The application is allowed with costs, hearing fee three gold mohurs. Let a certificate issue that this case complies with the provisions of section 110 of the Code of Civil Proce

REVISIONAL CIVIL.

Before Jwala Prasad and Dhavle, JJ.

DAMODAR JHA

v.

BALDEO PRASAD.*

Provincial Small Cause Courts Act, 1887 (*Act IX of* 1887), *Schedule II, article* 35 (*ii*)—*suit by landlord against tenant for the price of bamboos unlawfully cut, whether cognizable by a Court of Small Causes—article* 35 (*ii*), *whether applicable.*

Article 35 (*ii*), Schedule II of the Provincial Small Cause Courts Act, 1887, does not bar the jurisdiction of a Small Cause Court Judge to try a suit brought by a landlord against his tenant for the recovery of the price of bamboos alleged to have been unlawfully cut and appropriated by the latter.

Mirza Dilbar Hossain v. *Sadaruddin Chowdhury* (1), *Radha Ballabh Guha* v. *Panchkari Sil* (2), *Raghubir Dayal* v. *Mulwa* (3), and *Shiv Gir* v. *Khazan Gir* (4), followed.

Ramprasad Parmanik v. *Sricharan Mandal* (5) and *Deoki Rai* v. *Harakh Narayan Lal* (6), not followed.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

S. C. Mozumdar, for the applicant.

*Civil Revision no. 115 of 1929, from a decision of Babu S. C. Sen, Subordinate Judge of Darbhanga, dated the 11th January, 1929.

(1) (1922) 27 Cal. W. N. 469.
(2) (1927) 46 Cal. L. J. 552.
(3) (1926) I. L. R. 49 All. 440.
(4) (1922) I. L. R. 3 Lah. 369.
(5) (1917) 27 Cal. L. J. 594.
(6) (1926) 97 Ind. Cas. 129.

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S. Saran (with him *Janak Kishore*), for the opposite party.

JWALA PRASAD, J.—This is a civil revision arising out of a decision of the Subordinate Judge of Darbhanga exercising powers of a Small Cause Court Judge, dated the 11th January, 1929. The defendant is the applicant before us. He is co-sharer with the plaintiff in mauza Atihar and both the parties have separate takhtas. The defendant has certain lands in the plaintiff's patti both nakdi and bhaoli. The plaintiff instituted the suit out of which this revision has arisen, to recover price of the bamboos said to have been cut and taken away by the defendant as tenant of the plaintiff without his permission from the plots of land mentioned in the plaint. In the plaint it was stated that the defendant cut away in 1333 three hundred and five bamboos and in 1334 four hundred and fifty bamboos from different plots of his. It was stated that timber of the trees on the nakdi land exclusively belonged to the plaintiff, and half the timber of the trees cut from the bhaoli land belonged to him and the other half to the defendant; and that the defendant did not give the plaintiff his share of the timber cut in the aforesaid years and appropriated the entire timber to himself.

The defendant denied having cut the trees in question in the years in suit, stating that he had cut bamboos years ago and since then he had no occasion to cut and that most of the bamboo clumps had dried up. He admitted the plaintiff's right to take half of the bamboos cut from the bhaoli plots, but denied the plaintiff's right to appropriate the entire timber of the trees cut from the nakdi land.

A pleader commissioner was deputed to the land for the purpose of ascertaining what number of bamboos, if any, were cut and taken away by the defendant, and he reported that 312 bamboos were cut in 1333 and 299 in 1334, out of which 89 in the former year and 74 in the latter year were cut from

the bhaoli plots. According to his report 163 bamboos were cut from the bhaoli lands and 448 from the nakdi. The Barahil witness for the plaintiff stated that 410 bamboos were cut in the years in suit from the bhaoli lands. He did not say how many bamboos were cut from the nakdi lands; but from the total of the bamboos stated by him to have been cut, namely, 785 bamboos, it can be inferred that 375 were cut from the nakdi lands.

The Court below accepted the statement of the Barahil that 410 bamboos were cut from the bhaoli lands, in which the share of the plaintiff and the defendant was half and half, that is, 205 each. He rejected the plaintiff's case as well as the statement of his Barahil witness as to the total number of bamboos cut. The learned Subordinate Judge does not say so; but apparently he accepted the total quantity of bamboos cut as stated by the commissioner, namely, 601, and deducting therefrom the bamboos cut from the bhaoli land, namely, 410, as stated by the Barahil witness, he finds that 201 bamboos were cut from the nakdi lands, a figure which does not tally either with the statement made in the plaint or in the evidence of the plaintiff's witness, or in the report of the commissioner; but it is less than any of those figures. Upon this finding the Court below holds that the plaintiff is entitled to the price of 205 bamboos cut from the bhaoli lands and 201 cut from the nakdi lands, namely, 406 bamboos, and has allowed the plaintiff price for the same at the rate of four bamboos for a rupee, namely Rs. 101-8-0 in all as the price of the bamboos cut by the defendant.

