

(1917) 04 CAL CK 0034
In the Calcutta High Court

Meyoa Lall Ghose and Others

APPELLANT

Vs

Gobinda Sunder Sinha Chowdhury

RESPONDENT

Date of Decision : 02-04-1917

Acts Referred:

Bengal Tenancy Act, 1885 — Section 23

Citation : 41 Ind. Cas. 679

Hon'ble Judges : Smither, J;Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned District Judge of Murshidabad modifying a decision of the Subordinate Judge of Barhampur. The suit was brought by the plaintiff for a declaration of his patni right in certain lands, for khas possession and also for damages against the defendants for cutting and appropriating fourteen palm-trees. The defence was that the lands were parts of a raiyati holding of the defendants and that there was a custom in the locality under which the tenants had the right to cut down trees and appropriate the timber. The learned Judges in both the lower Courts held, on the question as to whether the trees felled were growing on the land that formed a portion of the raiyati holding of the" defendants, that having regard to the facts, the onus lay on the plaintiff. The present appeal is preferred wholly against the learned Judges having placed the onus on the plaintiff in that manner. Now, it is found as a fact by the learned Judges in the Courts below that the lands on which the palm-trees were standing are contiguous to the land comprised in the raiyati-holding of the defendants and, therefore it has been urged on behalf of the respondents that, according to the decision of this Court, the Judges rightly placed the onus on the plaintiff and required him to show that these lands were not within the limits of the holding of the defendants. The cases in which that Rule has been recognized are many. First of all there is the decision in the case of Rajendra Kumar Bose v. Mohim Chandra Ghose 3 C. W. N. 763. That decision has, no doubt, been considered in other cases, but the Rule laid down in that case as applicable to cases where the land is contiguous to the

holding of the defendant has been recognized in some recent decisions which are reported in 19 Calcutta Weekly Notes. Those decisions are *Gopini Debi v. Lokenath Teivari* 11 Ind. Cas. 696 : 19 C. W. N. 140.; *Protap Chandra Boy v. Kidhister Das* 23 Ind. Cas. 69 : 19 C. W. N. 143 : 19 C. L. J. 408. There is also another case in the same Volume at page 149; *H. Manners v. Harihar Dutt Koer* 22 Ind. Cas. 563 : 19 C. W. N. 149. Those cases recognize the Rule that where the land is found to be contiguous to the holding of the defendant, the onus is on the plaintiff to show that he is entitled to recover Khas possession. But it is sought to distinguish those cases on the ground that the land which is called the contiguous land is of a different character to the land which forms the raiyati holding of the defendants. That I do not think is well founded. The finding made by the learned Judge in the primary Court was that other tenants in the locality had palm-trees growing on their jote lands. I do not think that the mere fact that a portion of the jote has palm-trees growing on it whereas the other portion is cultivated with paddy, shows that the land is of a different character to the land which has admittedly formed a part of the jote of the defendants. I see no reason to think that the learned Judge did not rightly apply the law when he came to the conclusion that the land was contiguous to the raiyati-holding of the defendants and that, therefore, the onus lay on the plaintiff. In that view, the present appeal fails and must be dismissed with costs.

Smither J.

2. I agree.

***In No. 2397 of 1914.

Fletcher, J.

3. This appeal arises out of the same judgment which was the subject-matter of Appeal No. 2427 of 1914 just now disposed of. It is preferred by the defendants against the decree passed by the learned District Judge in so far as it granted perpetual injunction restraining the defendants, the tenants, from cutting down and appropriating the trees growing on their holding. The judgment of the learned Judge has been attempted to be supported by the plaintiff on the ground that the trees in the present case were presumably growing on the holding at the time when the property was let out to the defendants. Whether that is so or not, I do not think there is any evidence to show when those trees began to grow and became timber like trees. The case, I think, is a perfectly simple one and is covered by the general rules that have been laid down having regard to Section 23 of the BeDgal Tenancy Act. The rules are these without doubt: first, that the tenant prima facie has the right to fell the timber growing on the land so as to bring the holding on which the tenant has a right of occupancy to the best use as an agricultural holding. If the landlord says that there is a custom under which the tenant has not that right, then the landlord has got to prove that custom. The second proposition is that the timber of the trees, felled by the tenant in exercise of his right, when felled, belongs to the landlord apart from any special

custom for the tenant to appropriate the same. If the tenant says that there is a special custom for the tenants to appropriate, then he has got to prove that special custom. But that does not in any way interfere with the right of the tenant to fell the trees growing on the holding, which is not affected by arid is a totally different right from the right to appropriate the timber when so felled. There was no reason for the learned Judge to interfere with the decree passed by the Court of first instance with reference to the injunction and, in my opinion, the injunction ought to be dissolved. The injunction granted is obviously much too wide in restraining the tenants from cutting down the trees growing on the land and, with reference to the appropriation of the timber so felled, it will be an ample protection to the landlord if a simple declaration is made that the defendants are not entitled to appropriate any trees felled by them" and growing on any portion of the land held by them as tenants of the plaintiff. The present appeal must, therefore, be allowed in these terms with costs in this Court only.

Smither, J.

4. I agree.