1896

TULSI PERSAD BHAKT v. BENAYEK MISSER.

findings of the two Courts below on the oral and documentary evidence submitted to them. That being so the present appeal cannot be entertained.

There were several other issues, but really no argument has been addressed to their Lordships upon them. There does not seem to be any ground whatever for impeaching the finding of the learned Judge, confirmed by the High Court, on the other issues that were raised, as to consideration for the mortgages, as to the defendant being so intoxicated at the time of the mortgages that he was unable to understand their nature, or that they were obtained by undue influence.

Under these circumstances their Lordships will humbly advise Her Majesty that the appeal be dismissed, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Wrentmore & Swinhoe.*

C. B.

P.C.* 1896. *Feb.* 21 & 25 *and March* 20.

A. CASPERSZ, OFFICIAL RECEIVER (PLAINTIFF) *v.* KISHORI LAL ROY CHOWDHRI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Master and Servant—Damage by cutting trees on land—Liability of employer not established on the facts, in respect of his servants injury to a third party—Variation of decree, asked by respondent, requiring cross appeal—Civil Procedure Code (Act XIV of 1882), section 561.

On a claim by the Official Receiver for damages for the wrongful felling and carrying away of trees growing on part of the estate held on trust by him, those acts, to the injury of the owners whom he represented, were proved against certain of the defendants holding some employment under others, who were made co-defendants with them in this suit. These co-defendants were not proved to have ordered such acts, nor was there any evidence that to cut or carry away timber was within the scope of the employment of any of the defendants. The co-respondent employers were not, therefore, under any legal responsibility in the matter.

In reference to whether the decree made against one of the respondents could be varied in his favour, he not having filed a cross-appeal, the rule prevailed that he could only be heard to support the decree, section 561 of the Civil Procedure Code not applying here.

* *Present:* LORDS WATSON, HOBHOUSE and DAVEY, and SIR R. COUCH.

1896

CASPERSZ v. KISHORI LAL ROY CHOWDHRI.

APPEAL from a decree (29th June 1891) of the High Court, made on the hearing of two appeals separately filed by two defendants, and of cross-objections filed under section 561 of the Civil Procedure Code by two other defendants, from a decree against them made (21st December 1889) by the Subordinate Judge of the Dacca district.

The Official Receiver appointed by the High Court in 1878 to charge of the estates of the Ghosal family of Bukoilas in the 24-Pergunnahs, brought this suit on the 29th August 1887. Proceedings were continued by his successor in the Receivership, and this appeal was carried to a conclusion by the present appellant, who was appointed to the same office after the transmission of the record. The respondent No. 2, Tasoda Lal Chowdhri, had appeared in his own right and as executor of Kanai Lal Chowdhri, deceased. Thus the Chowdhri respondents were counted as three, in whose service the four other respondents had been; and there were seven other formal defendants in the Court of first instance not made respondents in appeal.

The principal questions raised on this appeal related to the part taken by the respondents in the wrongfully felling and carrying away trees growing on a revenue-paying estate, mauza Dakhin Kroke, in the Dacca district, of which mehal the Ghosal family owned an eight-annas, or a one-half, share; the Chowdhri defendants, a five-annas and ten-gundas share; the formal defendants owning the rest. The Courts below had differed as to who had done these acts, and as to the amount of the damages. In part of the case reference was made to the exoneration of an employer, where his servant had injured a third party by proceedings not comprehended within the scope of his employment. In another part reference was made to the rule that, in an appeal before their Lordships, a respondent, who has filed no cross-appeal, can only be heard to support the decree.

It was admitted that mauza Dakhin Kroke was held jointly by all the proprietors. No partition by metes and bounds had been made, and the custom among the joint shareholders, before the cutting complained of was, as alleged in the plaint, and found by the first Court, that from time to time the timber should be cut down with the consent of all the shareholders, and that the felled

1896

CASPERSZ v. KISHORI LAL ROY CHOWDHRI.

trees, or their value, should be divided according to their proportionate shares.

The claim was for damages Rs. 10,146-14, the complaint being that the Chowdhri defendants, departing from the custom and in contravention of the rights of the Ghosal family, had sent their servants, Nos. 4 to 7, named Mohan Chunder Das, Krishna Chunder Sein, Naraharri Sircar, and Hurri Bhuian, who, accompanied by labourers, had cut and carried off the trees in spite of protests made. The plaintiff sued for one-half of what was said to be the value of the trees. These acts were alleged to have commenced on the 15th or 16th of Bhadro 1293, (August 1886) and to have continued till the 26th Bhadro, when, upon the information of the plaintiff's servants, the police interfered and arrested the men cutting the trees. These were prosecuted before the Joint Magistrate of Dacca, and were convicted, but were acquitted on appeal, apparently with reference to a question of title having been raised.

