

(1958) 08 OHC CK 0016

In the Orissa High Court

Case No : First Appeal No's. 4 and 5 of 1951

Union of India (UOI)

APPELLANT

Vs

Mahammad Khan

RESPONDENT

Date of Decision : 04-08-1958

Acts Referred:

Contract Act, 1872 — Section 71
Penal Code, 1860 (IPC) — Section 403

Citation : AIR 1959 Ori 103

Hon'ble Judges : S. Barman, J;P.V.B. Rao, J

Bench : Division Bench

Advocate : B.K. Pal, in F.A. No. 4 of 1951 and P.C. Chatterji, in F.A. No. 5 of 1951, for the Appellant; P.C. Chatterji and H. Sen, (in F.A. No. 4 of 1951) and H. Sen, (in F.A. No. 5 of 1951), for the Respondent

Final Decision : Allowed

Judgement

S. Barman, J.—The defendants are appellants from a decision of the Additional Subordinate Judge of Sambalpur, granting a decree in favour of the plaintiff-respondent against the defendants-appellants to the extent of Rs. 8,902/6/-, finding them jointly liable to compensate the plaintiff-respondent for the said amount, suffered by the plaintiff-respondent, as loss,

2. The relevant facts for the present purpose are shortly these: The plaintiff-respondent was a timber merchant, carrying on business at Sambalpur since the year 1931. The plaintiff-respondent had stacked large quantities of timber on land belonging to the Bengal Nagpur Railway Administration (hereinafter referred to as the appellant-Railway) adjoining Sambalpur Railway Station, mostly for the purpose of supplying the same to the war Board.

During the active prosecution of the Great War the plaintiff-respondent was constantly supplying timber which used to be loaded into wagons at Sambalpur Railway Station. Due to paucity of wagons, huge quantities of timber could not be despatched and consequently had to be kept, for considerable length of time,

in the Railway premises leased out to the plaintiff-respondent, the plots being plot Nos. 235, 236, 237 and 246. In or about November 1946, the appellant-River Development Division (hereinafter referred to as the appellant-River Development) applied to the railway authorities for lease of certain areas adjoining the plaintiff-respondent's plots of land and ultimately the lease was granted from January 1, 1947.

The appellant-Railway gave delivery of possession of the leased portion of the railway land to the appellant-River Development about the end of December, 1946, the said lease having been for the purpose of keeping Heavy Equipment for the construction of the then proposed Hirakud Dam in Sambalpur District. On 30-12-1946 the appellant-River Development, in writing, gave notice (Ext. B) which was as follows:

"To whomsoever it may concern. It is given for public notice and intimation that the Railway plot adjacent to the Saw Mill Building and demarcated by white posts have been leased to C. W. I. N. C. for storing machines etc. meant for the Hirakud Dam. The whole area will be enclosed by barbed wire fencing within 2-1-1947. If any body has any of his materials within the plot leased to the C. W. I. N. C. and demarcated as stated above he is requested to remove the same within 15-1-1947 after which it will be quite difficult to allow any outsider to enter the yard as the yard will be full with the heavy machines.

Sd/- S.K. Palit 20-12-1946"

3. The purpose of the said notice was that whoever might happen to have any timber in the yard, which the appellant-River Development took lease of from the Appellant Railway, was requested to remove the same within 15-1-1947. The plaintiff-respondent, who was one of the timber merchants and had stacked a large quantity of timber in the railway premises, instead of confining his stacks to the plots allotted to him under agreements of licence stacked them also in undemarcated area without any authority whatsoever.

The plaintiff-respondent, along with other timber merchants, was informed as aforesaid that they must by January 15, 1947 remove their timber, if any from the encroached areas. The plaintiff-respondent, however, neglected to do so to the detriment of the interests of the appellants. The plaintiff-respondent could not, as of right, encroach upon any portion of the railway land for stacking timber waiting to be loaded into wagons.

The supply of wagons was regulated according to the rules of the appropriate department and was subject to the exigencies of time and conditions as then prevailed during the war. The plot of land which the appellant-Railway had leased out to the appellant-River Development as aforesaid, did not cover or include any portion of the land which had been allotted to the plaintiff-respondent under the Agreements of License.

