1896

PRAMATHA NATH SANDAL v. DWARKA NATH DEY.

and sue on the original consideration. This is in accordance with the case of *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (1), and with many unreported decisions of this Court, and is, in my opinion, the law in this country as well as in England.

For these reasons I think that the Small Cause Court Judge was wrong in deciding the second issue in favour of the defendant, and the rule must be made absolute to reverse his decision on that issue.

The result will be that the judgment dismissing the action will be set aside and the case sent back to the Small Cause Court to try the third issue and to dispose of the case in accordance with his finding on it.

The costs of the rule will abide the event of the trial.

RAMPINI, J.—I agree.

S. C. G. *Rule made absolute. Case remanded.*

CIVIL RULE.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

1896 *May* 5.

SAMSAR KHAN AND OTHERS (PETITIONERS) *v.* LOCHIN DASS AND OTHERS (OPPOSITE PARTIES.)

Bengal Tenancy Act (VIII of 1885), section 23—Landlord and Tenant—Right of occupancy raiyat to cut down trees—Onus of proof—Custom—Suit for damages.

Certain occupancy *raiyats* were, by the custom of the zemindari, entitled, after obtaining the permission of the village *barua* (headman), to cut down and appropriate *agachha* (valueless) trees for fuel.

No payment was ever made for such permission. The defendants, the *raiyats*, cut down and appropriated some *agachha* trees grown upon the lands after they entered into possession. The zemindar sued the defendants for damages.

* Civil Rules, Nos. 7, 8, 9, and 10 of 1896, against the decision, dated the 5th December 1895, of Baboo Prasanna Kumar Bose, Munsif of Dantun, in the District of Midnapore, sitting in the exercise of the Small Cause Court jurisdiction.

(1) I. L. R., 3 Calc., 314.

1896

SAMSAR KHAN v. LOCHIN DASS.

Held that, even if permission to cut the trees had not been given, the zemindar had in no way suffered damage, and had no cause of action.

Held, also, that, in such a case, the onus of proving the custom of the zemindari was on the zemindar.

Grija Nath Roy v. *Mia Ulla Nasoya* (1) and *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2) applied.

THE petitioner, a zemindar, allowed his *raiyats* to cut down and appropriate *agachha* trees growing on their holdings, provided they first obtained the permission of the *barua* (headman). He never demanded or received any payment for such permission. The opposite parties, *raiyats*, cut down certain trees without first getting the permission of the *barua*. The petitioner sued them for damages in the Small Cause Court of Dantun. The Munsif, sitting in the exercise of the Small Cause Court jurisdiction, dismissed the suit, on the ground that the plaintiff had sustained no damage by reason of the acts of the defendants, and therefore had no cause of action.

The plaintiff obtained a rule in the High Court against the Munsif's decision.

Babu *Harendro Narain Mookerjee* in support of the rule.—By the custom of this zemindari, the tenants were not to cut down trees without first obtaining permission to do so: therefore section 23 of the Bengal Tenancy Act is in favour of the zemindar.

Moreover, by the general law, the property in trees growing on the land is vested in the proprietor,—*Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2); the tenants, therefore, had no right to cut them down,—*Shookadasoondery Dabea* v. *Suroop Shaik* (3); *Sheik Abdool Rohoman* v. *Dataram Bashee* (4).

Babu *Uma Kali Mookerjee* showed cause.—The petitioner never received anything for the permission to cut trees; therefore he has not suffered damage, and has no cause of action. It is for him to prove that the local custom debarred the tenants from cutting trees,—*Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2); but he has not done so. He has no more right to these

(1) I. L. R., 22 Calc., 744 (n.). (2) I. L. R., 22 Calc., 472.
(3) Suth. Mof, S. C. Cr. Ref. 17.
(4) W. R., 1864, p. 367.

1896

SAMSAR KHAN v. LOCHIN DASS.

trees than to the crops sown by the tenants, *Goluck Rana* v. *Nubo Soonduree Dossee* (1). The Munsif finds that these trees were planted by the tenants.

Babu *Harendro Narain Mookerjee* in reply.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows :—

In these cases the zemindar sued to recover damages from the defendants, his *raiyats*, on account of certain trees cut down and appropriated by them. The trees in question appear, upon the finding of the Judge of the Small Cause Court, to be "*agachha*," or valueless trees : trees which are generally used for the purposes of fuel. They have been shewn to have grown on the lands of the *raiyats* after they were inducted into possession. The evidence on the part of the landlord was, as set out in the judgment of the Small Cause Court Judge, to the effect that there was a custom in the village that the *raiyats* could, when they required firewood for the purposes of cremation, and on occasions of marriage feasts, and the like, appropriate such trees with the permission of the *barua*, the village headman, who represented the zemindar ; and that when such permission was asked for, nothing had to be paid by the *raiyats*. It does not appear upon the findings of the Judge of the Small Cause Court that any such permission was taken from the *barua* in these cases : but it appears quite clear upon his judgment, and upon the facts of this case, that the zemindar could have sustained no damage in consequence of such permission not being taken.

According to certain cases decided by this Court under section 23 of the Bengal Tenancy Act, the onus in a case like this is upon the landlord to show that a tenant with occupancy right is debarred from cutting down the trees on his land, and not on the tenant to prove a custom giving him the right to do so,—*Grija Nath Roy* v. *Mia Ulla Nasoya* (2), and *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (3) ; and in accordance with that principle, we take it that the landlord in these cases ought to prove what the custom

(1) 21 W. R., 344. (2) I. L. R., 22 Calc., 744 (n.).
(3) I. L. R., 22 Calc., 742.

1896

SAMSAR KHAN v. LOCHIN DASS.

is ; and it seems to us that if the custom is as is represented by the witnesses called by the plaintiff, the *raiyats* have only to ask for the permission of the *barua*, and such permission would be given ; and in this view of the matter, the landlord could have sustained no damage by reason of the acts of the *raiyats* in cutting and appropriating the trees. It is not necessary in this case to decide whether, when any tree is grown by a *raiyat* on his land after the land has been settled with him, he has an absolute right to appropriate it ; or whether it belongs to the landlord. We think it is sufficient for the purposes of this case to say that the Judge of the Small Cause Court was right in holding that the plaintiff sustained no damage by reason of the acts of the defendants ; and, therefore, no cause of action has accrued to him. We accordingly discharge these rules. We make no order as to costs.

H. W. *Rules discharged.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

GONESH PERSHAD (PLAINTIFF) *v.* FAZUL EMAM KHAN AND OTHERS (DEFENDANTS.)*

1896
June 3.

Decree, Successive sales in execution of—Purchasers of the same property in execution of decree, Priority between—Sale pending appeal—Defect of party in appeal—Laches of appellant.

A sale in execution of a mortgage-decree was set aside, and the auction-purchaser appealed to the High Court without making the decree-holder a party to the appeal.

The decree-holder applied for a fresh sale, and at a second sale held pending the appeal purchased the property and obtained possession. On appeal to the High Court the first sale was upheld, and an order passed confirming the sale.

In a suit by the decree-holder, purchaser at the second sale :

Held, that the effect of plaintiff's not being made a party to the appeal is practically the same as if he had not been a party to the suit.

Held, also, that the plaintiff was not a party to the subsequent proceedings and could not be said to have bid at the sale with the effect of those proceedings hanging over his head. *Jan Ali* v. *Jan Ali Chowdhry* (1), referred to.

* Appeal from Original Decree No. 198 of 1894, against the decree of Babu Karuna Das Bose, Subordinate Judge of Patna, dated the 31st of May 1894.

(1) 10 W. R., 154.