The Chowdhri defendants in their written answer denied that the cutting had taken place by their order, or that they had profited by it.

Defendants Nos. 4 and 5, who, it was not denied, were in some employment as servants of Nos. 1, 2 and 3, admitted that, after an ineffectual protest by them, they had participated in the cutting, which, they said, had been done by the "officers and servants" of 2 and 3; and admitted cutting to about the value of Rs. 50, when they were arrested by the police. The defendant No. 7 denied the right of the Ghosals to the trees, alleging that he, with other co-sharers, was in possession of the mauza Dakhin Kroke in virtue of a *shikhmi* or under-tenancy; and that thus he was entitled to the wood, and that the plaintiff was not. He also denied that he had cut down, or taken, any trees, or caused these acts to be done.

The issues related to whether this suit for damages could be maintained, to the liability of the defendants for the acts done, and to whether the plaintiffs had the mauza in their direct possession.

The Subordinate Judge absolved the Chowdhri defendants Nos. 1 to 3 from all liability, finding that the cutting and carrying

away had been done without their authority or recognition. He also dismissed the claim to damages as against defendant No. 6, finding no sufficient evidence against him. Regarding defendant No. 7, the first Court found that, although he might have had a *shikhmi* in the mehal, it was not co-extensive with the eight-annas share belonging to the Ghosals, who, also, of this *shikhmi* had resumed possession since 1286, or 1879. Thus No. 7 had no right to the trees. It was also found that he had joined Nos. 4 and 5 in cutting and removing the trees. A decree was made against the defendants Nos. 4, 5 and 7 for Rs. 4,172.

Two appeals were preferred from this decree—one appeal by No. 7, and the other by the plaintiff. Nos. 4 and 5 filed a memorandum of cross-objections under section 561 of the Civil Procedure, going to the merits of the whole case against them, and urging that the first Court should have decided that the plaintiff had no right to the damages.

The appeal of No. 7 was allowed by the High Court and the suit as against him was dismissed with costs. In effect the Judges [O'KINEALY and AMEER ALI, JJ.] found that Hurri Bhuian had a heritable and transferable sub-tenure in the mauza Dakhin Kroke, extending over the whole of the Ghosals' eight annas share therein, and that it had not been proved that he had surrendered it. This went far in their opinion to dispose of the claim as against Hurri Bhuian. But the Judges examined the evidence as to the felling and carrying away of the trees, and concluded this part of their judgment thus : "Taking all these circumstances into consideration, we are of opinion that the evidence to connect Hurri Bhuian with the wrongful acts has totally failed, and that the Court below was not right in holding him liable for damages."

The High Court then took up the plaintiff's appeal as against the defendants Nos. 1, 2, 3 and 6, and they expressed their concurrence in the finding of fact, of the first Court, that Nos. 1, 2, and 3 had not given any authority or permission to their servants, the defendants 4, 5, and 7, to cut and carry away the timber, and that the scope of the employment did not comprehend any duty analogous thereto. They also concurred in the judgment of the Subordinate Judge that the defendant No. 6 had taken no part

1896

CASPERSZ v. KISHORI LAL ROY CHOWDHRI.

in the wrongful acts. They did not, in their judgment, give any particular opinion on the cross-objections of defendants Nos. 4 and 5. But in their decree they disallowed these objections. Considering the damages to have been incorrectly assessed, the High Court increased them to Rs. 8,019-8, and for this amount gave the plaintiff a decree against the defendants Nos. 4 and 5.

On this appeal,—

Mr. *C. W. Arathoon* appeared for the appellant.

Among the arguments for the appellant it was submitted that there was a contradiction between two of the principal findings of fact in the judgment of the Appellate Court below. That Court had affirmed the finding of the first Court that the defendants Nos. 4 and 5 were liable in damages to the plaintiff for the acts complained of. This involved that the Ghosals were entitled to the trees. But the High Court in their judgment had found that Hurri Bhuian, defendant No. 7, was entitled to the trees, as *shikhmidar*. Practically, however, the High Court must have arrived at the same conclusion as the first Court, that Hurri Bhuian was not entitled. Again, if the latter defendant were to be believed in his averment that the Ghosals had caused the trees to be cut, that would have been fatal to the plaintiff's right to obtain damages from any of the defendants. But if this statement should not be believed, its having been made should discredit the whole of Hurri Bhuian's evidence. Again, one of the High Court's grounds for believing Hurri Bhuian was that he had not been arrested, or prosecuted, by the police who came to the spot. But it was clear from the evidence of the police inspector that they had succeeded in arresting only six or eight of the hundreds said to have taken part in the cutting of the wood. The High Court had erred in allowing Hurri Bhuian's appeal. The first Court was right in finding on the evidence that he took part equally with defendants Nos. 4 and 5 in their wrongful acts, and was, equally with them, liable in damages to the appellant. So far as the same might be material, the judgment of the first Court as to the extent and duration of Hurri Bhuian's *shikhmi* in Dakhin Kroke was more correct than that of the High Court, which also should not have exonerated defendants Nos. 1 and 2, who were liable as principals on the implied agency of