Although in the plaint, the plaintiff alleged such wrongful inclusion of some

portion of the land leased out to him in the portion leased out to the appellant-River Development, it was rightly conceded on behalf of the plaintiff-respondent in course of hearing of these appeals that no portion of the land, held by the plaintiff-respondent under the Agreements of licence, was made over to the appellant-River Development.

4. When in spite of the said notice to remove the timber if any, belonging to the timber merchants including the plaintiff-respondent the plaintiff-respondent did not care to remove his timber, site had to be cleared with the help of cranes. The genesis of the plaintiff-respondent's claim in the suit is this removal of the timber which was left behind in the land leased out to the appellant-River Development.

5. The plaintiff-respondent, on these facts, has come out with a claim against the appellant, alleging that while taking delivery of possession by the appellant-River Development from the appellant-Railway, the staff of the appellant-River Development "damaged or otherwise disposed of and utilised the Schedule "A" timber belonging to the plaintiff which was stacked by the plaintiff in the Railway yard in Sambalpur Station."

Furthermore, the plaintiff's claim was that some portion of his timber was still in the possession of the appellant-River Development and upon which the said River Development had kept their Heavy Equipment, meant for the purpose of construction of the Hirakud Dam. It was on this alleged cause of action that the plaintiff-respondent instituted a suit against the appellants for recovery of a sum of Rs. 27,834/7/-, particulars whereof were purported to have been given in Schedule "A" to the plaint in the suit.

6. The main questions for consideration in these appeals are-

(a) whether or not in law, on the facts and in the circumstances of the case, the appellants are in any way liable to the plaintiff-respondent;

(b) assuming they are so liable, whether or not the alleged claim of the plaintiff-respondent as pleaded in the plaint was proved before the lower Court.

7. On the question of liability of the defendants-appellants, in law, on the facts and in the circumstances of the case stated above, the whole question is whether the defendants-appellant's conduct, in any way, amounted to conversion of the timbers left behind on the plots subsequently leased out by the appellant-Railway to the appellant-River Development.

8. The wrong of conversion consists in an act of wilful interference, without lawful justification, with a chattel in a manner inconsistent with another's right, whereby that other is deprived of the use and possession of it. The usual form of pleading alleging conversion is "the defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods."

We have to consider in this case whether the defendants converted to their use or wrongfully deprived the plaintiff-respondent of the use and possession of the plaintiff-respondent's timbers. The learned Counsel for the plaintiff-respondent strongly relied on the fact stated in paragraph 5 of the plaint, namely, that the plaintiff's timbers were damaged or otherwise disposed of and utilised by the staff of the appellant-River Development

His contention was that it was a clear case of conversion. In support of his contentions, he by way of arguing on principles drew our attention to Section 403, Explanation 2 of the Indian Penal Code. On the strength of this section, he argued that it was "a case of misappropriation by the defendants-appellants of the timbers, belonging to the plaintiff-respondent, because according to him the appellant-River Development appropriated the plaintiff-respondent's timbers to their own use.

Apart from the legal position that the principles of criminal law are not applicable for the purpose of determining civil liability, I am not impressed by the learned Counsel's argument on Section 403 of the Indian Penal Code. Section 403, explanation 2 provides that if the finder of such property gives notice to the owner and has kept the property for a reasonable time to enable the owner to claim the same, the finder of such property is not liable.

In the present case, the appellant-River Development, by notice dated December 30, 1946 (Ext. B) intimated that whoever may have any timber in the plot in question, were to remove the same by January 15, 1947, Therefore, this was sufficient notice within the meaning of Explanation 2 to Section 403 of the Indian Penal Code. After the expiry of the notice period, the appellant-River Development had no liability to the plaintiff-respondent in respect of the said goods.

9. On behalf of the plaintiff-respondent, a House, of Lords case *Hollins v. Fowler* (1875) 7 HL 757 was cited before us, where it was held that any person who, however innocently obtains possession of goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person is guilty of a conversion.

