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I accordingly allow the appeals of Baiju and Gharib, set aside their convictions and sentences and declare them to be acquitted. In the case of Dakhani, Bhopua, Chunni, Parshad and Anandi I set aside their convictions and sentences under sections 323/149, but uphold their conviction and sentence under section 147 of the Indian Penal Code. These five men will accordingly surrender to their bail and serve out the remainder of their sentence.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Thom

AMBA SAHAI AND ANOTHER (PLAINTIFFS) *v.* NATHU AND ANOTHER (DEFENDANTS)*

1932 *July*, 21.

Agra Tenancy Act (Local Act III of 1926), sections 3(11), 112, 197—Grove-holder—Right to plant new trees in place of dead or fallen trees—"Improvement"—Interpretation of statutes.

Under the Agra Tenancy Act of 1901, in the absence of a custom or contract to the contrary, a grove-holder had a right to plant new trees in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land, and that right has not been taken away by anything in the new Act. Section 197 of the Act of 1926 does not purport to lay down the rights and liabilities of a grove-holder exhaustively. The right of a grove-holder to maintain the grove by replacing dead or fallen trees is an important incident of the status of grove-holder and the legislature cannot be held to have intended to take away this important right without express words to that effect.

A grove-holder according to the present Act is a tenant, presumably a non-occupancy tenant, and so under section 112 he is not entitled to make an improvement without the written consent of his landholder. But the replacing of dead or fallen trees by the planting of new trees amounts only to "mere repairs" and does not amount to an "improvement" within the meaning of section 3, clause (11). There is a substantial distinction between making a new plantation of trees and maintaining an old plantation.

* Second Appeal No. 1954 of 1929, from a decree of Farid-ud-din Ahmad Khan, Additional Subordinate Judge of Shahjahanpur, dated the 4th of July, 1929, confirming a decree of R. C. Verma, Munsif of Tilhar, dated the 21st of January, 1929.

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Mr. *Haribans Sahai*, for the appellants.

Mr. *Hazari Lal Kapoor*, for the respondents.

KING and THOM, JJ. :—This is a plaintiffs' second appeal arising out of a suit for uprooting certain trees newly planted by a grove-holder, and for a perpetual injunction restraining the grove-holder from planting new trees in future without the permission of the zamindar. The defendants pleaded *inter alia* that they had the right of planting new trees, in place of those which had been cut or had fallen down, without the zamindar's permission. The trial court dismissed the suit and the lower appellate court took the same view and dismissed the appeal.

The facts proved are that the defendants are grove-holders, and that the grove in question was planted more than 50 years before the institution of the suit. The area of the grove is 1·64 acres, and 33 old trees are still standing on it. The courts, therefore, held that the land still retained its character of grove-land. It is further found that the defendants planted about 22 new trees in the month of July, 1925.

As the new trees were planted before the commencement of the Agra Tenancy Act, 1926, the defendants had a right under the law then in force to plant new trees, in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land. For the law on this point we refer to the ruling in *Chokhe Lal* v. *Bihari Lal* (1). In that ruling the customary right of a grove-holder to plant fresh trees was recognized, in the absence of a special custom or contract to the contrary.

In the present case the plaintiffs have relied upon the provisions of the wajib-ul-arz prepared at the previous settlement, between 1870 and 1873. In this wajib-ul-arz a list of groves is set forth, giving particulars of the

(1) (1920) I.L.R., 42 All, 634.

khasra-numbers, the names of the owners, the area, and the number of trees. After giving this list of groves we find the following entry: "As the Government has excluded from the *jama* the area of the groves and uncultivated area we, the persons in possession of the groves, declare of our own accord that we shall do our best in rearing and looking after the trees and that *we shall plant fresh trees in place of damaged trees with the permission of the zamindar.*" In appears, therefore, that the wajib-ul-arz does not even purport to record an existing custom in respect of groves but records a declaration or promise on the part of the grove-holders to the effect that they will plant fresh trees, in place of damaged trees, with the permission of the zamindar. The plaintiffs have failed to establish that the grove now in suit is included among the groves mentioned in the wajib-ul-arz. In our opinion, therefore, the provisions in the wajib-ul-arz cannot be held to apply to the grove in suit since the wajib-ul-arz, at the most, only recorded a contract between the grove-holders of certain groves and the zamindars of the village and those groves did not include the grove now in suit. We hold, therefore, that the courts below were perfectly right in dismissing the plaintiffs' claim for uprooting the new trees which the defendants had planted in July, 1925, before the commencement of the present Tenancy Act.

It has been strongly urged on behalf of the appellants that even if they are not entitled to get the trees which were planted in July, 1925, uprooted, they are entitled to a perpetual injunction restraining the grove-holder from planting any fresh trees in future without their permission.

