

(1896) 03 CAL CK 0001
In the Calcutta High Court

A. Caspersz, (Official Receiver)	Vs	APPELLANT
Kishori Lal Roy Chowdhri and Others		RESPONDENT

Date of Decision : 20-03-1896

Acts Referred:

Citation : (1896) ILR (Cal) 922

Hon'ble Judges : Watson, J;R. Couch, J;Hobhouse, J;Davy, J

Bench : Full Bench

Judgement

Hobhouse, J.—The original plaintiff in this suit was and the appellant is the Official Receiver of the estate of the Ghosal family, who are owners of 8 annas of the mauza Dakhin Kroke. The substantial defendants are seven in number. The first two (numbered as 3, because one of them fills two characters) are owners of 5 1/2 annas of the same mauza. Nos. 4, 5, 6 and 7 were sued as servants or officers of the first two. There are other formal defendants, owners of the other shares, who are not parties to this appeal. The complaint is that the first two defendants by the hands of their officers cut trees in the forest belonging to the mauza, and the plaintiff prays for a declaration of his right, an injunction, and further relief.

2. The first two defendants allege that they did not cause any trees to be cut. Defendants 4 and 5 deny cutting the trees, and allege that the plaintiff cut them. No. 7 raises the same defence, and adds that he was possessed of a shikhmi or sub-tenure in the mauza which displaced the plaintiff's right. No. 6 disclaims both liability and interest. As against him the suit has failed. He does not appear in this appeal, and it is difficult to see why he was joined as a respondent. At all events he may now be disregarded.

3. The Subordinate Judge who tried the case held that, though it was very probable that the trees were cut by order of the first two defendants, there was no conclusive evidence against them. As to defendants 4, 5 and 7, he held that they cut the trees; and he awarded damages against them. As to the claim made by No. 7, Hurri Bhuian, to a sub-tenure the Subordinate Judge held that he had

proved such a tenure, but not that it affected the plaintiff's eight annas. He gave none of the parties any costs.

4. Against this decree appeals were presented to the High Court. The plaintiff appealed to make all the defendants liable except No. 6. Bhuian appealed on the double ground that he did not cut trees, and that his sub-tenure protected him. Defendants 4 and 5 lodged an objection in the nature of a cross-appeal, contending that they did not cut.

5. As regards the first two defendants the High Court substantially agreed with the Subordinate Judge and did not disturb his decree; but they appear not to have given these defendants any costs of the appeal. As regards defendants 4 and 5, they varied the decree below by disallowing certain expenses which the Subordinate Judge had allowed them, thereby enhancing the measure of damages against, them, and by making them pay costs in the lower Court. As regards the sub-tenure claimed by Bhuian, they differed from the Subordinate Judge as to its extent, thinking that it included the entirety of the mauza, but they held that Bhuian failed to prove that it gave any right to the timber in the forest. As regards Bhuian's liability for cutting, they held that none was proved against him. Therefore they varied the decree below by exonerating Bhuian and giving him costs in both Courts.

6. From this decree of the High Court the plaintiff appeals for the purpose of fixing liability on the first two defendants and on Bhuian. There is no cross-appeal. The plaintiff has named defendants 4, 5, and 6 as respondents; their Lordships do not understand why, as he seeks no further relief against them; but in the view now taken of the case it does not appear that any additional cost has resulted from this needless proceeding.

7. Several of the questions raised here may be disposed of very shortly. Both Courts have held that it is not proved that any cutting took place by actual order of the first two defendants. Mr. Arathoon was driven to contend that they must be held responsible for it in point of law, because the other defendants held some employments under them. But there is no evidence at all that to cut trees was in the ordinary course of the duty of any of them. The only statement to which their Lordships were referred bears the other way. The appeal wholly fails as against the first two defendants.

8. Defendant 4, being invited here, avails himself of the invitation to get the decree varied in his favour. He must, however, fall under the usual rule that respondents cannot be heard except to support the decree, and can only alter it by means of a cross-appeal.