The facts of the case here were, however, different. In this case, the liability of the broker, as agent, to his principal was involved. One B had fraudulently obtained cotton from F and H (whose ordinary business was that of a cotton broker and who was utterly ignorant of the fraud of E) purchased it from B in the belief and expectation that M, one of his ordinary clients, would accept it, and M did, afterwards accept it, though H only received from M as broker's commission and not a trade profit on the sale.

On these facts, the House of Lords held that in this instance H had made himself a principal and by transferring the cotton to M, had committed an act of conversion, which made him liable in trover to F, the real owner of the cotton. But that is not the case here in the present case in appeal before us. The

appellants did all they could to induce the respective owners of the timbers to remove their goods from the plot by notice in writing.

Although the plaintiff-respondent denied the receipt of such notice, other timber merchants removed their timbers from the area. In fact, as appears from the evidence of P.W. 4 who was a Forest Contractor, he himself and another timber merchant, S. D. Mukherji among others, removed their respective stocks of timber from the area in question, P.W. 4 also in evidence said that before the., area was given to the appellant-River Development, the Station Master Sambalpur, gave notice to timber contractors to remove timbers from the area.

Further it appears from Exts. 1 and 2 that in spite of repeated requests made by the District Commercial Officer, B. N. Rly., Chakradharpur, Station Master, B. N. Rly., Sambalpur, and also by the Assistant Forest Officer, Eastern S Lates, the plaintiff-respondent did not remove the timbers, if any, which encroached upon the area in question and failed to confine the stacking of his own timbers within the plots allotted to the plaintiff-respondent by Agreements of Licence aforesaid. Therefore, in the case before us there is no question of fraudulent deprivation or disposing of the goods by either of the appellants and consequently, on the facts of this case, the said decision of the House of Lords does not help the plaintiff-respondent.

10. The learned Counsel for the plaintiff-respondent, also relied on Section 71 of the Indian Contract Act, in support of his contention that the appellant-river Development had the same responsibility, as of a bailee as finder of the goods. Section 71 requires that, to be responsible for the goods, the finder of the goods has to "take them into his custody." In the present case, the defendants-appellants did not take the plaintiff-respondent's timbers, if any, into their custody.

Far from taking them into their custody, they gave notice to all timber merchants concerned to remove their respective stacks of timbers, if any, from the area in question. Therefore, on the facts it is not a question of bailment at all. The mere fact that the timbers happened to be in the area in question does not mean that the defendants-appellants took them into custody or took possession of them. In this connection a passage from Salmond's Jurisprudence (11th Edition) may be quoted which is as follows :

"A chattel may be upon my land, and yet I shall have no possession of it unless the animus and corpus possessions both exist. I may have no animus; as when my neighbour's sheep, with or without any knowledge, stray into my field. There may be no corpus as when I lose a jewel in my garden, and cannot find it again. There may be neither corpus nor animus; as when, unknown to me, there is a jar of coins buried somewhere upon my estate."

Those are very sound principles of law propounded by a Jurist of the eminence of Sir John Salmond. Applying these principles to the facts of the present case, it comes to this : The plaintiff-respondent's timbers happened to be left behind in

the area in question. This particular area was subsequently let out on lease by the appellant-Railway to the appellant-River Development in December, 1940.

The lease actually took effect from January 1, 1947. On the eve of the commencement of the lease, the appellant-River Development gave notice on December 30, 1946 to all concerned to remove the timbers from the area in question by January 15, 1947. Therefore, the defendant-appellants did not take the timbers either into their custody or take possession.

In fact, they did all they could to notify the owners of the timbers to retake their goods from the area within the notice period. Therefore, the defendants-appellants had no animus possidendi which is required to amount to possession in law. Mere corpus or physical existence or lying down of the timbers in the area in question did not amount to possession or taking custody in law. Therefore, Section 71 of the Contract Act has no application at all to the facts of the present case.

11. This leads me to the consideration of the question what then is the responsibility, if any, of the defendant-appellants with regard to the timbers, to the plaintiff respondent. In other words, the question is what is the liability of the occupier, such as the appellant-River Development, who was in no way responsible for the presence of the goods on their land.