As regards the customary right claimed by the defendant that the landlord is not entitled to the timber of the trees standing on the nakdi lands, the learned Subordinate Judge rejected the plea, holding that the said right was not proved. The defendant being aggrieved by the decision of the Small Cause Court Judge has come to this Court in revision and

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disputes the finding of the Court below on both the points, namely, as to the quantity of bamboos to which the plaintiff is entitled and the right of the plaintiff to appropriate the entire timber of the trees cut from the nakdi lands. This is the second time that the case has come to this Court in revision, and on the first occasion also the Subordinate Judge had given a decree to the plaintiff for Rs. 100, holding that about 400 bamboos were appropriated by the defendant which was the share of the plaintiff. At that time also the Subordinate Judge had held that the customary right of appropriating the entire timber of the trees standing on the nakdi lands set up by the defendant was not established. The case was remanded, because the Subordinate Judge did not clearly show how he had arrived at the figure in respect of the number of bamboos cut by the defendant to which the plaintiff was entitled and also because he had not referred to any evidence on which he found that the custom urged by the defendant was not proved. Although the decision of the Subordinate Judge on remand is clearer than that on the first occasion, yet it is not clear enough on both these points as it ought to have been.

As to the first point he says:

"There is no clear evidence whether the total number of bamboos 611 was taken from nakdi land alone. On the evidence I am disposed to hold that it was taken both from Nakdi and Bhaoli lands. So defendant is entitled to a remission of 205 bamboos as his share out of the total figure of 611 bamboos. So I find that defendant has taken 406 bamboos in excess of his share for which he is liable to pay compensation to the plaintiff."

Working it out arithmetically one can find that the learned Subordinate Judge means that the bamboos cut from the nakdi lands were 201 in number, by deducting 410 bamboos stated by the Barahil witness to have been cut from the bhaoli lands from the figure 611 as the total quantity of bamboos stated in the commissioner's report to have been cut from the defendant's holding. The commissioner's report itself does not agree with the figure of the bamboos

cut from the nakdi lands as found by the learned Subordinate Judge. The pleading and the proof offered by the plaintiff do not also give exactly that figure. But as the number 201 happens to be less than the number of bamboos stated by the commissioner to have been cut from the nakdi lands as well as than that stated by the plaintiff and his witness, this figure may be accepted as being in favour of the defendant in order to avoid further remand which would be harassing and ruinous to the parties.

As regards the second point, namely, the finding of the Subordinate Judge upon the customary right, pleaded by the defendant, of appropriating the entire timber which is standing on the tenant's nakdi land is also open to objection inasmuch as the finding is based entirely upon the admission of the defendant in his evidence that he had himself instituted a suit against a tenant of his, namely, Hit Lal, for the price of timber in respect of the nakdi lands and got a decree. This solitary statement is to my mind not sufficient upon the question of the custom pleaded by the defendant one way or the other. The pleading and the judgment of that case were not filed in the Court below. After remand by this Court the learned Subordinate Judge fixed the case for hearing, directing the parties to come ready with their evidence and witnesses, fixing the 14th December, 1928. On that date the defendant filed a copy of the khatian in respect of the plots in question. After some adjournment the case was decided without any evidence being given by the parties, on the evidence already on the record. The khatian filed by the defendant was returned to his pleader on the 11th January, 1929, without being tendered in evidence. The learned Advocate on behalf of the defendant has urged that this document was not received in evidence by the Subordinate Judge and was rejected without any ground. There is no substance in this contention. It is not borne out by anything on the record. There is no endorsement either on the list of the documents

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and no mention of it in the order-sheet. It seems to me that the defendant for some reason or other took back this document without tendering it in evidence. After the application was filed in this Court, the defendant put in a petition stating that the village-note of the survey and settlement record-of-rights shows that there is a custom in the village according to which the tenants appropriate the timber of the entire trees standing on the nakdi lands and that the landlord gets nothing. It was stated that the defendant had no knowledge of it and came to know of it only a few days after the application was filed in this Court. The plaintiff wants to file the plaint and the judgment of the suit instituted by the plaintiff against his tenant Hit Lal for the price of timber in respect of the nakdi lands. The village-note no doubt supports the defendant's case that there is a custom in the village of the tenants appropriating the entire timber of the trees standing on their nakdi lands. Both parties, therefore, have not given all the evidence that they want to give on this point and in view of the importance of the question relating to the custom governing the rights of the tenants and the landlord in the entire village, I would leave the question open to be agitated and determined in a subsequent suit, if any, between the parties. This appears to me to be the better course than remanding the case for fresh evidence and decision, which would involve the parties in heavy expense.

It may be mentioned that the learned Advocate on behalf of the defendant also raised the question that the jurisdiction of the Small Cause Court Judge to try the suit is barred by Article 35 (*ii*) of the Provincial Small Cause Courts Act (Act IX of 1887) and reliance has been placed upon the decision in the case of *Ramprosad Paramanik* v. *Sricharan Mandal*(1). In that case Mookerjee, J., held that a suit for compensation for wrongfully cutting a tree grown, and misappropriating crops raised, by the plaintiff on his land, is excepted from the cognizance of a

(1) (1917) 27 Cal. L. J. 594.

