
(1950) 05 GAU CK 0002
In the Gauhati High Court
Case No : First Appeal No. 317 of 1947

Kishori Ram Malla

APPELLANT

Vs

Abdul Majid

RESPONDENT

Date of Decision : 29-05-1950

Acts Referred:

Citation : AIR 1950 Guw 190

Hon'ble Judges : T.V. Thadani, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : K.R. Barooah and B.C. Barua, for the Appellant; J.C. Sen, for the Respondent

Judgement

Ram Labhaya, J.—This is an appeal from the judgment and decree of the Addl. Sub Judge, A. V. D., dated 31st July 1947 in a suit for compensation for wrongful catching and removal of fish by the defendant from a fishery leased to the plaintiff. The plaintiff claimed Rs. 5380-1-0. The claim was decreed to the extent of Rs. 4911 6-0 with proportionate costs. The decretal amount was to carry interest at the rate of 2 per cent, per annum from the date of the decree till realisation. The cross-claim of the defendant was disallowed.

2. Plaintiffs case was that he was the lessee of fishery Mahal No.11 in the Sadiya Frontier Tract of the Lakhimpur district for three years, (1944-45, 1945-46 and 1946-47) in succession. The lease in each year commenced from 1st of April, Bardighalibeel was alleged to be included in plaintiff's fishery Mahal No. 11. Defendant was the lessee of Songkhong Mahal No. 8 in the said tract for the year 1941-45. The two fisheries were said to be at considerable distance from each other. On 21st February 1945 defendant sent about 75 or more fishermen to collect fish from the Bardighalibeel and they at his instance caught and removed fish from that beel from 21st February to 25th February (both days inclusive) and from 3rd March to 11th March (both days inclusive), The fish was sent to Dibrugarh market where it was sold. Plaintiff reported the matter to the Superintendent of Police, Lakhimpur and the Political Officer, Sadiya Frontier

Tract, on 21st February 1945. On 24th February, plaintiff's uncle went to the site and found the fishermen busy catching fish in the beel in question. They admitted that they had been fishing in the beel since 21st February at the instance of defendant in this case. On that day they gave an undertaking to deliver all fish caught from the beel to the plaintiff, in future. A writing Ex. 1, was executed. In the document it was stated by the executants that they were all defendant's men and that they were catching fish in Borbeel under his orders. On their learning that Borbeel was settled with Abdul Majid and not with Kishori Ram Malla, defendant, they agreed to send fish to the town to plaintiff's men on receipt of a certain share agreed to between the parties. They further promised to realise the price of fish sent on previous days to the defendant from him. Six out of the fisher men signed the document as executants and it was attested by witnesses.

3. The Political Officer, Sadiya Frontier Tract, also passed an order on 24th February directing plaintiff to stop fishing in Bardighalibeel after a visit of inspection to the locality in the presence of both the parties. Plaintiff claimed Rs. 4252.5.0 on account of the price of the fish realised by the defendant. He also claimed a sum of Rs. 1083-12-0 on account of expenditure incurred in connection with the enquiry made by the Political Officer, S. F. Tract, on the spot and under another head.

4. Defendant repudiated the claim. He averred that there was no beel by the name of "Bardighali" and no such beel was included in plaintiff's fishery. He denied that his men caught fish illegally or dishonestly from the alleged Bardighalibeel and claimed that the water from which fish was caught by his men from 21st February onwards was included in his Songkhong Mahal No. 8. He admitted receiving a notice dated 21st February 1945 from the Political Officer Sadiya Frontier Tract to stop fishing, but alleged that he protested against the order by sending a telegram that he had been fishing in the waters covered by his lease. Liability for compensation under both heads of claim was denied. Exhibit 1, referred to in the plaint, was said to have been obtained by intimidation. Defendant preferred a counterclaim of Rs. 631.7-4 on the ground that plaintiff had caught fish from the disputed water on 26th February, 27th February and March 1945 without any right.

5. The learned Sub-Judge found that the fish had been caught from Borbeel which was included in fishery No. 11 leased to the plaintiff. In his view defendant had no right to catch fish from that beel and that his catching fish through his men from that beel was a wrongful act on his part. He further found that the price of fish realised by him was Rs. 4127-10 0 which the plaintiff was entitled to recover from him. He also allowed a sum of Rs. 783 12-0 to the plaintiff on account of expenses incurred by him in connection with the enquiry as to his rights by the Political Officer, Sadiya and for money spent under another head.

6. The learned Counsel for the appellant has first pointed out that plaintiff's case as put in the plaint was that fish had been caught from Bardighalibeel. The

finding of the Court was that fish had been caught from Borbeel. It is urged that without any amendment of the plaint, the plaintiff could not claim to recover the price of fish caught from Borbeel as his case was not that fish was caught from Borbeel or that Borbeel was included in his fishery No. 11. (Holding that this contention had no force his Lordship examined the contention that plaintiff had failed to establish that Borbeel was included in his fishery No. 11 and concluded:) In these circumstances there can be no manner of doubt that the finding arrived at by the learned Sub-Judge that Borbeel from which fish was caught was part of fishery No. 11 is correct.

7. The learned Sub-Judge allowed the plaintiff a sum of Rs. 783-12 0 on account of expenses incurred by him in connection with the inquiry by the Political Officer, Sadiya, as to the rights of the parties to catch fish in Borbeel and also (Sic) account of payment made by him to one Sarju for catching the fish there. The learned Counsel for the appellant has not disputed the liability of the defendant to pay this amount. He, however, disputes the correctness of the assessment of the price of the fish which according to the decree of the Court below was Rs. 4127-10 0. The learned Counsel points out in this connection that defendant-appellant was a military contractor. He could sell good quality fish to the Army at a rate higher than that prevailing in the open market, and the plaintiff was not entitled to the full sum realised by the defendant by sale of a part of the fish as a contractor to the Army. We do not think defendant is entitled to keep with himself any part of the money realised by the sale of fish which had been caught as the result of a wrongful act on his part. The fish was caught at his instance. His men trespassed into the fishery of the plaintiff. He and all those were wrong doers. The money that was made by the sale of the fish was the result of wrongful operations. The learned Counsel has not been able to refer us to any law or principle of equity on which the defendant could be permitted to withhold any portion of the profit accruing to him as the result of a wrongful act on his part. The learned Counsel has claimed that in collecting the fish defendant had to pay a certain portion of the proceeds to his fishermen. We think for reasons given above he cannot claim any amount by way of collection charges either. This view finds support from Rohan Singh v. Durga Bakhsh Singh, AIR 1929 oudh 65: (111 I.C. 760). In this case the learned Judges held that

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case. In the case of fraudulent and dishonest trespassers while awarding mesne profits against them on rent basis it is right to refuse them charges for collecting rent of property in their possession as trespassers.

8. The principle laid down in this case is in point and we are not persuaded to hold that the assessment of compensation in this case is excessive or that it calls for any interference.

9. The result is that the appeal fails and is dismissed with costs.

Thadani, C. J.

10. I agree.