This point came up for decision in an English case *Wilde v. Waters* (1855) 24 LJ CP 193. The facts in that case were these : The plaintiffs were the outgoing tenants," and the defendant the incoming tenant, of certain premises that the articles in question had been placed on the premises by the plaintiffs, and that there had been a negotiation between the plaintiffs and the defendant for the purchase of them, which went off

After the expiry of the plaintiffs' term, the defendant refused to give them up and there was an action for trover brought accordingly. On those facts, it was held that a mere refusal by the defendant to deliver, to the plaintiff, a chattel of his, which is on the defendant's premises, is not evidence of a conversion; but a denial by the defendant of the plaintiffs right to it, or a refusal by which the defendant exercised a dominion over the chattel, is. In the Judgment Mr. Justice Maule observed as follows :

"Where a outgoing tenant leaves a picture hanging on a wall, the new tenant may refuse to admit the owner of the picture to take it, and may not choose to put himself to the trouble of giving it, but the picture is still the owner's chattel. The question, in such a case, would be, whether the jury could infer from the refusal that the new tenant exercised any dominion over the chattel. If it appeared that he had merely said "I don't want your chattel, but I shall not give myself any trouble about it", that would not give the owner an action of trover."

and accordingly the said suit for trover was non-suited.

In the present case, the defendants-appellants are on a firmer ground than the

defendants in the English case (1855) 24 LJ CP 193, just cited. Here, the defendants-appellants gave notice to all timber-merchants, including the plaintiff-respondent to remove or retake the timbers, if any, in the area in question by a particular date. If and when the plaintiff-respondent did not choose to avail himself of the opportunity of retaking his goods from the area in question by 15-1-1947, he did so and left the goods in the area at his own risk.

After 15-1-1947. that is, on the "expiry of the notice period, the position of the timbers becomes as that of abandoned goods left behind in the area in question. In fact, they become *res derelictio*. In this connection a passage from Sohm's Institutes of Roman Law (3rd Edition) 317 throws light on this subject and is worth quoting for the present purpose:

" "*Derelictio*" occurs where a person abandons the possession of a thing with the intention of abandoning the ownership of it, as where he throws away the peel of an orange after eating the orange. The effect of *derelictio* is to make the thing *res nullius* the moment the abandonment of possession is physically complete. Any one may therefore "occupy", and acquire ownership in *res derelictio*."

Our law of tort is based on principles of English common law which, in turn mostly, have their basis on the legal principles of ancient Roman Law. The above passage from Roman Law throws light on the subject. In the present case, the timbers left in the area in question after the notice, could be deemed or treated *res derelictio*, in any event, after 15-1-1947.

12. Winfield in his authoritative work on "Tort" (6th Edition) discussed this aspect of the law in detail at pages 437-441. In course of the discussion, he referred to *Anthony v. Haney* (1832) 8 Bing 186, where Tindal C. J., laid down the underlying principles for determination of liability in such cases. In another English case *British Economical Lamp Co., Ltd. v. Empire, Mile End. Ltd.*, (1913) 29 TLR 386, the facts were these :

C let his theatre to B. B did not pay his rent So C re-entered and thus terminated the lease. B left, in the theatre, some detachable electric lamps which he had hired from A. A sued C for detinue of the lamps. It was held that the facts did not show any detinue and it was also said that C had done no wrong by not allowing A to enter and remove them. The question for consideration before the Court was whether the plaintiffs had shown any cause of action, either in detinue or in trover.

Their Lordships took the view that they had not, because the plaintiffs claimed the right to enter the theatre and remove the lamps and expressed the view that there was no doubt those lamps could have been removed by the tenants when they left, or by the plaintiffs at that time. Mr. Justice Lush in his judgment observed as follows:

"The plaintiffs had no cause of action against them for refusing to allow them to enter on the premises and remove the lamps, or for themselves refusing to

remove and restore them. Mr. Wallace (Counsel for the plaintiffs), however, said that there was evidence of an assertion by the defendants of a property in the lamps and of a dealing with the lamps by the defendants as their property. If there had been such a dealing I think that there would have been a conversion, and treating this as an action of conversion the plaintiffs would, in my opinion, on proving that fact have been entitled to damages. I do not however, think that the plaintiffs gave any real evidence in support of this contention. The defendant's statement that they were in possession was not sufficient....."

