1939

BHAYA MOHAMMAD AZIM KHAN v. RAJA SAADAT ALI KHAN

SAME v. MUMTAZ ALI KHAN, DECEASED (NOW REPRESENTED BY RANI HUZUR ARA BEGUM)

P. C.

By the terms of the Order in Council of 9th April, 1932, they have to consider whether special leave to appeal ought to have been granted and upon an examination of the various enactments they have reached a conclusion adverse to the appellants. If the appellants can still claim to come before an appellate Bench of the Chief Court nothing is here said to prejudice their claim, but their Lordships must humbly advise His Majesty that special leave to appeal to His Majesty in Council ought not to have been granted and that this consolidated appeal should accordingly be dismissed. The appellants must pay one set of costs to be divided equally between Raja Saadat Ali Khan and Raja Mumtaz Ali Khan's representatives.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

Solicitors for Raja Saadat Ali Khan: *Barrow, Rogers & Nevill.*

Solicitors for representatives of Mumtaz Ali Khan: *Nehra & Co.*

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge

B. CHANDRA BHAN SINGH (APPELLANT) *v.* HUBBA (DEFENDANT-RESPONDENT)*

1938

February, 4

Grove—Small portion of grove brought under cultivation—Eight mango and two babul trees on an area of six bighas—Grove, whether has lost its character—Planting of new trees, effect of—Second appeal—Question whether grove has lost its character as such, whether a question of law or fact.

The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law, and so where a court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact.

*Second Rent Appeal No. 60 of 1936, against the decree of K. N. Wanchoo, Esq., District Judge, Rae Bareli, dated the 4th of July, 1936, confirming the decree of M. Mohammad Mujtaba Siddiqui, Assistant Collector, Ist Class, Rae Bareli, dated the 29th November, 1935.

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The fact that 3 biswas out of an area of 6 bighas and 1 biswa of grove land is brought under cultivation is not by itself sufficient to hold that a grove has lost its character as such; but in view of the fact that there are only eight mango and two babul trees on an area of 6 bighas, 1 biswa it is impossible to hold that the grove has not lost its character as such. The mere fact that the grove-holder has planted some new trees does not protect him from ejectment.

Mr. *P. N. Chowdhri*, for the Appellant.

Mr. *Ganesh Prasad*, for the Respondent.

THOMAS, C.J.:—This is a plaintiff's appeal under section 119 (B) of the Oudh Rent Act against a judgment and decree of the learned District Judge of Rae Bareli, dated the 4th July, 1936, upholding the decree passed by the learned Assistant Collector, first class of the same place, dated the 29th November, 1935, dismissing the plaintiff's suit.

The plaintiff admittedly is the proprietor of Mahal Beni Bahadur Singh in which the disputed plot no. 180 is situated. The area of the said plot is 6 bighas and 1 biswa. The plaintiff brought the suit for possession by ejectment from a part of plot no. 180 only measuring three bighas.

The defence was that the land in suit was the grove land of the defendant.

The sole question for decision in the appeal is whether the plot in dispute is or is not a grove land Both the lower courts have held that the land in dispute had not lost its character as such. The proceedings of the 27th August, 1935, show that the defendant admitted that there were eight mango and two babul trees on the plot in dispute. The defendant further admitted that 3 biswas was under cultivation while according to the plaintiff 3 bighas was under cultivation. The number in dispute in the first, second and third settlement, is entered as a *talab*. It is further clear from the statement of the defendant that the area of the *talab* which is under water is $2\frac{1}{2}$ or 3 bighas.

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Thomas C. J.

The contention of the learned counsel for the appellant is that where there are only ten trees on an area of 6 bighas and 1 biswa, it should be considered that the grove in question has lost its character as such. On the other hand, it has been contended by the learned counsel for the respondent that whether or not the grove in question has lost its character as such is a question of fact. I do not agree with this contention. The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. Where a court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. The case therefore stands thus: That we have eight mango and two babul trees standing on an area of 6 bighas and 1 biswa. I have not the slightest doubt that the babul trees must be self-grown. The question is whether the grove has lost its character as such. The evidence of the defendant is vague. In his cross-examination he clearly stated that he could not say how many trees stood on the 3 bighas for which the suit was brought. He further admitted that he had brought 3 biswas of land under cultivation. This fact by itself is not sufficient to hold that a grove has lost its character as such; but in view of the area and the number of trees it seems to me impossible to hold that the grove has not lost its character as such. I accordingly hold that the grove has lost its character as such and that the mere fact that the defendant has planted some new trees does not help him. The plaintiff being the proprietor of the *mahal* in which the disputed land is situated is entitled to the relief which he has claimed.

I accordingly allow the appeal and set aside the decree of the lower courts, with costs.

Appeal allowed