*Present:* De Sampayo J. and Schneider A.J.

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NONEIHAMY *v.* SILVA *et al.*

*318—D. C. Galle, 15,427.*

*Usufructuary—Right to dig for minerals.*

A usufructuary may dig for and extract minerals from the land, but he is only entitled to the interest on the proceeds thereof.

IN this case the first plaintiff-appellant as absolute owner of 1/32nd share and of another half, which is subject to a life interest in favour of the second respondent, of the land called Mulanegodabedda, alleged that the first respondent, who owned no share of the said land, had since September, 1913, acted in collusion with the second respondent, and had obtained and appropriated 700 tons of plumbago. The first plaintiff-appellant claimed a sum of Rs. 1,875 from the respondents, being the value of her share of the plumbago calculated at the rate of Rs. 100 per ton, and after giving credit to the respondents for Rs. 10,000 for working expenses. The first plaintiff-appellant further prayed that the respondents be ordered to bring into Court the value of half share of the second respondent, viz., the Rs. 30,000, or to give adequate security for the same.

The respondents denied that so much as 700 tons were obtained, and pleaded that in any event the first respondent was not bound to bring the value of the half share, viz., Rs. 30,000, into Court, or to give security for the same.

By judgment dated July 29, 1918, the appellant's action was dismissed as against the first respondent, and the appellant was declared entitled to receive a sum of Rs. 19.09 only from the second respondent, and the second respondent was further ordered to bring into Court a sum of Rs. 305.40 only, which the Court assessed was the value of her half share.

The District Judge (L. W. C. Schrader, Esq.) delivered the following judgment:—

In this case the minor plaintiff is entitled to a 1/32nd part of the land Mulanegodabedda and to a half, subject to the life interest of second defendant, her grandmother Gimarah. In this land Louis (first defendant) has been mining for plumbago since September, 1913, on the strength of an agreement entered into with Gimarah, witnessed and consented to by the minor's next friend, and with the full cognizance and assent of her mother, another co-owner. The arrangement was one in which second defendant was held out as the sole owner of the land, and gave first defendant permission to mine for a return of one-tenth share of the yield to the owner. This he has done, and has rendered . . . . . a list of receipts from the grantor showing that he has paid her in the aggregate of money and plumbago a total of Rs. 610.81 as the one-tenth share.

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The next friend and his wife instituted partition proceedings when plumbago digging was prosperous, and obtained an injunction three months before the expiry of the agreement, and the minor's next friend now sues the license grantor and licensee for—

(1) The payment of 1/32nd share of the proceeds, which he calculates at Rs. 1,875.

(2) An order on defendants to tender security for the minor's half share of the proceeds of the mining, or Rs. 30,000.

(3) In the alternative, an order to bring into Court the whole proceeds, Rs. 60,000, to be kept for plaintiff, subject to second defendant's usufruct.

2. The issues as to quantities arise; also whether the claim can be for shares of the output or of the ground share; whether the defendants acted in collusion to deprive the minor; whether the life interest which second defendant enjoys entitled her to the use of the minerals absolutely, or whether she is bound to secure them or their value to the minor and enjoy only the interest upon them; and lastly, whether the action is maintainable against the first defendant for security in respect of second defendant's obligations.

3. The case is complicated by reason of the fact that the minor's natural guardians, her mother Angohamy and the next friend—her second husband—acquiesced in and openly sanctioned this mining agreement. But it is conceded that this operates as no estoppel to the minor.

4. The rule governing the usufructuary's right over minerals and stones on the property is stated by *Voet, lib. VII., tit, 1, 24*, in the passage "*magis est . . . . . fructuarius solo talium rutorum œsorumque pretio utatur, quamdiu vivit, aut exeo fœnori collocato usuras percipiat, finito usufructu pretium deductis impensis proprietario redditurus.*" This is clear enough, and the amount agreed upon as the ground share, which was presumably considered reasonable by the plaintiff, and is usual, must be regarded as the "*pretium deductis impensis*". For it is certain that the mineral could not have been extracted by the defendant or in her name on any other terms. Neither she nor the minor were capable of working the mine on any other terms and gain a larger share of the profit. And the usufructuary has a perfect right to exploit the property in this way. She is, therefore, bound to secure to the minor the half share of the principal sum or price.