In the present appeal before us, there was no evidence of such assertion by the defendants-appellants of property in the timbers or of dealing with their timbers by the defendants-appellants as their own property. Far from it, the defendants-appellants repeatedly requested all timber merchants concerned to remove the timber from the area in question. There was no evidence whatsoever to show any conduct on the part of either of the defendants-appellants, which was inconsistent with such attitude with regard to the timbers.

13. The above view also finds support in an old decision of the English Court in *Thorogood v. Robinson* (1845) 6 QB 769 : 115 ER 290. The facts were these: The plaintiff was a lime-burner and was in possession of some land and of the lime, breeze etc., which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land and, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who at the time, were loading a barge there with part of the lime.

He refused to let them do anything to the kiln fires, or put any more of the lime on the barge. The defendant's evidence showed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. On these facts, it was held that it is not every wrongful act depriving a party of the possession of his goods that amounts to a conversion.

Where the plaintiff's goods and servants were on 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 their goods, there having been no subsequent demand or refusal, the jury found that there was no conversion. In that case Lord Denim C. J. observed as follows:

"it was a Question for the jury whether the Conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. 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."

14. The learned counsel for the defendants appellants cited before us a case of *Hemmings v. Stoke Poges Golf Club* (1920) 1 KB 720, where the facts were that one Mr. Hemmings was a servant of "the Stoke Poges Golf Club, managed by Mr. Jackson. As such servant, and to do his work as a servant, he occupied as part of his wages, one of the club's cottages, used partly for the work of the club in connection with caddies, chauffeurs and telephones.

His service with the club was terminated, and the local tribunal, in excusing him from military service required him to do work of national importance on a farm. He got such work but continued to live in the club's cottage, as he had difficulty "in getting another cottage. The club allowed him to stay for some little time and then required him to leave. He still stayed on. Accordingly the club, through Mr. Jackson sent people to take possession.

They entered without any disturbance or violence. Mr. and Mrs. Hemmings declined to leave. Thereupon, they carried Mrs. Hemmings out sitting in a chair. They led Mr. Hemmings out. They carried the furniture out and put it in a garage with one side open to the weather. The weather was showery, and part of the furniture was wet. All these operations were carried out with no more force than was necessary to remove people, who did not actively resist but declined to go unless carried.

On these facts, as Scrutton L. J., put it, the question for consideration before the Court was whether, if an owner of landed property finds a trespasser on his premises, he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him, without having to pay damages for the force used. On the facts so stated, Scrutton L.J., straightway answered the question that "common honesty and common sense would answer "Of course he may",

It was held that the defendants were not liable their right of entry being a defence to civil proceedings for the acts complained of. It is true that the facts in this case were rather extreme but even in such an extreme case, the law gave protection to the defendants and the plaintiffs were held to have no cause of action against them. The facts, in the present case before us and evidence, are much stronger in favour of the defendants-appellants than the facts in the English cases cited above. We hold that the defendants-appellants were not liable to the plaintiff-respondent in respect of the timbers.

In this view of the matter, on the issue as to alleged liability of the defendants-appellants in law, our finding is against the plaintiff-respondent.

15. As to the proof of the quantum of damages claimed the basis of the plaintiff-respondent's claim is Schedule "A" read with paragraph 7 of the plaint. The onus of proof was on the plaintiff-respondent to prove each of the eleven items in the

Schedule "A", item by item, by evidence. It appears from the Schedule that the particulars had been given of each of the items, except item 10 flump sum), by reference to quality, quantity, number of pieces & current price of these goods, as they then prevailed in the market. The question remains for this Court to consider whether these items have been proved by reference to the particulars given in the Schedule. (After discussion of the evidence His Lordship concluded):

16-20. We are satisfied that the plaintiff-respondent had no cause of action against the defendants-appellants for the suit and that the plaintiff-respondent failed to prove the quantum of damages for the alleged loss.

21. The result, therefore, is that these appeals which were heard analogously, must be allowed. The judgment and decree of the learned Additional Subordinate Judge must be set aside and the suit dismissed. The defendants-appellants, having the same interest, as against the plaintiff-respondent, in resisting the claim both in the suit and in this appeal, will get one set of costs in equal proportion throughout.

P.V. B. Rao, J.

