

(1964) 10 RAJ CK 0004
In the Rajasthan High Court
Case No : Second Appeal No. 376 of 1959

Kanhaiyalal

APPELLANT

Vs

Badrilal and Another

RESPONDENT

Date of Decision : 26-10-1964

Acts Referred:

Bills of Sale Act, 1854 — Section 1

Citation : AIR 1965 Raj 121 : (1965) RLW 56

Hon'ble Judges : D.M. Bhandari, J

Bench : Single Bench

Advocate : P.N. Datt, for the Appellant; J.P. Jain, for the Respondent

Final Decision : Partly Allowed

Judgement

D.M. Bhandari, J.—This is a Civil Regular Second Appeal by the plaintiff from the judgment and decree, dated the 24th of February, 1959, of the District Judge, Jhunjhunu reversing on appeal the Judgment and decree, dated the 17th of November, 1958 of the Civil Judge, Neem-ka-Thana.

2. The plaintiff-appellant Kanhaiyalal filed the suit for the recovery of Rs. 600/- as damages against defendant-respondents Badrilal and Shri Ram alleging that the defendants had obtained a decree against Ganpat and Bhura, sons of Teja and in execution of that decree they had got attached on 21st of January 1955 one she-buffalo with a female calf and another shebuffalo (called "jhotri" in local parlance). These cattle, according to the plaintiff, had been handed over by him to Bhura and Ganpat for grazing and had been attached on account of enmity by the defendants knowing full well that they belonged to the plaintiff and that his judgment-debtors had no right, title and interest therein. It was further alleged by the plaintiff that these cattle were kept in the custody of the defendants after attachment as supurdars but they were not properly looked after, nor were they properly fed with the result that they became of little value. The plaintiff further alleged that he had purchased these cattle for Rs. 500/- and they would have fetched Rs. 100/- more if sold in the market. The plaintiff, therefore, claimed Rs.

600 as damages from the defendants.

Both the defendants contested the suit denying that these cattle belonged to the plaintiff. Several issues were framed by the trial Court and the suit was dismissed mainly on the ground that the plaintiff had failed to prove that the attached cattle belonged to him, The plaintiff filed an appeal in the Court of the District Judge, Jhunjhunu. The learned District Judge held that, the attached cattle belonged to the plaintiff and that they were worth Rs. 500/-. The learned District Judge also held that all the attached cattle had died their natural death during the period they were in possession of the defendants as supurdars and no negligence or carelessness on the part of the defendant-respondents had been established on the point that they were not properly maintained by them. The learned District Judge held that for this reason the plaintiff was not entitled to their price from the defendant-respondents.

He, however, granted a decree for Rs. 75/-as nominal damages on the ground that the defendant-respondents had not established that they had got the attachment made bona fide, that is, after taking all due care and caution that they were not attaching the property of a third person. In this appeal, the plaintiff claims that his suit for Rs. 600/-/- should have been decreed in entirety.

3. The contention of the learned counsel for the appellant is that it is a clear case of trespass committed by the defendant-respondents with regard to the attached cattle as they had acted without due care and caution in attaching them and taken them away as supurdars and so they are liable to pay damages to the extent of the market value of the property attached.

4. Learned counsel for the defendants has urged that it was an admitted case of the parties that the cattle in dispute were attached while they were in possession of Bhura and Ganpat and that the defendants had not committed any trespass by doing so and the plaintiff had no right to file a suit for damages on account of trespass. It is further urged that the plaintiff has failed to prove that the defendants had attached these cattle actuated by malice, and, as such, he was not entitled to any decree for damages as the attachment had been carried out by a Court of law and the defendants were only enforcing their right to execute their decree. Lastly, it is contended that all the attached cattle died their natural death and the plaintiff who was at the most entitled to get back the cattle, cannot recover any damages from the defendants if the death of the attached cattle occurred naturally without any fault of the defendants as held by the lower appellate Court.

5. The first question in this appeal is: Whether the plaintiff was entitled to maintain the suit for damages on account of trespass when the cattle were seized not from the possession of the plaintiff but from the possession of Bhura and Ganpat. It has been held by the lower appellate Court that the cattle belonged to the plaintiff and he had handed them over to Ganpat and Bhura for grazing. It is in evidence that even the fodder for feeding of the cattle was

supplied by the plaintiff to Bhura and Ganpat. It may, therefore, be taken in the circumstances of the case that it was a case of simple bailment, and not a case in which a bailee had acquired any right, title and interest in the eattle. In the ease of trespass, ordinarily the person who has possession of the property has a right to bring an action, but a person who has an immediate right of possession, may also sue in certain circumstances.