5. In regard to quantities extracted, I hold the plaintiff's estimates to be absolutely unfounded and unreliable. The four or five tons a day deposed to was a pure exaggeration of the first defendant for his own purposes when an injunction was claimed, and the rapid output was strictly limited in time to the short period of June and early July. I agree that the receipts are a very proper and good clue to the amount really taken out, and hold that it cannot have been more than the sixty or seventy tons during the whole period of the lease.

6. I have already found on the evidence that there was no collusion between defendants, to which the plaintiff's mother and stepfather were not parties; that there was no intention of depriving the minor of her rights, as the grandmother had every intention of leaving, and the party expected her money to devolve on the minor. A quarrel has, however, since occurred over

the disposal of the plaintiff's hand in marriage, so that the family harmony has been disturbed, with the usual result, that the daughter and son-in-law are vigorously preventing their mother-in-law from their rights.

7. With regard to the position of the first defendant, I am of opinion that the action is not maintainable. As I have found, Voet makes it clear that the usufructuary is entitled to open mines and put the property to this use, so long as he only uses the interest of the money. The first defendant is only the instrument who opened the mines in her name. As miner he is entitled to the reward of his labour. It is the usufructuary alone against whom the action lies. The licensee was in no sense a wrong-doer, nor his act tortious. I think the passages from Nathan cited reveal the fact that the action lies only against the usufructuary; certainly it cannot lie against the instrument. The first defendant must be discharged. He entered into a permissible and legitimate agreement with the defendant, although not capable of being enforced at law by reason of its want of notarial execution. But it was acted upon, and such action was lawful and within the compass of the contracting parties' rights. As licensee he is not responsible for the obligations of the other party or parties to the contract. I answer the last issue in the negative.

8. The action is dismissed, with costs, as against first defendant, payable by next friend personally. The second defendant is decreed to pay (a) Rs. 19.09 as the minor's 1/32nd share, and (b) to bring into Court the half share of the price received, to wit, Rs. 305.40, for plaintiff, subject to her own (second defendant's) life interest.

The plaintiff succeeds only on one issue (the seventh), and is not entitled to costs. The whole case was due to a quarrel, in which the minor (plaintiff) has no concern. These parties will, therefore, bear their own costs.

*Samarawickreme*, for plaintiff, appellant.

*A. St. V. Jayawardene*, for defendant, respondent.

March 14, 1919. DE SAMPAYO J.—

The facts involved in this case are the same as those in the connected case No. 316, D. C. Galle, 15,425, save that the plaintiff, who is the Nonohamy referred to there, is a minor, and that there is no estoppel operating against her. Nevertheless, the question of liability practically remains the same. The first defendant, who dug for plumbago on the land, did so lawfully under the agreement with the second defendant. As stated in my judgment in the other case, it was within the power of the second defendant to make the best use of the land of which it is capable, and the plaintiff must look for her share of the profits to the second defendant, who took the whole. Even with regard to the half share of the land which belongs to the plaintiff, and over which the second defendant has an usufruct, the law does not make the mining unlawful. *Maasdorp, vol. 2, p. 156*, after referring to the various authorities, lays down that the usufructuary may dig for and extract minerals from the land, but that he is only entitled to the

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interest on the proceeds thereof. The District Judge has given effect to this law by ordering that 1/32nd share of the Rs. 610.81, which the second defendant received as ground share, should be paid to the plaintiff, but that half of the sum should be brought into Court to remain in deposit subject to the second defendant's life interest. In my opinion the judgment appealed from is right. Some complaint is made of the order requiring the next friend of the plaintiff to pay the first defendant's costs personally. The next friend is the second plaintiff in the other action. It is quite plain that he is practically the party plaintiff himself, and the circumstances disclosed do not justify any relief being granted to him in respect of the costs of the first defendant.

I would dismiss the appeal, with costs, which also should be paid by the next friend.

SCHNEIDER A.J.—I agree.

*Appeal dismissed.*