22. I agree, but wish to add the following:

23. These two appeals by defendants 1 and 2, River Development Division and Union of India representing Bengal Nagpur Railway respectively, arise out of a common judgment and decree directing the defendants to pay Rs. 8902-6-0 as damages for conversion of the plaintiff's timber.

24. The second defendant-appellant Bengal Nagpur Railway in First Appeal No. 4 of 1951 (hereinafter called the appellant Railway) leased out a certain portion of land near the Sumbalpur Railway Station in or about November, 1946. the lease to commence from 1st January 1947, as the first defendant-appellant River Development Division in First Appeal No. 5 of 1951 (hereinafter called the Appellant River Development) wanted the same for storing certain heavy machinery in connection with the Hirakud Darn which was then under construction.

The plaintiff-respondent no. 1, since deceased, who was a timber merchant carrying on business at Sambalpur alleging that he stacked large quantities of timber mostly on four plots of land (Plots nos. 235, 236, 237 and 246) leased out to him by the appellant Railway, that the appellant Railway leased out a portion of the land including some portion leased out to him to the appellant River Development and delivered possession of the same along with his timber, and that the appellant River Development damaged or otherwise disposed of and utilised the said timber, claimed damages in a sum of Rs. 27,834-7-0 against both the defendants for conversion.

25. The defendants filed written statements admitting that the plaintiff stacked a large quantity of timber at the Sambulpur Station yard; that he, instead of confining his stacks to the plots allotted to him under Agreements of Licenses

stacked them also on a large undemocrated area without any authority whatsoever; that though he was asked several times to remove the timber from the encroached areas he neglected to do so; that the appellant Railway made over some portion of the railway land at the Sambalpur station yard to the appellant River Development for stacking heavy equipment in connection with the Hirakud Dam Project in December 1946; that no portion of the lands held by the plaintiff under Agreements of Licenses was made over to the appellant River Development nor any timber of the plaintiff was delivered by the appellant Railway to the appellant River Development; and that the Station Master, Sambalpur, the Dist. Commercial Officer, Chakradharpur and the General Manager, Bengal Nagpur Railway issued notices to the plaintiff and others for immediate removal of their goods but as the plaintiff did not take any steps for removal of his timber the site was cleared with the help of cranes, the logs having been thrown out of the leased premises of the appellant River Development and the River Development Division did not damage or otherwise dispose of or utilise any timber belonging to the plaintiff.

The appellant River Development further stated in its written statement that after the delivery of the leased premises the River Development notified on 30-12-46 requiring the owners to remove the logs, scantlings and sleepers lying inside their area as the said area was going to be fenced with barbed wire by 15-1-47. It was also alleged that after the said notices, scantlings, logs and sleepers were removed by the owners, but a few logs and scantlings not so very useful were lying here and there inside the plot besides the sleepers that filled and levelled up the drain that ran diagonally across the yard; and that a few which were possibly useless were left on the plot and were still lying there.

28. The learned Subordinate Judge who heard the case held that the plaintiff failed to prove that any portion of the plots included in his license had been leased out by defendant No. 2 or occupied by defendant No. 1 and that the plaintiff without confining his stack to the plots leased out to him stacked the timber on other lands, belonging to the Railway.

He also held that defendant No. 2 gave notice to all persons to remove their timbers from the area in question before possession of the area was delivered to defendant No. 1; that defendant No. 1 similarly gave notice to all concerned to remove their timbers from the area by 15-1-47 that the plaintiff had no authority to stack his timber over the area leased out to the appellant River Development; and that his occupation of the area was that of a trespasser.

But holding that even then the plaintiff's proprietary right over the timber could not possibly be forfeited and that according to the admission of the defendants the plaintiff was in fact using the area by keeping his stacks of timber there, the learned Subordinate Judge held that the defendants could not possibly take the law into their hands by meddling with the pieces of timber of the plaintiff lying there; that though he (the learned Subordinate Judge) could not impugn the conduct of defendant No. 2 in removing the plaintiffs timber to outside the area

in question with the purpose of clearing the area, it lay on the defendants to prove the fact of actual removal of the timber from the area; and that the defendants failed to prove the same.