their servants Nos. 4 and 5. On the latter question reference was made to the explanation of the liability of the master for the wrongful act of the servant in the course of his employment, given in *The Bombay Burma Trading Corporation* v. *Mirza Mahomed Ally* (1).

Mr. *J. H. A. Branson*, for the Chowdhri defendants Nos. 1, 2 and 3; and for Nos. 4 and 7 argued in support of the judgment of the High Court, referring to the evidence on all the points in question. He pointed out the evidence that bore in favour of Hurri Bhuian's alleged *shikhmi*, and contended that he had not been proved to have taken part in the cutting down, or removal, of the timber. The decree dismissing the suit against him should be affirmed, because this respondent, and not the appellant, was entitled to the possession of the timber growing on the mauza. Though what was urged as to the defective title of the plaintiff bore in favour of respondent No. 4, cross-objections did not take the place here of a cross-appeal, and the latter had not been filed.

Mr. *C. W. Arathoon* was not heard in reply as to the case for Hurri Bhuian, the main question of the appeal, but as to respondents Nos. 4 and 5, and as to costs.

On a subsequent day, March 20th, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The original plaintiff in this suit was and the appellant is the Official Receiver of the estate of the Ghosal family, who are owners of 8 annas of the mauza Dakhin Kroke. The substantial defendants are seven in number. The first two (numbered as 3, because one of them fills two characters) are owners of 5½ annas of the same mauza. Nos. 4, 5, 6 and 7 were sued as servants or officers of the first two. There are other formal defendants, owners of the other shares, who are not parties to this appeal. The complaint is that the first two defendants by the hands of their officers cut trees in the forest belonging to the mauza, and the plaintiff prays for a declaration of his right, an injunction, and further relief.

(1) I. L. R., 4 Calc., 116; L. R., 5 I. A., 130.

1896

CASPERSZ v. KISHORI LAL ROY CHOWDHRI.

The first two defendants allege that they did not cause any trees to be cut. Defendants 4 and 5 deny cutting the trees, and allege that the plaintiff cut them. No. 7 raises the same defence, and adds that he was possessed of a *shikhmi* or sub-tenure in the mauza which displaced the plaintiff's right. No. 6 disclaims both liability and interest. As against him the suit has failed. He does not appear in this appeal, and it is difficult to see why he was joined as a respondent. At all events he may now be disregarded.

The Subordinate Judge who tried the case held that, though it was very probable that the trees were cut by order of the first two defendants, there was no conclusive evidence against them. As to defendants 4, 5 and 7, he held that they cut the trees; and he awarded damages against them. As to the claim made by No. 7, Hurri Bhuian, to a sub-tenure, the Subordinate Judge held that he had proved such a tenure, but not that it affected the plaintiff's eight annas. He gave none of the parties any costs.

Against this decree appeals were presented to the High Court. The plaintiff appealed to make all the defendants liable except No. 6. Bhuian appealed on the double ground that he did not cut trees, and that his sub-tenure protected him. Defendants 4 and 5 lodged an objection in the nature of a cross-appeal, contending that they did not cut.

As regards the first two defendants the High Court substantially agreed with the Subordinate Judge and did not disturb his decree; but they appear not to have given these defendants any costs of the appeal. As regards defendants 4 and 5, they varied the decree below by disallowing certain expenses which the Subordinate Judge had allowed them, thereby enhancing the measure of damages against them, and by making them pay costs in the lower Court. As regards the sub-tenure claimed by Bhuian, they differed from the Subordinate Judge as to its extent, thinking that it included the entirety of the mauza, but they held that Bhuian failed to prove that it gave any right to the timber in the forest. As regards Bhuian's liability for cutting, they held that none was proved against him. Therefore they varied the decree below by exonerating Bhuian and giving him costs in both Courts.