9. As regards Bhuian's claim under his sub-tenure, Mr. Branson does not point to any evidence showing that the objection taken by the High Court ought to be overruled. In the absence of evidence it must be held that he has shown no title to the timber in the forest.

10. The remaining question, whether Bhuian participated in the cutting, requires more examination, because the two Courts have differed in their views of a large body of evidence. There are, however, some important parts of the story which are free from dispute.

11. One of them is that Bhuian was in the employment of the first two defendants. Another is, that he was present during the cutting; though with what object is disputed. It will be better to give his statement, which is a very remarkable one, in his own words. He says:

I went to that guruh for the first time three years ago when that gajar guruh was cut down. I went on the 15th or 16th Bhadro, I remember; but there may be a difference of one or two days in the date. At that time I went to the gajari guruh for seven or eight days, or eight or nine days. I went to see as they were going to ruin me. At that time I simply prohibited them and cried out "dohai" (a call for help); but they did not heed me. I used to go to that guruh in the morning and return at noon, and sometimes later. I used to walk about all that time and see what trees and how many trees were being cut; but I did not keep any account of them.

To Court.-I did not give any information to the Police. I wanted to give information, but other persons said, "You will get no good by giving notice at the thana; you will get no good except by instituting suit in Court." I wanted to go and give information at the thana on the day following that on which the cutting of the trees commenced, but I did not go as the people told me not to do so. I asked advice of Roop Churn Saha and Gagan Kur, and I asked other persons also; I do not remember their names. I did not keep any account of how many chambul and how many jack trees were cut down. On the first day I went alone; and after that, on all the days I went, I took one or two of my co-sharers with me. My brothers Koilas, Rajani and Sonatun used to go with me, and Gagan also went one day. None of them have come to give evidence. Besides crying out dohai and walking about in the guruh, I did not do anything else. I cried out dohai for two or three days; but as they did not heed me, I ceased crying out dohai.

12. A third point now undisputed, being covered by concurrent decisions, is that the defendants' allegation that cutting was ordered by the plaintiff is untrue; and that the plaintiff's charge against the defendants is true so far as regards Nos. 4 and 5.

13. The controversy then is narrowed down to one point, viz., with what object was Bhuian present at the cutting. Their Lordships will briefly run over what the witnesses say. Bhairub, who was present, says: "I forbade Hurri Bhuian, Mohim Das and Krishna Sen to cut the trees. Thereupon they said, we will cut the trees : we will not listen to your prohibition." Brindabun was present, and questioned Bhuian, who said that the first two defendants were cutting. Ramkrishna cut trees pointed out by Bhuian, and took half for his payments, Bhuian taking the other half. Earn Soonder tells nearly the same story. Babar Ali,

the plaintiff's tahsildar, remonstrated with Bhuian and defendants 4, 5 and 6; and the reply was a threat of unpleasant consequences to himself, and an order to the cutters to go on. Sheikh Meghue is in the employ of a neighbouring landowner. He went to protect his master's property, and warned Bhuian and the others not to trespass. They replied that they were cutting the trees of their own masters. Guru Churn lives in the neighbouring hat or market town of Sabhar. Bhuian saw him there and instructed him to cut trees : and he did so, getting half for his payment. Madhub Pramanik gives similar evidence. All these witnesses were cross-examined, with the effect that none was shaken, and some spoke to the point with rather more particularity. None of them has been specifically contradicted by any other witness, except so far as the evidence relates to the first two defendants.

14. The Subordinate Judge states in brief terms the effect they left on his mind. "I believe the evidence of the plaintiff's witnesses, and I therefore hold that the defendants Mohim Chunder Das, Krishna Churn Sen, and Hurri Nath Bhumik have caused the gajari and other trees to be cut down and taken away." It is true that in so deciding the Subordinate Judge seems to have had in his mind the broad issue raised in the pleadings, and apparently in the whole of the evidence, whether it was the defendants or the plaintiff who cut the trees. It does not appear that any attempt was made at the trial to distinguish Bhuian's case on the point of cutting from that of defendants 4 and 5. That distinction was drawn on his separate appeal, and is the point on which the High Court has differed from the Subordinate Judge. It remains to see whether it rests on substantial grounds.

