Appellate Jurisdiction.(a)

Regular Appeal No. 139 *of* 1872.

J. H. IRVINE ..... *Appellant.*

THE THACHARAKAVIL MANA VIKRAVEN TIRAMELPAD of Nilambúr. } *Respondent.*

The suit was brought to cancel a decision of the Magistracy (A), dated 11th December 1869, whereby 1st defendant was put in possession of the Choladi forest, to establish plaintiff's jenm right thereon, and to recover the same with Rupees 14,000, value of timber. The facts, as they appeared, were that there was a coffee estate called Choladi, carved out of the same jungles as that in which the Choladi forest was, but not adjoining it and in a different taluq. The cultivation of that estate was begun in 1862 by a Mr. Gordon, who in 1865 transferred his interest to a Mr. Burnett, who, in 1867, was succeeded by 1st defendant (Irvine). In the following year 1st defendant proceeded to lay claim to the land in dispute, and in 1868 he prosecuted some hill-men for trespass and had their crops attached. In June 1869 he procured an order from the Deputy Magistrate whereby the Gudalúr Sub-Magistrate was ordered to attach certain lands (no boundaries being specified). The land and timber thereon were accordingly attached and an order of attachment served on plaintiff. The case then came before the Assistant Magistrate, who, after holding an enquiry as to possession, passed the order (A) cancellation whereof is prayed in the plaint.

The District Judge found that down to the interference of the Magistrate in 1868, plaintiff was in possession as owner, and he further decreed that defendant should pay plaintiff Rupees 14,000 on account of the timber, which had been carried off, by whom it did not appear.

On appeal, the High Court confirmed the decision of the District Judge on the question of title, but reversed it as to the value of the timber carried off, because there was not that causal connection between its loss and a wrongful act of the defendant which was needed to justify the award of that sum as damages. There was no evidence of the mode of the loss. The occasion for it was given by an order of a Magistrate, and the mere preferring of the complaint which gave birth to that order did not render the defendant responsible in the circumstances of the case.

1873. *April* 1. *R. A. No.* 139 *of* 1872.

THIS was a Regular Appeal against the decision of G. R. Sharpe, the District Judge of Calicut, in Original Suit No. 4 of 1870.

The suit was brought to cancel a decision of the Magistracy, dated 11th December 1869, whereby 1st defendant was put in possession of the Choladi forest, to establish plaintiff's jenm right thereon, and to recover the same with Rupees 14,000, value of timber. The plaint stated that the said forests were in the possession of plaintiff's ancestors and of himself after his attaining the karnavanship in 1036, that defendants had no right thereon and never held possession thereof, that the Magistrate, by the above order,

(a) Present: Holloway, Acting C. J. and Innes, J.

1873. *April* 1. *R. A. No.* 139 *of* 1872.

directed that 1st defendant should retain possession, and that 128 logs of timber, valued at Rupees 14,000, and felled by plaintiff in Edavom and Mithunom 1044 were by another order, dated 19th June 1869, made over to 1st defendant by the Magistracy.

1st defendant stated that plaintiff had no title, that the 3rd defendant was the owner of and demised the land on kánam for 80 years to 2nd defendant on 9th July 1862, that 2nd defendant on 18th July 1865 transferred his right to one John Burnett, that 1st defendant received the said lands as successor of the said John Burnett in the management of the Choladi Estate, that plaintiff had not been in possession or lawfully exercised any acts of ownership since 9th July 1862, that in felling the above timber plaintiff was a trespasser, that upon his (1st defendant) immediately complaining to the Magistrate the timber was attached, that he did not remove nor interfere with the said timber, but that plaintiff by his servants wrongfully removed the same and converted it to his own use, and that the timber is of greater value than is stated in the plaint.

2nd and 3rd defendants did not appear.

The following issues were settled—

I.—Who is the owner of the jenm right of the land sued for.

II.—Who was in possession, and on what right, prior to the Mag istrate's order, dated 11th December 1869.

III.—What became of the timber (128 logs) after its attachment by the Magistracy in 1869.

The following is taken from the judgment of the District Judge—

"The land which forms the subject-matter of this suit is jungle, and bears the name of Choladi; and the main question for determination is whether it is plaintiff's jenm property or is the jenm of 3rd defendant, through whom the other defendants claim, and who has been examined as 1st defendant's 5th witness. It is admitted that such witness owned a jungle called Choladi, and that 1st defendant is now in possession of a coffee estate called by that name and carved

1873. *April* 1. *R. A. No.* 139 *of* 1872.

out of the jungle, but with the exception, perhaps, of a few yards, that estate does not come below the crest of the ghaut, whereas the land in dispute is below the ghaut and slopes away for a mile and more to the Chaliar river which 1st defendant claims as the boundary of his estate.