From this decree of the High Court the plaintiff appeals for

the purpose of fixing liability on the first two defendants and on Bhuian. There is no cross-appeal. The plaintiff has named defendants 4, 5, and 6 as respondents; their Lordships do not understand why, as he seeks no further relief against them; but in the view now taken of the case it does not appear that any additional cost has resulted from this needless proceeding.

Several of the questions raised here may be disposed of very shortly. Both Courts have held that it is not proved that any cutting took place by actual order of the first two defendants. Mr. Arathoon was driven to contend that they must be held responsible for it in point of law, because the other defendants held some employments under them. But there is no evidence at all that to cut trees was in the ordinary course of the duty of any of them. The only statement to which their Lordships were referred bears the other way. The appeal wholly fails as against the first two defendants.

Defendant 4, being invited here, avails himself of the invitation to get the decree varied in his favour. He must, however, fall under the usual rule that respondents cannot be heard except to support the decree, and can only alter it by means of a cross-appeal.

As regards Bhuian's claim under his sub-tenure, Mr. Branson does not point to any evidence showing that the objection taken by the High Court ought to be overruled. In the absence of evidence it must be held that he has shown no title to the timber in the forest.

The remaining question, whether Bhuian participated in the cutting, requires more examination, because the two Courts have differed in their views of a large body of evidence. There are, however, some important parts of the story which are free from dispute.

One of them is that Bhuian was in the employment of the first two defendants. Another is, that he was present during the cutting; though with what object is disputed. It will be better to give his statement, which is a very remarkable one, in his own words. He says:—

"I went to that *gurh* for the first time three years ago when that *gajár gurh* was cut down. I went on the 15th or 16th Bhadro, I remember;

1896

CASPERSZ v. KISHORI LAL ROY CHOWDHRI.

but there may be a difference of one or two days in the date. At that time I went to the *gajari gurh* for seven or eight days, or eight or nine days. I went to see as they were going to ruin me. At that time I simply prohibited them and cried out '*dohai*' (a call for help); but they did not heed me. I used to go to that *gurh* in the morning and return at noon, and sometimes later. I used to walk about all that time and see what trees and how many trees were being cut; but I did not keep any account of them.

"*To Court.*—I did not give any information to the Police. I wanted to give information, but other persons said, 'You will get no good by giving notice at the *thana*: you will get no good except by instituting suit in Court.' I wanted to go and give information at the *thana* on the day following that on which the cutting of the trees commenced, but I did not go as the people told me not to do so. I asked advice of Roop Churn Saha and Gagan Kur, and I asked other persons also; I do not remember their names. I did not keep any account of how many *chambul* and how many jack trees were cut down. On the first day I went alone; and after that, on all the days I went, I took one or two of my co-sharers with me. My brothers Koilas, Rajani and Sonatun used to go with me, and Gagan also went one day. None of them have come to give evidence. Besides crying out *dohai* and walking about in the *gurh*, I did not do anything else. I cried out *dohai* for two or three days; but as they did not heed me, I ceased crying out *dohai*."

A third point now undisputed, being covered by concurrent decisions, is that the defendants' allegation that cutting was ordered by the plaintiff is untrue; and that the plaintiff's charge against the defendants is true so far as regards Nos. 4 and 5.

The controversy then is narrowed down to one point, *viz.*, with what object was Bhuian present at the cutting. Their Lordships will briefly run over what the witnesses say. Bhairub, who was present, says: "I forbade Hurri Bhuian, Mohim Das and Krishna Sen to cut the trees. Thereupon they said, we will cut the trees: we will not listen to your prohibition." Brindaban was present, and questioned Bhuian, who said that the first two defendants were cutting. Ramkrishna cut trees pointed out by Bhuian, and took half for his payments, Bhuian taking the other half. Ram Soonder tells nearly the same story. Babar Ali, the plaintiff's tehsildar, remonstrated with Bhuian and defendants 4, 5, and 6; and the reply was a threat of unpleasant consequences to himself, and an order to the cutters to go on

Sheikh Meghu is in the employ of a neighbouring landowner. He went to protect his master's property, and warned Bhuian and the others not to trespass. They replied that they were cutting the trees of their own masters. Guru Churn lives in the neighbouring *hat* or market town of Sabhar. Bhuian saw him there and instructed him to cut trees : and he did so, getting half for his payment. Madhub Pramanik gives similar evidence. All these witnesses were cross-examined, with the effect that none was shaken, and some spoke to the point with rather more particularity. None of them has been specifically contradicted by any other witness, except so far as the evidence relates to the first two defendants.

