

LETTERS PATENT.

Before Dawson Miller, C. J. and Foster, J.

BODHA GANDERI

v.

ASHLOKE SINGH.*

1926.

May, 28.

Possession—person in possession, without title dispossessed by trespasser—right to regain possession—Transfer of Property Act, 1882 (Act IV of 1882), section 3—Immoveable property, whether includes mango tree.

Where a person who has been in possession of property for several years without title is dispossessed by another, who also has no title, the former is entitled to be restored to possession.

Query.—Whether a mango tree is immoveable property within the meaning of the Transfer of Property Act, 1882, under section 3 of which, “Immoveable property does not include standing timber, growing crops or grass”.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

P. Dayal and *R. Lal*, for the appellant.

L. N. Sinha, for the respondents.

DAWSON MILLER, C. J.—The plaintiff in this case sued for recovery of possession of a mango tree standing on what has been referred to as plot no. 246 in mauza Biswambharpur of which the defendants are the tenants. It appears that in the year 1911 the landlords of the village made a gift of this tree to the plaintiff apparently in consideration of his past services. The gift was evidenced by a written document but it was not registered as required by law assuming that the interest transferred was immoveable property. Accordingly the document

*Letters Patent Appeal no. 79 of 1925, from a decision of Ross, J., dated the 8th July, 1925, setting aside a decision of B. P. L. Sen, Subordinate Judge, 2nd Court, Arrah, dated the 2nd August, 1922, reversing a decision of M. Aziz Ahmad, Munsif, 3rd Court, Arrah, dated the 5th December, 1921.

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could not be, and in fact was not, put in evidence on behalf of the plaintiff in proof of his title. He proved, however, that since the year 1911 up to the year 1919 when he was dispossessed by the defendants he had been in undisputed possession of this mango tree without any opposition on behalf of the maliks and enjoying the fruits thereof. In the year 1911 there had been some dispute between the defendants and the maliks as to the right to possess the plot of land no. 246 on which the mango tree stood. The defendants' holding was adjacent to that plot. In the result a compromise was arrived at between them whereby of the five mango trees standing on the plot the defendants were allowed to have the use of the three easternmost whereas the other two were retained by the maliks whose case was that this particular plot was their bagh. At the same time on payment of nazarana the land in plot 246 was settled with the defendants the tenants of the neighbouring holding. It is quite clear, however, that that settlement expressly excluded the two western mango trees from the possession of the defendants. Shortly afterwards the landlords made a gift of one of these two mango trees to the plaintiff and as I have said he has remained in possession ever since except for some dispute which arose between him and the defendants in, I think, the year 1912 when some criminal proceedings were instituted by the defendants but were withdrawn upon the understanding that the defendants would not endeavour to take the fruits of that tree until they had proved their title in a civil court.

I have referred to these facts which have been found by the learned Subordinate Judge on appeal because it is necessary to see at the outset exactly what the title claimed by the plaintiff and the defendants respectively in the property is. It is clear from what I have stated that if the interest which the plaintiff took was an interest in immoveable property and if the mango tree is to be regarded as immoveable property then the gift to him in 1911 which was not

registered was not a valid gift and he cannot prove his title by production of that document. It is equally clear from the facts found by the learned Subordinate Judge to which I have just referred that the defendants themselves also had no title to this mango tree. Their main defence was that it was true two trees had been left in possession of the landlords at the time of the dispute in 1911 and that one of them had been given to the plaintiff but that both these trees had subsequently been cut down, one by the landlords themselves and the other by the plaintiff. This case, however, was not substantiated and the evidence called to support it was disbelieved by the learned Subordinate Judge. The Subordinate Judge in the result found that the gift being a gift of moveable and not immoveable property did not require a registered document and he gave a decree in favour of the plaintiff.

On appeal to this Court by the defendants the main point which seems to have been argued before the learned Judge, Ross, J., was that mango trees are not timber within the meaning of the definition clause in the Transfer of Property Act. By that Act, section 3, immoveable property does not include standing timber, growing crops or grass. Ross, J., in a considered and very careful judgment dealt with the authorities on the subject both in this country and in England and arrived at the conclusion that in the particular circumstances of this case and having regard to the fact that this tree was not intended to be used as timber but was intended and was in fact used by the plaintiff for the purpose of enjoying the fruits from it, it must be regarded as immoveable property and not moveable. Although the subject is one about which there has been considerable difference of opinion in this country and although the decisions upon it are somewhat conflicting I am not prepared to differ from the decision arrived at by Ross, J. But the matter does not end there for this is a case in which the plaintiff being in lawful possession and having

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been in lawful possession for eight years was suddenly dispossessed by the defendants. If the defendants could make out that they had a title to the tree in question then I think undoubtedly the plaintiff would not be able to recover but as the defendants have no title whatsoever to the tree as appears from the facts found by the lower appellate court then the situation is this :—as between two persons who are unable to make out a valid title one is in possession and has been in possession for several years. He is suddenly dispossessed by another who has no better title than the person whom he dispossesses, in fact he has no title at all. In these circumstances it seems to me that the plaintiff is entitled to be restored to possession of this tree. The defendants had no right whatever to dispossess him and, if they do, whatever may be his title he clearly can seek the aid of the court to be put back in such possession as he had before being dispossessed by those who had no title. The judgment of Ross, J., will be set aside and the plaintiff will be given a decree declaring that he is entitled to recover possession from the defendants. The plaintiff is entitled to his costs here and before Ross, J.

FOSTER, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Ross and Macpherson, JJ.

RAJ GOPAL ACHARJYA

v.

UPENDRA ACHARJYA GOSWAMI.*

1926.

*May, 28,
31.*

Chota Nagpur Tenancy Act, 1908 (Ben. Act of 1908), section 258—Minor, ex parte decree against—suit for

*Appeal from Appellate Decree no. 1117 of 1923, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 11th of August, 1923, confirming a decision of Babu Sachindra Nath Ganguli, Munsif of Raghunathpur, dated the 30th of April, 1923.