungoten or that part thereof to all persons having an interest in the same; or (b) to pay compensation to all such persons in consideration of those mines or minerals or that part thereof being worked or gotten in such manner and subject to such restrictions as the Lieutenant-Governor may in his declaration specify, by S. 5 (3) that if the declaration mentioned in case (a) is made then those mines or minerals or that part thereof shall not thereafter be worked or gotten by any person and by S. 5 (4) that, if the declaration mentioned in case (b) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person save in the manner and subject to the restrictions specified by the Lieutenant-Governor.

Section 6 provides that when the working or getting of any mines or minerals has been prevented or restricted under S. 5, the persons interested in those mines or minerals and the amounts of compensation payable to them respectively shall be ascertained as therein mentioned and section 7 that, if before the expiration of the said 60 days the Lieutenant-Governor does not publish a declaration as provided in S. 5 the owner lessee or occupier of the mines may, unless and until such a declaration is subsequently made, work the mines or any part thereof in a manner proper and necessary for the beneficial working thereof as therein mentioned with a special provision for the case of damage or obstruction caused by improper working.

In these statutory provisions two things may be noticed, first, the repetition of the phrase "mines ... or minerals lying under the land or any particular portion of the land" and, secondly, the absence of any provision in regard to mines or minerals which do not lie under any land acquired but the support of which might be necessary for such land or any works thereon. Here a sharp distinction may be observed between the Act of 1885 and the familiar provisions of the so called "mining code" contained in the English Railways Clauses Act of 1845, by which elaborate provision is made in regard to the working of minerals at a prescribed distance from a railway company's undertaking. It is difficult to suppose that the distinction was not deliberate.

The facts that are relevant to the present question can now be shortly stated. In the year 1913 Khora Ramji, the respondents' predecessor in title as owner of the Khas Jheria Colliery, which included mines of coal adjacent and subjacent to the branch line of the East Indian Railway Company at and near the station of Jheria, desired to have a siding on that line constructed and maintained for the benefit of the colliery. An agreement was accordingly made between him and the Railway Company which in form consisted of two documents, the one a printed form described as "Memorandum of Terms for the construction of short branches and sidings for the use of collieries, mills or other industries," the other of a letter of acceptance of such terms signed by or on behalf of Khora Ramji. The date ascribed to the agreement is the 11th June, 1913. The printed memorandum, as its description indicates, was a common form document, of which it is necessary only to refer to clause 6. This clause which must be set out in full is in the following terms:—

"6. Surface rights only will be acquired. An applicant, if also the owner of mining rights in the land so acquired, or in land under the branch or other lines with which the siding is connected, will be allowed to work and get minerals under the said land, provided that all operations

connected therewith are carried out in such a manner as not thereby to injure or to endanger the safety of the undertaking or any part thereof. The procedure laid down in the Land Acquisition Mines Act XVIII of 1885 shall be strictly adhered to in regard to all proposed working of mines under such land. The applicant shall waive all claims for compensation, either from Government or the Company, for any restricted working of the mines that compliance with the foregoing may entail, and shall accept entire responsibility for any accidents that may occur owing to failure to attend to these requirements. The Applicant agrees by the acceptance of these terms to permit any person appointed by the Company to enter and inspect and where considered necessary make plans and surveys of all workings beneath, or in the near vicinity of, the land acquired for the siding in order to see whether the precautions being taken are sufficient, and the Company reserves to itself the absolute right to refuse to allow the use of its stock on any siding to which it is not satisfied that proper support has been given."

The word "undertaking" was defined by the memorandum to mean and include "all works, buildings, rolling stock and other property forming part of or appertaining to, and all rolling stock or trains passing over the railway" and the word "applicant" to mean "the owner or leaseholder or duly constituted agent or manager of any colliery, mill, or other industrial concern, desirous of obtaining or using a siding or branch leading from the railway or who has obtained or uses such a siding or branch."

The letter of acceptance was in the following terms:—

"The Agent,
East Indian Railway, Calcutta.
14924S.

Dear Sir,

Your letter No. B.10605 of 11th June, 1913.

We agree to accept the above terms for the construction, working and maintenance of the siding asked for by Khora Ramji Khas Jharia Colliery, P.O. Jharia at Jharia on the East Indian Railway Jherria branch line and we understand and accept that the provisions and stipulations contained in clause 6 of the above terms extend and apply to all the mines and minerals belonging to Khora Ramji underlying the land of the branch or branches connecting the siding with the main line. Khora Ramji."

It appears that the terms of the letter which was appended to the memorandum were drafted by the Railway Company and submitted to Khora Ramji for his signature.

Pursuant to this agreement in the year 1915 a piece of surface land, 1 bigha 6 cottahs in extent, contiguous with and to the west of the lands previously acquired for the purpose of Jheria Station, was acquired by the Government of Bihar and Orissa under the provisions of the Land Acquisition Acts. On the land so acquired a siding was constructed and used for the purposes of the colliery. The seams of coal under such land form part of the colliery. There are three seams, the top seam known as "No. 11-12 Seam" the middle seam known as "Special Seam" and the bottom seam known as "No. 10 Seam".

There followed more than ten years of spasmodic controversy between the parties during which the rights of working or of compensation for not working were canvassed.