15. It appears to their Lordships that the reasons assigned by the High Court for disregarding the evidence of the witnesses are all of a conjectural character. As to several of them, they simply make the remark that they are servants or tenants of the plaintiff or of co-sharers in the same interest. Such considerations may be important enough when there is contradiction, or vacillation, or a nice balance of evidence, or some violent improbability about the story that is told; but they cannot be relied on as of themselves supplying reasons for disbelief. And as to the witnesses Sheikh Meghu and Guru Churn they do not apply at all.

16. It is impossible to say that the story told by the witnesses of Bhuian's cutting is improbable, or at all out of the ordinary way. The improbability suggested by the High Court is that Bhuian would not be likely to proclaim his intention of cutting in the bazar of Sabhar; and that those witnesses who were tenants or servants would have given immediate information to the plaintiffs which they did not do. Their Lordships cannot adopt these suggestions. Bhuian had to procure a large number of workmen, several hundreds it seems, and he could hardly do that without going to the town, and speaking to many people. Moreover, the remark does not apply at all to the first six of the witnesses; those who were present on the spot either as cutters or as spectators. Nor is it apparent why the plaintiff's tenants should at once go to them with warning. As

the story is told, the cutting was not a secret conspiracy, but was ordered quite openly by the agent of part-owners of the estate purporting to act on their behalf, and there was no reason to suppose anything wrong until objection was made by the other part-owners.

17. Apparently the chief difficulty felt by the High Court is that Bhuian was not charged with a criminal offence as Nos. 4 and 5 were, nor was he implicated by the evidence given before the Magistrate. They wholly disbelieve one of the witnesses, Bahar Ali, because in the criminal proceedings he does not say exactly what he says in the present suit. Their Lordships fail to see, though Mr. Branson endeavoured to show it, any contradiction between Bahar Ali's two statements. And Bhuian may well have ordered the cutting without making himself obnoxious to any criminal charge. The two questions are entirely distinct. The police evidence was important on the broad question whether the cutting was the act of the plaintiff or of the defendants, and it was so treated by the Subordinate Judge. But on the question of Bhuian's personal liability it is of no importance, for he was not charged with any offence, and it would have been wrong on that enquiry to go into any evidence specially directed against him.

18. Moreover, while dwelling on the slender considerations just mentioned, the High Court say nothing about the admitted fact of Bhuian's presence during the whole of the operations, and the extraordinary explanation given by him. Believing that the trees were his own, and that the plaintiff's men were come to ruin him, he looked on crying dohai for two or three days, and walking about in the forest for eight or nine days seeing how many trees were cut, though keeping no account of them. His brothers and co-owners of the trees were with him, but they too did nothing, and he has not called them to give evidence in this suit. To their Lordships' understanding the plaintiff's witnesses give an explanation of Bhuian's presence, which is clear, consistent, and probable, and which is also uncontradicted except by his own denials, whereas his explanation is absurd to the degree of incredibility. The result is that the decree of the High Court ought to be varied by including Bhuian among the defendants liable for damages.

19. Their Lordships think that an order should be made on the following lines. So far as relates to Bhuian the decree should be discharged, and in lieu thereof, first it should dismiss Bhuian's appeal; secondly, it should declare that the plaintiff is entitled to recover the sum of Rs. 8,019-8 with interest thereon in the terms of the decree, against Bhuian as well as against defendants 1 and 5, and should order accordingly; thirdly, it should declare that Bhuian is equally liable with defendants 4 and 5 to pay to the plaintiff his costs in the first Court and in the High Court with interest according to the terms of the decree against those defendants. Quoad ultra the decree should be affirmed. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

20. With regard to the costs of this appeal, as all the respondents who have appeared have joined in the defence, and as the plaintiff has succeeded against

one and failed against others, it will be right to leave the parties to bear their own costs.