Court of Small Causes by Article 35, sub-clause (*ii*) of the second Schedule of the Provincial Small Cause Courts Act, and that the jurisdiction in a Small Cause Court to try such a suit cannot be created by waiver or consent. There is a conflict of decisions on this point. The same Court (the Calcutta High Court) latterly in the case of *Mirza Dilbar Hossain* v. *Sadaruddin Chowdhury* (1) took a contrary view in a case similar in nature to that decided by Mookerjee, J. [*vide* also the case of *Radha Ballabh Guha* v. *Panchkari Sil* (2)]. This is a case very similar to the present one, inasmuch as in the aforesaid two cases the plaintiff claimed compensation for the trees cut by the defendant standing on the plaintiff's own land, whereas in the case of *Radha Ballabh Guha* v. *Panchkari Sil* (2) as well as in the present case the defendant was the plaintiff's tenant and the plaintiff in his plaint alleged that the defendant had, as such tenant, no right to cut and appropriate any tree without the permission of the plaintiff either under the local custom or under the law, and he had wrongfully and illegally cut away the trees in question and was liable to pay compensation. I mention this distinction purposely. Article 35 (*ii*) of the Provincial Small Cause Courts Act bars the jurisdiction of the Small Cause Court to try a suit for compensation for an act which is, or save for the provisions of Chapter IV of the Indian Penal Code would be, an offence punishable under Chapter XVII of the same Code. Now when upon the case laid in the plaint it is clear beyond any shadow of doubt that the defendant had committed an offence punishable under Chapter XVII of the Indian Penal Code, the jurisdiction of the Small Cause Court to try such a suit is barred; but where upon the facts stated in the plaint the case against the defendant is wrongful or illegal but not necessarily penal so as to bring him within the purview of the Indian Penal Code, the jurisdiction

(1) (1922-23) 27 Cal. W. N. 469.
(2) (1927) 46 Cal. L. J. 552.

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of the Small Cause Court is not at all barred. In short and without referring to the other circumstances, if upon the plaint a question of a bona fide claim on behalf of the defendant is obvious, then Article 35 (*ii*) will have no application. Now, the right of a landlord and tenant in respect of trees is often a disputed right depending in some cases upon the statutory provisions and in others upon custom. The tenant has, as in this case, possession of the land upon which the trees stand and all the trees themselves, and is entitled as of right to appropriate the fruits thereof. It may be noted here that in the present case the record-of-rights entered the defendant as in possession of the trees and the fruits thereof: in some instances the entire and in others to the extent of half. A criminal case for misappropriation, theft or mischief could easily be defeated by the defendant urging that he had a right to appropriate the entire timber standing on his holding either under the law or custom, and in the written statement filed in this case the defendant did raise such questions and claimed the right to appropriate the entire timber standing on the nakdi lands. Therefore, Article 35 (*ii*) did not bar the cognizance of the Small Cause Court in respect of the suit in question [*vide* also *Raghubir Dayal* v. *Mulwa* (1) and *Shiv Gir* v. *Khazan Gir* (2)]. A contrary view is to be found in the case of *Deoki Rai* v. *Harakh Narain Lal* (3). In the view that I have taken the contrary view expressed in the case of *Deoki Rai* v. *Harakh Narain Lal* (3) and other cases need not be referred to in detail. It may be mentioned that this point was not taken at any stage either in the Court below or in this Court when the case was remanded and it has for the first time been taken now. There is to my mind no substance in this contention, and it must be overruled.

(1) (1926) I. L. R. 49 All. 440.
(2) (1922) I. L. R. 3 Lah. 369.
(3) (1926) 97 Ind. Cas. 129.

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In the result I would affirm the decision of the Subordinate Judge in so far as it has decreed the plaintiff's suit for Rs. 101-8-0 as price of the bamboos taken by the defendant, and would leave the question of the customary right of the parties in the trees standing on the tenant's nakdi lands open. As the plaintiff has principally succeeded, I would dismiss the application with costs.

DHAVLE, J.—I agree.

Rule discharged.

REVISIONAL CRIMINAL.

Before Wort, J.

1929.

July, 1.

MANMOHAN RAI

v.

KING-EMPEROR.*

Approver—statement of, to police during investigation—accused entitled to copy—Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 162.

Where a person accused of an offence which is under investigation makes a statement to the police during the investigation the defence are entitled to a copy of that statement if the maker of it is about to be examined as an approver in the trial of the offence.

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

S. Sinha (with him *D. L. Nandkeolyar*), for the petitioner.

Sir Sultan Ahmad, Government Advocate, for the Crown.

WORT, J.—This rule was granted with regard to a trial which is now proceeding against certain persons, being forty-two in number, for an offence punishable under section 400 of the Indian Penal Code.

*Criminal Revision no. 362 of 1929, from an order of Mr. R. Ghose, Sessions Judge of Purnea, dated the 7th June, 1929.