The cultivation of that estate appears to have been commenced in 1862, when a Mr. Gordon (2nd defendant) obtained a mortgage under No. I from 3rd defendant. In 1865 Gordon, under No. II, transferred his interest to a Mr. Burnett (1st defendant's 2nd witness) and in September 1867, 1st defendant, as he tells us in his deposition, assumed charge of the estate. Simultaneously, or rather in the following year, he proceeded to lay claim to the land in dispute and prosecuted some hill-men for trespass by cultivating a portion of it. The Gudalúr Sub-Magistrate lent a willing ear to his complaint; for admitting that there was no evidence against the parties complained against, and that what evidence there was shewed that he had no jurisdiction over the locality, he still continued to detain the accused in custody, and to hold the crops under attachment. What became of the accused does not appear, but in May 1869, the Deputy Magistrate of Wynaad ordered the release of the crops on the ground that 1st defendant had not attended to prosecute.

This did not meet 1st defendant's views, so in the following month, *i. e.* June 1869, he appears to have given a deposition before the Deputy Magistrate which resulted in the remarkable order (F) whereby the Gudalúr Sub-Magistrate was ordered to attach certain lands: no boundaries were specified in the order, and the Deputy Magistrate, though declaring his inability to say who was in possession, quietly assumed such lands to belong to 1st defendant's Choladi Estate. The Gudalúr Sub-Magistrate deputed his gomastah to carry out the Deputy Magistrate's order, and accordingly the plaint land and the valuable timber thereon were attached, the plaintiff being at the same time served with an order of attachment (F). A young Assistant Magistrate then appears upon the scene, and he, after holding an enquiry as to possession, passed the order (A), the cancellation whereof forms one of the prayers of the plaint.

1873. *April* 1. *R. A. No.* 139 *of* 1872.

The 1st defendant has thus the advantage of having an order of the Magistracy on his side, and although looking at the statement of the evidence upon which that order purports to be founded, I should have found it difficult to arrive at the same result, and although it is impossible to say how far Mr. Austin in arriving at it was influenced by the *ex-parte* declaration of the Deputy Magistrate, still the effect of that order is to throw the burden of proof upon plaintiff, and I now proceed to consider whether he has successfully sustained it."

The District Judge then commented upon the evidence adduced by plaintiff and continued—

" I entertain, therefore, no doubt upon the direct evidence of plaintiff's ownership and possession, but there is much more in his favor. The land in dispute is admittedly below the crest of the ghaut, and land so situated is shewn by the Amshom officials of both taluqs to be in Ernad and not in Wynaad taluq; nay, even 1st defendant in his deposition admits this to be so. How in the face of all this and with title deeds registered in the Gudalúr registry only, 1st defendant can have been rash enough to go before the Magistrate and enter into conflict with plaintiff respecting land in the Ernad taluq, is a mystery past my understanding.

But very little consideration would have satisfied him that an experienced coffee planter like 2nd defendant would not have taken precipitous land unfit for his purposes, and as little consideration would have satisfied him that a land owner would not have parted with such extensive and heavily timbered land for next to nothing at all." .....

" I am satisfied that down to the interference of the Magistrate in 1868, plaintiff was in possession as owner, and I am fortified in that conclusion by the non-denial in 1st defendant's written statement of such possession prior to 1862.

It still remains to consider plaintiff's claim to the timber or its value. There is no dispute that such timber was felled by plaintiff from the plaint land, and that in pursuance of the order of the Deputy Magistrate an officer was sent to the spot and attached it. As to what then took place, there is, unfortunately, a conflict of testimony. On plaintiff's side two witnesses depose that 1st defendant said he would take

1873.
April 1.
R. A. No.
139 *of* 1872.

charge of the timber, and to the same effect is H, the Officer's Return, which states that the Amshom officials declined to have anything to do with it, but that 1st defendant said he would look after it to prevent any one removing it. This 1st defendant does not admit, but from the evidence and the conduct of the attaching officer it must be presumed that 1st defendant at all events conveyed that impression to the bystanders and to that officer. It is certain also that 1st defendant's carpenter was present and marked some of the logs, and by his letter (No. V) 1st defendant would appear to have been active in the attachment. It would, therefore, be very difficult for me to say, were it necessary to decide the point, that 1st defendant did not put himself in the position of custodian of the timber, but as 1st defendant's liability appears to me otherwise clear a decision is not absolutely called for on that point.

