1926

BANKA SINGH v. GOKUL.

the Code. The failure of the learned Magistrate to comply with the provisions of section 145 (1), Code of Criminal Procedure, vitiates the entire proceedings held in the case and his order must be set aside. Accordingly I set aside the order of the learned Magistrate dated the 13th of May, 1926.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Pullan.

1926 *December*, 14.

SRI THAKURJI (PLAINTIFF) v. JAIKALI KUNWAR AND OTHERS (DEFENDANTS).*

Bengal Regulation, No. XI of 1825, *Alluvion and Diluvion, section* 4—*Land taken away by gradual accretion but restored by sudden change—Custom of* dhardhura *absent.*

Where no custom of *dhardhura* is proved to exist, land which is taken away by the river gradually, but restored suddenly, if it is capable of identification, will still remain the property of its original owner.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the appellant.

Mr. *Sankar Saran*, for the respondents.

DALAL and PULLAN, JJ.:—These two appeals arise out of a dispute between the riparian owners of villages situated on opposite banks of the river Rapti. Appeal No. 1025 is between the owners of the village of Shergarh and those of the village of Domingarh, and appeal No. 1062 is between the owners of the village of Haraiya on the one side and the owners of the villages of Domingarh and Bahrampur on the other. But no contest now remains between the

* Second Appeal No. 1025 of 1924, from a decree of Baij Nath Das, First Additional Judge of Gorakhpur, dated the 29th of February, 1924, confirming a decree of Hari Har Prasad, Second Additional Subordinate Judge of Gorakhpur, dated the 24th of April, 1923.

owners of the village of Haraiya and those of Bahrampur because they compromised the matter in the lower court. The findings of fact in this case are that up to the year 1300 Fasli the plaintiffs appellants were in possession of the disputed plots which then lay on the south-west side of the river. From the year 1300 to the year 1323 Fasli the land came by gradual accretion into the possession of the owners of the village of Domingarh on the north-east side of the river. In the year 1324 Fasli, by a sudden change of the channel of the river the land was restored to the south-western side, namely, its original position in the villages belonging to the plaintiffs appellants. There is also a finding that no claim of adverse possession has been established on behalf of the respondents, and a further finding that the custom of *dhardhura* is not proved to exist in connexion with these villages. On these findings the lower courts have come to the conclusion that the land came into the possession of the defendants respondents by gradual accretion and so became their property, and that they have not lost the land by the sudden change of the river in 1324 and they are, therefore, still the owners. The lower courts believe that their finding is in accordance with section 4 of Regulation XI of 1825, but on this point we are not prepared to agree with the decision. Under the terms of that Regulation, land which gradually accedes to another estate becomes annexed to it. That is the general principle. An exception is made in the case where a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment and joins with another estate without destroying its identity. It appears to us that the courts below have read so far only and they have not considered what actually happens in the case of a sudden accretion of this nature. The rule goes on

1926

SRI THAKURJI v. JAIKALI KUNWAR

to say :" In such cases the land on being clearly recognized shall remain the property of its original owner." In the present case the original owners are undoubtedly the plaintiffs appellants. That is a finding of fact which cannot now be assailed. There is nothing in the Regulation which lays down what is to happen in a case where land is taken away by the river gradually and restored suddenly. In our opinion the clause which we have quoted above will still apply in such a case and the land will go back to the original owner. We consider this is the legal as well as the equitable view to be taken in a case such as this. We, therefore, allow these appeals with costs, but in the case of appeal No. 1062 the compromise will have effect.

Appeal allowed.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.

1926 December, 15.

SARJU SINGH AND OTHERS (DEFENDANTS) *v.* BIJAI BAHADUR SINGH AND OTHERS (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 193 *(k) —" Standing timber "—Fruit trees not included in the term—Act No. X of* 1897 *(General Clauses Act)—Applicability of.*

Fruit trees are not included in the term " timber " or " standing timber, " and, therefore, cannot be sold by an officer who is authorized to sell movable property only.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the appellants.

The respondents were not represented.

WALSH, A. C. J., and BANERJI, J. :—In our opinion, the Judge's order is technically right

* First Appeal No. 40 of 1926, from an order of Gauri Prasad, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 23rd of January, 1926.