On the 17th July, 1930, formal intimation was given by or on behalf of Khora Ramji to the Government Chief Inspector of Mines in India of the reopening of "11-12 Seam coal mine at our Khas Jheria Colliery". This intimation followed vain attempts to agree the form of declaration which should be issued by the Lieutenant-Governor under the Act of 1885. It resulted after a further substantial delay in the issue on the 17th June, 1931, of a declaration by which the Government, after reciting the acquisition of certain land for the purposes of the railway and the notice given by Khora Ramji of his intention to work No. 11-12 seam and the inspection of the mines on behalf of the Government whereby it appeared that the working out of the coal of the mines underlying the said land was likely to cause damage to the surface of the land and to the works constructed thereon and further reciting that Khora Ramji had agreed not to work and get minerals underlying the land acquired for their siding or underlying the land acquired for the branch or other lines with which the siding

was connected or underlying the land of the branch or branches connecting the said siding with the main line in such manner as to injure or endanger the safety of the undertaking or any part thereof, were pleased to declare under clause (b) of subs. (2) of S. 5 of the Act their willingness to pay compensation to all persons having an interest in the said mines lying under a portion of the land acquired under the Land Acquisition Act, 1894, which was described as coloured in pink on the plan therein referred to, in consideration of the said mines being worked or gotten in the manner and subject to the restrictions therein specified. It is not necessary to set out the restrictions: it is sufficient to say that they involved the leaving unworked of a quantity of coal which in the ordinary course would have been worked and gotten.

No steps having been taken to assess the compensation payable under this declaration, presumably because the parties could not agree the basis of such assessment, in August, 1934, the suit, in which the present appeal is brought, was commenced by the respondents who claimed a declaration of their rights in respect of compensation and the appropriate further relief. It is unnecessary to deal with the numerous and intricate questions which have been raised in the course of the suit. The single outstanding question raised in this appeal is one of construction of clause 6 of the agreement of the 11th June, 1913, viz. to what extent was the colliery owners' statutory right to compensation waived by that clause? There being now no dispute in regard to the waiver of the right to compensation for coal unworked under the land acquired for the siding, the question may in the light of the argument before their Lordships be stated more narrowly in these terms: was the waiver of the right to claim compensation limited (as the respondents contend) to the right to claim in respect of coal lying vertically under the railway tracks in the station yard in Jheria Station or did it extend (as the appellant contends) to the right to claim in respect of coal lying beneath the adjacent land the support of which was necessary for the safety of the tracks?

It is clear that except so far as it has been waived the statutory right to compensation is intact and that it is for the appellant to establish the waiver. For this purpose he can only rely on clause 6 of the agreement. In the construction of this document their Lordships bear in mind that the parties negotiated on the basis of their existing statutory rights and that in view of its genesis the case is one in which if there is any ambiguity the document must be construed against the appellant.

The material words that have to be construed may here be repeated. They are the words in clause 6 of the memorandum "An applicant if also the owner of mining rights in the land so acquired or in land under the branch or other lines with which the siding is connected will be allowed to get and work minerals under the said land provided . . ." and the words in the letter of acceptance "and the mines and minerals belonging to Khora Rhamji underlying the land of the branch or branches connecting the siding with the main line". It is in truth not surprising that the interpretation of these words should have created difficulty. But the real difficulty appears to their Lordships to lie in the determination of the surface area intended to be covered by these words rather than in any uncertainty as to the meaning of the words "under the land" or "underlying the land" when the surface area has been ascertained. This real difficulty has been resolved by the High Court (in this respect varying the order of the learned Subordinate Judge) in these words "therefore when the letter of acceptance is read along with clause 6 of exhibit I [i.e. the memorandum] I think it must be taken to cover the land underlying the entire network of railway tracks within the station yard and the Jharia Railway Station." This conclusion and the cogent reasoning that led to it have not on this appeal been the subject of serious criticism and appear to their Lordships to be well-founded. The appellant however seeks to enlarge the area of waiver by the claim that it extends not only to coal vertically under the land, the area of which is so defined, but also to mines which must be left unworked for the lateral support of such land. This contention has been rejected both by the Subordinate Judge and by

the High Court. In their Lordships' opinion it has been rightly rejected. The natural meaning of the words "lying under" or "underlying", between which there is no difference, is lying vertically under. The bare possibility cannot be rejected of a context which would give the words a different meaning such as "lying below or at a lower level whether subjacent or adjacent", but in the document under review there is no such context. On the contrary the very clause which has to be construed refers specifically to the Act of 1885, which, except so far as its provisions are varied by agreement, defines the rights of the parties, and in that Act the words "minerals lying under the land" can mean nothing else than minerals lying vertically under the land. Here is a context fatal to the contention of the appellant. It would indeed be hard to find a distinction more familiar to those conversant with mining law than that between vertical and lateral support. If the parties had intended that there should be waiver of a right to compensation for minerals left unworked for lateral support, they should have made it clear. They have not done so but have used familiar language apt to refer and only to refer to minerals vertically underlying a defined surface area. As the High Court justly observed (and this is the sum of the matter) "If the railway intended otherwise, then the clause should have been worded differently."

For these reasons their Lordships are of opinion that this appeal should be dismissed with costs and will humbly advise His Majesty accordingly.

In the Privy Council

THE SECRETARY OF STATE

2.

AMBALAL KHORA AND OTHERS

DELIVERED BY LORD SIMONDS

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