The appellants' argument is based on the provisions of the Agra Tenancy Act of 1926. It is argued, firstly, that the rights of grove-holders have been defined in section 197. This section mentions certain rights of grove-holders, but is silent on the question whether a grove-holder has a right to replant trees in place of

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trees which have fallen down or been cut down. It is argued, therefore, that by implication the legislature has denied the grove-holders' right of planting new trees.

We are not prepared to accede to this contention. Section 197 does not purport to state the rights and liabilities of grove-holders exhaustively. There is nothing to show that a grove-holder has no right other than a right mentioned in that section. As we have already stated, the law which was in force before the commencement of the present Act recognized the grove-holders' right of planting new trees to replace fallen trees, so long as the land retained its character of grove-land, provided there was no village custom or contract to the contrary. This right of *maintaining* a grove was a very important incident of the right of a grove-holder. It must be presumed that the legislature knew the existing law and in our opinion the legislature cannot be held to have intended to take away this important grove-holder's right without express words to that effect. Merely because section 197 is silent on the point whether a grove-holder has a right to maintain his grove-land as a grove, by replanting trees whenever required, we are not prepared to hold that the legislature has by implication taken away that right.

It is further argued that under section 112 a non-occupancy tenant is prohibited from making any improvement except with the written consent of the landholder. Now, a grove-holder is certainly a "tenant"; see section 3(6). A grove-holder is moreover presumed to be a "non-occupancy tenant"; see section 197(*a*). Grove-land is now included in the definition of "land"; see section 3(2). So it follows that grove-land is a "holding" or part of a "holding"; see section 3(8).

It is further pointed out that under section 3(11) "the planting of trees" is expressly mentioned as an "improvement" with reference to a tenant's holding;

see section 3(11). So the appellants' learned advocate claims to have proved (1) that a grove-holder is prohibited from making any improvement without the written consent of his landholder, and (2) that the planting of trees in grove-land is an "improvement" with reference to the grove-land. He contends, therefore, that a grove-holder is prohibited from planting trees in his grove-land without the written consent of his landholder.

The first proposition must, we think, be conceded. The second proposition is, however, open to doubt. The question turns upon whether "the planting of trees" mentioned as an improvement in section 3(11)(*c*) means only making a *new* plantation of trees or whether it includes the replacing of fallen or useless trees in a grove for the purpose of maintaining the grove.

We think there is a substantial distinction between making a new plantation of trees and maintaining an old plantation. For the purpose of maintaining an old grove it is necessary to plant new trees from time to time, to replace old trees which are dead or useless. But this sort of replanting, for the purpose of keeping a grove in good condition and of preventing further deterioration, would not ordinarily be held to amount to an improvement, and we do not think that it is an "improvement" within the meaning of the Act. All the works which are mentioned as "improvements" in section 3(11) appear to be new works; "the planting of trees" is coupled with "the reclaiming, clearing, enclosing, levelling or terracing of land". The works of this latter nature are evidently intended to refer to new works. Moreover, it is expressly stated in sub-clause (*e*) that "mere repairs" are not to be included among improvements. We think that replacing trees which have fallen down in a grove by planting new trees amounts only to "repairs" and should not be held to amount to an "improvement"

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Filling up gaps among trees of an old grove is analogous to filling up gaps in an old embankment. In each case the work is of the nature of repairs, for the purpose of maintaining the grove or embankment in its original state, and is not an "improvement".

Our conclusions on this point are fortified by the general principle that the legislature cannot be deemed to have intended to take away a very important right incidental to grove-holding without enacting express provisions to this effect. In our opinion the right which a grove-holder had before the commencement of the present Tenancy Act, to maintain his grove by replacing fallen trees, has not been taken away by anything in that Act.

We hold, therefore, that the appellants' contention cannot be accepted and the courts below have come to a right decision. We accordingly dismiss the appeal with costs.

PRIVY COUNCIL

*J. C.** 1933 *January*, 12

KALAWATI DEVI (PLAINTIFF) *v.* DHARAM PRAKASH (DEFENDANT)

[On appeal from the High Court at Allahabad]

Hindu law—Adoption—Authority to adopt—Construction—Khandani rishtadaran—*Estoppel.*

A Hindu by his will authorised one of his two widows to adopt, but forbade her to adopt any son of the relations of her family (*khandani rishtadaran*), or of that of her co-widow, or of his mother; if his brother should give his son in adoption, he should be adopted:—

Held that the will precluded the widow from adopting the son of a daughter of her brother. The word "*khandani*" was used in a general sense as referring to blood relations; the principle that a Hindu female on marriage passes into her husband's family could not be invoked, as it would exclude authority to adopt the son of the testator's brother or any agnatic relation of his.

**Present*: Lord THANKERTON, Lord WRIGHT and Sir GEORGE LOWNDES.