The Subordinate Judge states in brief terms the effect they left on his mind. "I believe the evidence of the plaintiff's witnesses, and I therefore hold that the defendants Mohim Chunder Das, Krishna Churn Sen, and Hurri Nath Bhumik have caused the *gajari* and other trees to be cut down and taken away." It is true that in so deciding the Subordinate Judge seems to have had in his mind the broad issue raised in the pleadings, and apparently in the whole of the evidence, whether it was the defendants or the plaintiff who cut the trees. It does not appear that any attempt was made at the trial to distinguish Bhuian's case on the point of cutting from that of defendants 4 and 5. That distinction was drawn on his separate appeal, and is the point on which the High Court has differed from the Subordinate Judge. It remains to see whether it rests on substantial grounds.

It appears to their Lordships that the reasons assigned by the High Court for disregarding the evidence of the witnesses are all of a conjectural character. As to several of them, they simply make the remark that they are servants or tenants of the plaintiff or of co-sharers in the same interest. Such considerations may be important enough when there is contradiction, or vacillation, or a nice balance of evidence, or some violent improbability about the story that is told ; but they cannot be relied on as of themselves supplying reasons for disbelief. And as to the witnesses Sheikh Meghu and Guru Churn they do not apply at all.

It is impossible to say that the story told by the witnesses of Bhuian's cutting is improbable, or at all out of the ordinary way.

1896

CASPERSZ v. KISHORI LAL ROY CHOWDHRI.

The improbability suggested by the High Court is that Bhuian would not be likely to proclaim his intention of cutting in the bazar of Sabhar; and that those witnesses who were tenants or servants would have given immediate information to the plaintiffs which they did not do. Their Lordships cannot adopt these suggestions. Bhuian had to procure a large number of workmen several hundreds it seems, and he could hardly do that without going to the town, and speaking to many people. Moreover, the remark does not apply at all to the first six of the witnesses; those who were present on the spot either as cutters or as spectators. Nor is it apparent why the plaintiff's tenants should at once go to them with warning. As the story is told, the cutting was not a secret conspiracy, but was ordered quite openly by the agent of part-owners of the estate purporting to act on their behalf, and there was no reason to suppose anything wrong until objection was made by the other part-owners.

Apparently the chief difficulty felt by the High Court is that Bhuian was not charged with a criminal offence as Nos. 4 and 5 were, nor was he implicated by the evidence given before the Magistrate. They wholly disbelieve one of the witnesses, Bahar Ali, because in the criminal proceedings he does not say exactly what he says in the present suit. Their Lordships fail to see, though Mr. Branson endeavoured to show it, any contradiction between Bahar Ali's two statements. And Bhuian may well have ordered the cutting without making himself obnoxious to any criminal charge. The two questions are entirely distinct. The police evidence was important on the broad question whether the cutting was the act of the plaintiff or of the defendants, and it was so treated by the Subordinate Judge. But on the question of Bhuian's personal liability it is of no importance, for he was not charged with any offence, and it would have been wrong on that enquiry to go into any evidence specially directed against him.

Moreover, while dwelling on the slender considerations just mentioned, the High Court say nothing about the admitted fact of Bhuian's presence during the whole of the operations, and the extraordinary explanation given by him. Believing that the trees were his own, and that the plaintiff's men were come to ruin him, he looked on crying *dohai* for two or three days, and walking about in the forest for eight or nine days, seeing how many trees

were cut, though keeping no account of them. His brothers and co-owners of the trees were with him, but they too did nothing, and he has not called them to give evidence in this suit. To their Lordship's understanding the plaintiff's witnesses give an explanation of Bhuian's presence, which is clear, consistent, and probable, and which is also uncontradicted except by his own denials, whereas his explanation is absurd to the degree of incredibility. The result is that the decree of the High Court ought to be varied by including Bhuian among the defendants liable for damages.

Their Lordships think that an order should be made on the following lines. So far as relates to Bhuian the decree should be discharged, and in lieu thereof, first it should dismiss Bhuian's appeal; secondly, it should declare that the plaintiff is entitled to recover the sum of Rs. 8,019-8 with interest thereon in the terms of the decree, against Bhuian as well as against defendants 4 and 5, and should order accordingly; thirdly, it should declare that Bhuian is equally liable with defendants 4 and 5 to pay to the plaintiff his costs in the first Court and in the High Court with interest according to the terms of the decree against those defendants. *Quoad ultra* the decree should be affirmed. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

With regard to the costs of this appeal, as all the respondents who have appeared have joined in the defence, and as the plaintiff has succeeded against one and failed against others, it will be right to leave the parties to bear their own costs.

Appeal allowed. Decree varied.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents, Nos. 1, 2, 3, 4, and 7: Messrs. *Veish, Howell & Macfarlane.*

C. B.