Consequently he held that in the face of the admitted case of the defendants that the plaintiff had kept huge stock of timbers over the area in question and in the absence of any satisfactory evidence from the defendants' side to prove the actual removal of the whole of the plaintiff's timbers by the defendants to outside the area, the defendants should be held liable for the timber of the plaintiff. But he did not pass a decree for the entire amount claimed as the plaintiff did not produce the best available evidence which was admittedly in his custody and on mere guess-work and surmises gave a decree for Rs, 8000/- and odd.

27. Mr. B.K. Pal, the learned counsel who argued the questions involved in these two appeals contended that the learned Subordinate Judge misconceived the nature and scope of the suit and erred in holding that the burden of proof lay on the defendants; that he erred in opining that there was material admission on the part of the defendants with regard to their liability; and that he ought to have held that the few pieces of timber left out were useless ones and were abandoned by the plaintiff and even if they were still lying on the premises leased out to the appellant River Development that would not amount to conversion so as to entitle the plaintiff to claim damages.

To make out a case of conversion in order to claim damages, the plaintiff must prove that the defendants without lawful justification wilfully interfered with a chattel belonging to the plaintiff in a manner inconsistent with his right whereby the plaintiff is deprived of the use and possession of it. It is for the plaintiff to prove that the defendant converted to his own use or wrongfully deprived the plaintiff from use and possession of the plaintiff's goods. The plaintiff did not adduce any satisfactory evidence with regard to this.

He did not file his account books which were admitted to be in his possession showing the quantity of timbers stacked by him on the premises and the quantity still left out and which was delivered by defendant No. 2 to defendant No. 1 along with the leased premises. During the trial he did not even apply for the issue of a commission to find out if there was actually any timber belonging to the plaintiff on the premises occupied by the appellant River Development.

Had he taken out a commission, the Court would have been in a position to know whether any timber belonging to the plaintiff still remained in the leased premises. It is in evidence and it is practically the admitted case that not only the plaintiff but also some other merchants were stacking their timbers near the railway line and on the premises leased out and that the other merchants removed their timbers after the notice was given.

This evidence is not only the evidence of D. W. 1 but also is spoken to by some witnesses of the plaintiff himself. Under these circumstances it cannot be known

whether even if some pieces of timber remained on the leased premises, they belonged to the plaintiff and the plaintiff has failed to prove any title to the pieces of timber still remaining if they actually remained.

Though the plaintiff and his witnesses stated that an account of the pieces of timber remaining was taken after the delivery of possession, yet the so-called account prepared was not produced into court. According to the evidence and the contentions of the defendants only useless timber remained on the leased premises mostly including the sleepers which covered the channel running right across the leased premises,

It is not known whose pieces of sleepers covered the Nala. There is no reliable evidence on the side of the plaintiff that he ever demanded his pieces of timber after the delivery to the appellant River Development; that there was a refusal of such delivery; and that the appellant used it for his own purpose. These pieces of timber which actually remained are therefore abandoned pieces of timber which the plaintiff never wanted to remove even though notice was given to him for their removal by both the defendants.

The learned Subordinate Judge is clearly wrong in holding that it lies on the defendants to prove the fact of actual removal of the timber from the area and that therefore the defendants should be held liable for the conversion of the timber of the plaintiff. Though the learned Subordinate Judge came to the conclusion with regard to the liability of the defendant on this ground alone, yet he referred to the evidence of P.Ws. 2, 3 and 4 as proving the actual utilisation of the timber by defendant No. 1. P.W. 2 simply stated that there was a big Nala inside the area in question and that Nala has been filled up by timbers of the plaintiff and by earth; and that some telegraph posts and sleepers belonging to the plaintiff were lying.

He did not say that the Nala was filled up by the men of defendant No. 1. On the other hand he clearly stated that when defendant No. 1 took possession of the area and fenced it, the timbers lying on the area were lifted by cranes at the instance of defendant No. 1 and thrown away hither and thither and inside Nalas nearby.

