

(1898) 09 MAD CK 0001
In the Madras High Court

Thottathil Ahmmad and Another

APPELLANT

Vs

Muthedath Avuthraman and Others

RESPONDENT

Date of Decision : 13-09-1898

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 43

Citation : (1898) 8 MLJ 273

Hon'ble Judges : Subrahmania Aiyar, J;Benson, J

Bench : Full Bench

Judgement

Subrahmania Aiyar, J

1. The question in this case is whether the: suit is wholly or to any extent barred, because the respondent (plaintiff) did not include the items of damages, claimed here, in O. S. 507 of 1893 instituted by him against the appellant (defendant). In that suit the respondent asked for and obtained a decree for the possession of a hill from which he had been evicted and for the damages caused by the appellants" having cut and removed certain trees from the said hill. The damages now claimed are in respect of trees alleged to have been cut and removed subsequent to the institution of the previous suit and in respect of a quantity of timber which, it is said, had been stored on the hill by the respondent and which also the appellant took away after the institution of that suit. First, as to the item of the present claim relating to the trees cut and removed--Now it is scarcely necessary to say that in the case of property, such as the hill which was in question in the earlier suit, cutting saleable timber is the mode of cultivation (Honywood v. Honywood, L. R., 18 Eq., 306) and resembles, to borrow the words, of Sir Frederick Pollock, "taking a crop off arable land".

Consequently, the profits made by the appellant with reference to the trees cut by him while in possession, was really mesne profits. Buneead Singh

v. Sadaseeb Dutt, 2, W.R., Mis. App. 50) cited for the respondent, directly supports that conclusion. And the finding is that the said mesne profits

were received by the appellant since the commencement of the previous litigation.

2. Next, in regard to the damages claimed with reference to the timber said to have been secured on the hill, but taken away by the appellant, the

argument on his behalf was this: In evicting the respondent from the hill, the appellant necessarily dispossessed him of the timber also and, in effect,

converted the same to his own use. Consequently, the value thereof should have been claimed in the present suit along with the damages therein

claimed on account of trees which had been cut and removed before the institution of that suit. But a trespass on a piece of land is by itself no

proof of any trespass to, or conversion of, any moveables to be found on the land at the time the trespass took place. Non constat, the person

committing the trespass either claimed or otherwise interfered with the owner's right to the moveables; Strictly speaking, notwithstanding the

respondent's eviction from the hill, the possession of the timber in question should be presumed to continue in the respondent, in the absence of

proof of any act or acts on the part of the appellant, with special reference to such goods, showing unequivocally that the respondent was entirely

deprived of the use of those goods. Though the facts in the present instance are dissimilar to the facts of the cases to be presently referred to, yet

the drift of the decisions in those cases seems to indicate that the view just stated is correct. In *Hartley v. Moxam*, 3 Ad. and Ell., 701, the

defendant claimed a sum of money as due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which plaintiff held of the

defendant and in which the plaintiff had put them, kept the key and refused the plaintiff access to them, saying that nothing should be removed till

the defendant's bill was paid. *Crese-well, J.*, being of opinion that no taking was proved which would support an action of trespass directed a

non-suit and on a motion for a new trial, Lord Denman, C.J. William Coleridge and Whitman, J.J. upheld the non-suit. In *Thorogood v. Robinson*,

6 Ad. and Ell., 769, the plaintiff's goods and servants were on the land which the defendant recovered in ejectment, and the defendant on entering

under the writ of possession turned the plaintiff's servants off the land and would not let them remain for the purpose of removing the goods. There was no subsequent demand or refusal. It was held that the jury might find that there was no conversion. Lord Denman, C.J., said ""The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them. If the defendant had then refused to deliver them or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. (Ib. 722). Lastly, in *England v. Cowley*, L. R., 8 Ex. 126), the plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession and afterwards went to M's house to remove them. Upon his arrival at the house, he was met by the defendant M's landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It being too late for the defendant that day to distrain, he prevented the removal of the goods with a view to distrain them the next day. Kelly, C.B., Bramwell, and Pollock, B.B. (Martin, B, dissenting) held that there was no evidence of conversion and Bramwell. B, went the length of holding that assuming that there was an actual prevention, still the action was not maintainable, and after putting several cases by way of illustration the learned Baron added, ""the truth is that in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by the plaintiff, he must say that nothing shall."" (Ib. 130). The present case, in one view, is much weaker than any of the cases above cited, since in them there was proof of something positive--some words said or some acts done by the party charged with reference in particular to the goods said to have been converted, whereas here nothing of the kind was even alleged to have occurred with reference to the timber in question at the time the respondent was evicted from the hill. It follows, therefore, that there was then no conversion of the timber by the appellant, but that it was converted, as found by the lower

appellate Court, only when after the suit of 1893 was filed he actually removed and appropriated it. The lower appellate Court is therefore right in

holding that the causes of action relied on now are different from those relied on in the previous suit and, therefore, does not operate as contended

for the appellant as a bar to the present claim u/s 43, Criminal Procedure Code.

3. I would dismiss the second appeal with costs.

Benson, J

4. I agree, though not without hesitation as regards the trees cut and lying on the land at the time of the trespass.