6. On this point I may refer to the following passage from the speech of Lord Porter in the case *United States of America and Republic of France v. Dollfus Mieg et Cie., S.A., and Bank of England*, 1932 AC 582 :

"That the bank are bailees is, I think, not open to doubt, but that fact leaves undecided the difficult and interesting question: Can those who assert a possessory title to goods but make no claim to the property in them be said to retain possession after they have entrusted those goods to a bailee to hold on their behalf ? There is no direct English authority which decides the point, much less one binding on your Lordships. The nearest, I suppose, is *Ancona v. Rogers*, (1876) 1 Ex. D. 285, a decision on the words "apparent possession" contained in Section 1 of the Bills of Sale Act, 1854 (17 and 18 Vic. c. 36). In delivering the judgment of the Court in that case, Mellish, L. J. said (page 292, *ibid*): "There is no doubt" that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrong-doer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods and that in the Bills of Sale Act the word "possession" was used in a popular sense and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the pantehcon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession." It is urged, however, that these "dicta" are "obiter", and wrong; that, in any case, the judgment was not concerned with "possession" as opposed to property and that the true view is that the rule applies only in a case where the bailor has the property and the bailee has the possession. In such a case it is maintained that the bailor can sue in right of his property but that an action in right of possession belongs to the bailee only. This contention may be true where the bailor has no right to demand an immediate return of the article at his will, but the better opinion is, I think, that where the bailor can at any moment demand the return of the object bailed, he still has possession. See Pollock and Wright on Possession (1888), p. 166; Real on Bailments (1900), p. 40; and Halsbury's Laws of England, 2nd Ed., Vol. 1, P 775, sub-title Bailment. In each of the authorities referred to. the right of the bailor is limited to a case of gratuitous bailment, a requisite which, in my opinion, is fulfilled in the present case. The bank held the bars, without any right of Hen, at the will of the Commission."

7. Dixon, J. in *Penfolds Wines Proprietary, Ltd. v. James Peter Elliot*, 74 Com-WLB

204 has also taken the same view.

It is stated in Winfield on Tort, 7th Edn. on page 909;

"In a simple bailment determinable at will the bailor does not lose possession and may sue any wrongdoer other than his bailee in trespass."

The same law is stated in Salmond on Torts, 11th Edn., p. 360, in these words:

"Further in the case of a bailment at will, the bailor does not lose his possession any more than the master does when his chattels are in the custody of his servant; both bailor at will and master can bring trespass against a third person but not against the bailee or servant."

James in his Treatise "General Principles of the Law of Torts" (1959 Edn.), p. 80, has stated:

"Similarly, as has already been remarked, goods which are in the keeping of a carrier or of a gratuitous bailee are still regarded as being in the owner's possession. But on the other hand the bailee is also treated as being in possession for the purpose of bringing a claim. Though where this is the case an action by one of the parties entitled to "possession" will form a bar to a claim by the other; and if the bailee sues he may have to account to the bailor for the damages he recovers."

In Clerk and Lindsell on Torts, 11th Edition, p. 453, the law has been stated to be, as follows:

"When there is a simple bailment of a chattel, as by loan or deposit, the bailee holds merely as agent for the bailor. The one has actual possession but the other has a right of possession, and either may sue a stranger for a wrongful act."

In support of this statement of law, the learned authors have cited *Manders v. Williams* (1849) 4 Ex 339, *Meux v. Great Eastern Ry.* (1895) 2 Q. B. 387: and *White v. Morris* (1852) 11 CB 1015.

Harry Street in the Law of Torts, (3rd Edi.), p 32, has stated the law thus:

"A bailor does not have possession and, therefore, cannot ordinarily sue in trespass for an act done to the goods bailed. If, however, the bailor has an immediate right to possession as in the case of a bailment at will, he may then sue."

In my humble opinion, in the circumstances of the case, Bhura and Ganpat were holding the cattle as agents of the plaintiff without acquiring any right in them and the plaintiff had a right to sue the defendants for damages for trespass in spite of the fact that he was not in immediate possession of the cattle.