He also stated, that he informed the same to the plaintiff and on the day the plaintiff told him about the conduct of defendant No. 1's man, he did not see any timber actually falling into the Nala. P.W. 3 is a depot clerk under some petty contractors. He stated that there was a Nala inside the area that it had been filled up by sleepers; logs and poles; and that many sleepers were also spread out on that area at the instance of defendant No. 1.

he did not categorically say that the Nala had been filled up by the sleepers, logs and poles of the plaintiff and his statement that the sleepers were spread out at the instance of defendant No. 1 cannot be accepted as defendant No. 1 is the River Development organisation, some men on its behalf must have instructed and the witness did not say who that officer was.

He stated that he heard about a month before the removal from the contractors that the area in question will be taken by defendant No. 1. He admitted that defendant No. 1 published a notice asking all persons stacking articles in the area to remove their articles; and that he saw big logs being lifted by cranes and small timbers being removed manually.

His statement that defendant No. 1 meddled with the timbers of the plaintiff, in my opinion, refers only to the removal of the timbers by cranes for being thrown out. P.W. 4 is a forest contractor and he stated that there was one big Nala and there was one small Nala in the area; that they had been filled up, but he could not say how they were filled up.

He also stated that some contractors removed their timbers from the area after notices were given by defendant No. 1 as well as the Station Master, Sambalpur. The plaintiff's evidence (P. W. 6) is contradictory to the evidence of these three witnesses, I am of opinion that this evidence of these three witnesses as also the plaintiff regarding the use made by defendant No. 1 of the timber of the plaintiff cannot be accepted.

The learned Subordinate Judge has not referred to these contradictions and has also not taken into consideration that the evidence of these witnesses did not specifically refer to the point in question. On the other hand their evidence clearly shows that the other contractors had notices asking them to remove the timber and that they removed their timber as also of the plaintiff which leads to the inference that what was left behind was useless timber abandoned by the owners whoever they may be including the plaintiff. The burden of proving of actual conversion by the defendants being on the plaintiff, he has failed to prove that and the learned Subordinate Judge's finding to the contrary is based upon a wrong view of the law as to burden of proof.

28. It is therefore clear that when the premises were leased out to defendant No. 1 by defendant No. 2 both the defendants gave notice to the owners of the timber who stacked their timber without any authority. They are trespassers. Even then having been given notice the plaintiff did not care to remove his timber. He admitted that some of the logs etc. were removed.

He did not file his account books to show whether there was any stock of timber still lying on the premises after defendant No. 2 delivered possession of the same to defendant No. 1. In the absence of the account books which are the best evidence with regard to this matter, the so-called evidence of P.Ws. 2, 3 and 4 cannot be relied upon.

In my opinion, therefore, even if some of the timbers remained on the premises, those were use-less timbers abandoned by the plaintiff. Consequently it is in law, as clearly explained in the lucid judgment of my learned brother, *res nullius* and any use made of the same, if any, by defendant No. 1 is not actionable.

According to the decisions referred to in the judgment of my learned brother,

there is no liability on the part of defendants 1 and 2 for compensating the plaintiff as the defendants cannot be said to be either bailees or persons who are in law bound to take care of the timber of the plaintiff, when admittedly the plaintiff was a trespasser on the leased premises, when he was given notice asking him to remove his timber, if any, and when he actually neglected or failed to remove the same.

29. Before closing the judgment, I must remark that the case was not conducted as it ought to have been in the trial court, by both the parties. The plaintiff did not produce the account books which were admittedly in his possession and which admittedly would show every relevant fact relating to the question in issue. Though defendants 1 and 2 are responsible statutory bodies, they were satisfied with examining only D.W. 1 and did not produce any other evidence in the case.

The Station Master of Sambalpur was not examined. The alleged notices said to have been given by the Station Master were not produced. The plaintiff did not ask for issue of a commission to see if any of his pieces of timber were utilised either for resting the heavy machinery or for any other purpose by defendant No. 1. His pieces of timber would bear the hammer mark of the plaintiff and if a commission was issued, it would have been possible to know if any of the pieces of timber belonging to the plaintiff were utilised.

The plaintiff based his case mainly on the ground that the leased premises were originally leased out to him and that along with that premises the timbers were also transferred, though at the stage of arguments before the trial court and in the appeal before this Court it was frankly conceded that the leased premises did not include any plots leased out to the plaintiff.