The timber was in plaintiff's possession and of that possession he has been divested by an attachment of defendant's procuring, while the only ground upon which 1st defendant by his statement alleged non-liability to reimburse plaintiff was that plaintiff had himself recovered possession. I think it is much to be regretted that any such insinuation was made; there is not a tittle of evidence in its support, and it can never have been imagined that any Court would presume the commission of an audacious trespass by plaintiff in direct defiance of a Magistrate's order.

This is sufficient for the disposal of the case, and I need not discuss the point which has been present to my mind, but which has not been raised for 1st defendant, *i. e.*, whether he could not have sheltered himself under the plea that the attachment and consequent loss was the act of the Court. In the circumstances I have not considered the question with much attention, but it appears to me that it would not have been a good defence, inasmuch as the matter was not fully laid before the Deputy Magistrate, but the order was obtained on an *ex-parte* application and from a Magistrate who had no jurisdiction, and whom 1st defendant must have known to have no jurisdiction over the *locus in quo*.

Being of opinion that 1st defendant was a wrongdoer and trespasser, or that having procured the commission of the

1873. April 1. R. A. No. 139 of 1872.

trespass he must be held liable as a wrongdoer and trespasser, I declare that plaintiff is the jenmi and as such is entitled to recover possession of the property sued for, as delineated in the plan D, exclusive of such small portion (if any) below the crest of the ghaut as defendants may prior to 1868 have planted coffee upon; and I further decree that plaintiff be put in possession of the said property and do recover from 1st defendant Rupees 14,000 on account of the timber, and all his costs of suit. The 1st defendant will bear his own costs."

The first defendant appealed upon the following grounds among others:—

1. That the judgment of the Lower Court is contrary to law and against the weight of evidence.

2. That 1st defendant is not liable to make good to the plaintiff the damage claimed in the plaint.

3. That the damages fixed by the Lower Court are excessive.

Miller and Shaw, for the appellant, the first defendant.

J. H. S. Branson, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—On the question of title there cannot be the least hesitation in confirming the decree of the District Judge. The evidence is nearly all one way and the testimony of the witnesses, mostly officials, is confirmed by the fact that the land claimed by the plaintiff is in one taluq while that bought by the lessor of defendants was registered solely in another. As to the vagueness of which the appellant complains, it is probable that the decree preserving to the defendant what he has actually cultivated is a little too favourable. The evidence, as it stands, undoubtedly justifies a decree for the whole land claimed.

While the burden of proof is on the plaintiff, it is one more easily sustained in a case in which he has been put to his action for land of which there has been scarcely any user by the not very judicious proceedings of the Magistracy.

As to the value of the timber carried off, we are of opinion that the decree cannot stand, because there is not that causal connexion between its loss and a wrongful act of

1873.
April 1.
R. A. No.
139 *of* 1872.

the defendant which is needed to justify the award of that sum as damages.

If the agreement to be custodian of the logs were proved, it would become necessary to consider whether there was *culpa*, and the nature of the place and of the property and of the circumstances in which the custody was undertaken would make the mere loss very slight evidence of negligence.

Then is the defendant liable because the loss occurred immediately through the act of the Magistrate, but mediately through the complaint, now known to be unfounded, preferred by him to that Magistrate. There can be no pretence that there was fraud on the part of the defendant himself, for there is no reason to doubt that he merely set up a claim which, on the information of his lessor and of the vendee of that lessor, he might well believe to have a fair foundation. It cannot, therefore, be said that the operations of the Magistrate, which placed the timber at the place from which it was wrongfully carried away by some one, were even within so strong a case as *Fitzjohn* v. *Mackinder(a)* the legal result of the defendant's act. That very eminent lawyers dissented from that decision and that one of them still adheres to his dissent (Wm. Saunders I, 276) shews that it goes to the very verge of the law. In this case, however, there is not the smallest evidence that the complaint was fraudulent and it was certainly not for the defendant to know more of the jurisdiction of the Magistrate than he knew himself. There is not the least evidence as to the mode by which the timber was carried off, and it is very singular that the plaintiff with his many dependents was unable to give any such evidence. It is not for us to speculate upon the mode.

It is sufficient in this case to say that there is no evidence of the mode of the loss. That the occasion for it was given by an order of a Magistrate. That the mere preferring of the complaint which gave birth to that order does not render the defendant responsible in the circumstances of this case. The decree must be modified by disallowing the value of the timber. There will be no costs of this appeal.

Decree modified.

(a) 9, C. B. N. S., 505.