8. Now I take up the second contention of the learned counsel for the defendant-respondents that the plaintiff having failed to prove that the defendants had acted with malice and without reasonable or probable cause, cannot succeed. In

support of this proposition, the learned counsel for the defendants have relied on *Abas and Others Vs. Sheolal and Others*, and *Ramdeo v. Birdichand Sumermal of Sambhar*, 1952 Raj LW 86: AIR 1952 Raj 164. These cases are, however, distinguishable as the causes of action in those cases were based on the abuse of the process of law and not on account of trespass. So far as the law on the subject of trespass of the property of a third person is concerned, it has been authoritatively laid down by their Lordships of the Privy Council in *Kissori Mohun Roy v. Harsukhdas*, ILR 17 Cal 436 , in the following passage:

"The appellants mainly relied upon the English case of *Walker v. Olding*, (1862) 1 H&C 621 which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. (1862) 1 B & C 621 would have been an authority of importance had the law of executing been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment debtor. In India warrants for attachment in security are issued on the ex parte application of the creditor, who is bound to specify the property which, he desires to attach, and its estimated value. In the present case, by the terms of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on the 28th November, 1883 was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent depreciation of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment."

The aforesaid Privy Council decision has been followed by Indian High Courts in various cases. Recently, in this Court, *Modi, J. in Narayanlal v. Amolakchand*. 1962 Raj LW 342, has pointed out that-

"The gist of the matter in an action of tort for damages for attachment is the wrongfulness of the attachment or that such attachment amounts to a trespass on the rights of the plaintiff, and where that condition is satisfied, an action for damages must be held to lie and the plaintiff need not prove malice."

I am in respectful agreement with the view taken in that case. In a case of trespass on chattel, the defendant cannot urge that the plaintiff must prove that the former was actuated by malice. Even honest but mistaken belief of the defendant is not excusable. It is for the defendant to take due care and caution in making the attachment and if he is instrumental in attaching property of a third person, he is answerable in tort for trespass. This contention of the learned

counsel of the defendant-respondents has no force.

9. Now I come to the third contention of the learned counsel for the defendant-respondents. It is contended that even if the defendants had committed trespass and wrongful detention with respect to the cattle in dispute, the defendants are not liable if the said cattle died by natural death when in detention.

10. Here I may point out that in case of trespass on chattel, when the chattel has been taken away by the trespasser, the following remedies are open to a plaintiff:

(i) He may treat the trespass by the dependant as if he has been totally deprived of the chattel;

(ii) He may claim damages for wrongful detention of the chattel and also re-delivery of the same.

11. In the first case, the cause of action is the act of taking away the chattel and the plaintiff is prima facie entitled to the value of the chattel by way of damages. This follows from the decision of their Lordships of the Privy Council in ILR 17 Cal 436 (PC) . In the second case, the claim is for damages for wrongful detention and also for the re-delivery of the chattel, or payment of its value in the alternative. The principles governing the assessment of damages in the second case have been laid down authoritatively by their Lordships of the Supreme Court in Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI),

12. Again in the first case, it is not relevant what happened to the chattel after the date of the trespass. The plaintiff's right to claim damages arises and is complete as soon as trespass has been committed. In the present case, the plaintiff has claimed damages for trespass which took place when the cattle were attached and taken away by the defendant-respondents. He has not sued for their re-delivery. The defendants incurred the liability to recompense the plaintiff to the extent of the value of the cattle on the date they took them away. The plaintiff in this case does not want any relief on account of wrongful detention. If subsequently, the cattle died a natural death, it would not exonerate the defendants from their liability to pay damages to the extent of the value of the cattle. This value has been assessed at Rs. 500/- by the lower appellate Court, and the plaintiff is entitled to get this amount.

13. In this view, of the matter, the judgment and decree under appeal requires modification. I partly accept the appeal and modify the judgment and decree of the District Judge, Jhunjhunu, dated 24th of February, 1959 and decree the claim of the plaintiff to the extent of Rs. 500/-. The rest of the claim of the plaintiff is dismissed. The parties shall pay and receive costs in proportion to their success and failure in all the Courts.

14. Cross-objection filed by the defendant-respondents automatically fails and is dismissed.

15. Learned counsel for the defendant-respondents prays for leave to appeal to a

Division Bench. Leave is refused.