

## APPELLATE CIVIL.

*Before Mr. Justice Stephen and Mr. Justice Holmwood.*

MAHADAR MOHANTA

v.

BALARAM GAGOI.\*

1908

Feb. 17.

*Wild animals—Elephant—Animals fera natura—Right of property—Animus revertendi—Recapture.*

When a wild animal has escaped from captivity and pursuit of it has been given up, the property which a man may formerly have had in it ceases, and it becomes open to any one else to reduce the animal to his possession, and when it will, for the time, become his property.

An animal which has gone away and may be supposed to be likely to return to a state of captivity, is not a 'wild animal'.

Where an elephant, which had apparently been in a state of domestication for a long time, disappeared from the jungle where it regularly grazed but resumed its domestic habits on being recaptured:—

*Held*, that the elephant was not a 'wild animal,' and that the property in it never ceased with the original owner.

*Chytun Churn Doss v. The Collector of Sylhet*(1), and *Peal v. Campbell*(2) referred to.

SECOND APPEAL by Mahadar Mohanta, the defendant No. 2.

This appeal arose out of a suit brought by the plaintiff to recover possession of an elephant valued at Rs. 2,500.

The plaintiff alleged that the elephant was a tame one and belonged to him for 20 years. The animal was regularly turned into the jungle to graze, with its legs hobbled. It disappeared from the jungle on the 11th September, 1903. The plaintiff went on pursuing it, but failed to recapture the animal.

In January 1904, it was caught in a stockade by the defendants who were lessees of an elephant-catching *mehal* from the Government.

The plaintiff asked the defendants to give back the elephant to him, but they refused to part with the animal. He then brought an action against the defendants under section 403 of the

\* Appeal from an order of remand, No. 86 of 1907, against an order of W. B. Brown, Judge, Assam Valley Districts, dated Nov. 20, 1906.

(1) (1873) 21 W. R. 75.

(2) (1878) 3 C. L. R. 515.

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Indian Penal Code, but the Court discharged the accused and made over the elephant to the plaintiff. Against that order the accused preferred an appeal to the Sessions Judge, and the learned Judge referred the case to the High Court. The High Court directed that the elephant should be made over to defendant No. 1, and hence the present suit.

The defendants pleaded, *inter alia*, that the elephant was not the plaintiff's tame elephant; that even if the elephant caught by the defendants were owned by the plaintiff, still the plaintiff having failed to pursue it, the animal became "wild" at the time of its capture by the defendants, and the plaintiff's right in it ceased to exist according to law. It was further pleaded that the plaintiff could not get possession of the animal unless he paid the expenses incurred by defendant No. 1 in capturing the said elephant from the jungle.

The Court of first instance, holding that the plaintiff's ownership of the elephant had ceased to exist before its recapture by the defendant, dismissed the plaintiff's suit. On appeal, the learned District Judge reversed the decision of the first Court and remanded the case.

Against this decision the defendant appealed to the High Court.

*Babu Mon Mohan Dutt*, for the appellant. The animal in this case is a wild animal by its nature. It strayed away, and the plaintiff lost sight of it and gave up its pursuit. Although the animal was a tame one at one time, it having been in company with wild animals for two or three months, it regained its wildness at the time of its recapture; and, therefore, when the defendant captured it, the plaintiff had lost all right in it. The cases of *Chytun Churn Doss v. The Collector of Sylhet*(1), and *Peal v. Campbell*(2) support my contention.

No one appeared for the respondent.

STEPHEN AND HOLMWOOD JJ. This is an appeal against the order of the District Judge of the Assam Valley Districts by which he remits the case to the lower Court for that Court to come to a conclusion as to damages.

(1) (1873) 21 W. R. 75.

(2) (1878) 3 C. L. R. 515.

The question at issue is whether the plaintiff is entitled to an elephant who strayed from him in the month of September 1903, and who was captured by the servants of the Government *mehal* in the ensuing January. It is sought to withstand his claim on the ground that the elephant at the time of his capture was a wild animal in whom the plaintiff had lost all rights of property. There is no doubt that the law of this country as derived from the Institutes of Justinian and as recognised in England is that, when a wild animal has escaped from captivity and pursuit of him has been given up, the property which a man formerly may have had in him ceases, and it becomes open to any one else to reduce the animal to his possession, when it will for the time become his property.

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The question we have to decide is whether the elephant in this case was a wild animal. Now it is contended on behalf of the defendant that all elephants are from the nature of the case wild animals, because we may take it as a general rule that all elephants are born in a state of wildness. Two authorities have been quoted to us to support this contention. One is the case of *Chytun Ohuru Doss v. The Collector of Sylhet*(1), where a passage in Stephen's Commentary reproducing the law as laid down by Justinian is applied to the case of an elephant who had escaped from the control of his master. This part of the judgment is entirely *obiter*, as the case was decided against the plaintiff on the question of identity, and the point of law raised was not entirely answered by the part of the judgment to which we have referred.

The question again came before this Court in the case of *Peal v. Campbell*(2), where the elephant escaped from his former master and was captured by some one else. The case there was decreed in favour of the defendant. The facts as stated in the judgment of the Court are that the animal in question escaped from the master's premises or from the place where it had been left to graze in company with other elephants which were wild, and not merely did not return to its master but kept aloof from any habitation of man and resumed unmistakably the wild habits which had been familiar to it before its capture; and after recapture had to be treated precisely in the same manner as other wild elephants.

(1) (1873) 21 W. R. 75.

(2) (1878) 3 C. L. R. 515.

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Applying the law, as laid down in these authorities, to the present case, we are of opinion that the wildness of an elephant who has escaped from a life of domestication must in every case depend upon the circumstances. One test of wildness is supplied by Justinian, being followed by subsequent authorities, and this is called *animus revertendi*. If the animal has gone away and may be supposed to be likely to return to a state of captivity, it is obviously not wild. But there may be other tests of its wildness, and one is suggested by the case of *Peal v. Campbell*(1), and is this, that supposing the animal is recaptured, has it or has it not to be treated like a wild animal? In this case the elephant had apparently been in a state of domestication for a long time, and it appears from the judgment that it resumed its domestic habits on being recaptured. This seems to us to be a conclusive proof that it was not wild and that the property in it had never ceased under the general law relating to wild animals.

There is one other matter which goes a long way in opposition to the conclusion we are asked to adopt, that all elephants are wild, and that is the Act for the Preservation of Wild Elephants, (VI of 1879) This applies to wild elephants and makes it an offence to capture any such elephant. It also repeals certain sections of the Indian Forests Act which applied only to elephants. This makes it obvious that the Act contemplates the existence of tame elephants; and whereas it makes an offence to capture wild elephants it contemplates, and does not affect, the recapture of tame elephants apparently by the original owners.

The result is, that we hold that the elephant in this case was not a wild animal, that the property in him of the plaintiff had not come to an end when he was captured by the Officials of the *mehal*, and that the learned Judge's order to have the case remitted to the lower Court for compensation under section 168 of the Indian Contract Act was a proper and suitable order.

The appeal, therefore, is dismissed. We make no order as to costs.

*Appeal dismissed.*

S. C. G.

(1) (1878) 3 C. L. R. 515.