

(1915) 03 CAL CK 0011
In the Calcutta High Court

Gurai Kar and Others

APPELLANT

Vs

Srimati Rani Kuarmoni Singha Mandhata

RESPONDENT

Date of Decision : 15-03-1915

Acts Referred:

Bengal Tenancy Act, 1885 — Section 106
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : 29 Ind. Cas. 312

Hon'ble Judges : Walmsley, J;Chapman, J

Bench : Division Bench

Judgement

1. These are appeals by the plaintiffs. The suits were brought u/s 106 of the Bengal Tenancy Act for declarations that the tenants had the right to cut and appropriate trees. The Assistant Settlement Officer decreed the suits. The landlord appealed. The District Judge, in the course of his judgment, came to a finding that the custom had been established, but that it was unreasonable in so far as it permitted the appropriation of timber trees. By an oversight, however, the learned Judge recorded an order dismissing the landlord's appeal thus preserving the judgment of the Assistant Settlement Officer-intact. Upon an ex parte application by the landlord, the learned Judge amended his judgment and converted his order dismissing the appeal into an order directing that the decree of the Assistant Settlement Officer should be modified, in accordance with his finding that the custom should not be upheld so far as timber trees are concerned. The tenants, thereupon, appealed to this Court. They relied in their grounds of appeal both on the contention that the learned Judge was wrong in holding that the custom was unreasonable and upon the contention that it was not open to the learned Judge to alter his judgment. The learned Judges who disposed of the appeal dealt in their judgment with the latter contention only and directed that the judgment should be restored to its original condition. The learned Judges proceeded to say that it would be open to the respondent landlord to apply for a review. Thereupon, the landlord applied for a review of this judgment and on that application for review, the learned Judge amended the

judgment again, altering it into a judgment modifying the decree of the Assistant Settlement Officer in accordance with the finding that the custom, was unreasonable so far as timber trees were concerned.

2. In appeal to this Court, the tenants take three grounds. The first ground is that the application for review was barred by limitation. The judgment which was sought to be amended by that application for review was dated the 23rd August 1911, that is, the judgment in the form in which it stood after the restoration made in it in accordance with the order passed by the learned Judges of this Court in second appeal. The application for review of this judgment was made on the 20th September 1911, and was within time. The appellants' contention that this application for review must be held to relate to the original judgment of the 7th April 1909, cannot be sustained, although there are certain expressions in the judgment of the learned District Judge now appealed against which might support their contention.

3. The next contention in appeal is that the learned Judge had no jurisdiction to entertain this application for review. The judgment purports to pass the order u/s 151 of the Code of Civil Procedure, holding that the judgment, the review of which was applied for, was the judgment of his predecessor and that, therefore, he had no jurisdiction to deal with the application under Order XLVII. We are of opinion, however, that the learned Judge fell into an error in the view which he took, that the judgment the review of which was applied for was the judgment of his predecessor. It is true that the original judgment delivered on the 7th April 1909 was the judgment of the learned Judge's predecessor, Mr. Forrester. But the judgment, which in law was the judgment which had to be reviewed, was not that judgment but the judgment dated the 23rd August 1911, which was the result of the alteration made by the learned Judge, Mr. Comes, himself. It was his judgment made under the order of the "High Court. That was the judgment which had to be reviewed and the learned Judge had jurisdiction under Order XLVII, Rule 1, to review that judgment on account of what he held, and rightly held, to be a mistake on the face of the record.

4. The appellants, however, contend that the judgment is wrong, upon the ground that the learned District Judge was not justified in holding that the custom was unreasonable in so far as it permitted the tenants to appropriate timber trees. The respondent argued that the question whether, a custom is reasonable or not is a question of fact and not of law. We need only to refer to the judgment of Lord Lindley in the case of *Bradburn v. Foley* 3 C.P.D. 129 : 47 L.J.C.P. 331 : 38 L.T. 421 : 26 W.R. 423. for authority for saying that the reasonableness or unreasonableness of a custom is a question of law. The respondent then argued that this point having been taken in the grounds of appeal to this Court at the time when this case came up before this Court on the previous occasion, it must, be held that the point was then decided against the appellants and cannot now be re-argued. We are, however, satisfied that the learned Judges of this Court did not then decide this point. The appellants then

succeeded on the technical ground which they took and whether this point was argued or not, we are of opinion that it is open to them to argue it now. The learned Judge upheld the findings of the Assistant Settlement Officer upon, the question whether the custom of appropriating trees by the tenants had been established. The learned Assistant Settlement Officer lield upon the facts that this custom covered a large number of trees of different kinds which are mentioned in this connection and the Assistant Settlement Officer recorded the finding that the custom covered all classes of trees. This finding was upheld by the learned Judge in appeal. The learned Judge gives no reasons for holding that this custom was unreasonable in so far as it permitted the appropriation of timber trees, and we are unable to agree with him that there was any unreasonableness in the custom. As was said by Channell, J., in *Moult v. Halliday* (1898) 1 Q.B. 125 : 67 L.J.Q.B. 451 : 77 L.T. 794 : 46 W.R. 318 : 62 J.P. 8 : 14 T.L.R. 109: "There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable, for that it must be convenient is shown by the fact that it has been established and followed." There is nothing unfair or dishonest or contrary to the public good in the custom and we are unable to say that it was unreasonable.

5. The result is that this appeal is allowed, the judgment of the learned District Judge set aside and the judgment and decree of the Assistant Settlement Officer restored. The appellants are entitled to their costs. They are allowed three sets of costs for the seven appeals in this Court.