ALLAHABAD HIGH COURT

Kashi

Vs

Jagoo Bai

(Bennet, J.)

10.11.1933

JUDGMENT

Bennet, J.

1. This is a second appeal by defendants against a decree of the lower appellate Court upholding the decree of the Court of first instance for Rs. 22-8-0 damages on account of one shisham tree and one mahua tree appropriated by the defendants. The plaintiff sued on the ground that he was the owner of the entire village and that the shisham tree had dried up and the defendants cut the timber down and took it away and that they had also cut the mahua tree. The defence was that these two trees stood on the land of which the defendants were tenants and that their ancestors had planted these two trees; that according to law and custom of the village the defendants were owners of the trees. The suit was filed in the Court of the Small Cause Court Judge, and the Small Cause Court Judge passed an order to the effect that the plaint should be returned for presentation to the proper Court as the suit was not cognizable by the Court of Small Causes in view of Section 23, Provincial Small Cause Courts Act. as a question of title was involved which could not be finally decided in the Court of Small Causes. The first point which has been raised in second appeal is that the order was incorrect and that the case should have been heard by the Court of Small Causes, and that the Munsif had no jurisdiction to try the case. Section 23(1), Small Cause Courts Act, states as follows:Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may, at any stage of the proceedings, return the plaint to be presented to a Court having jurisdiction to determine the title

3. Learned Counsel for the appellants refers to a ruling reported in *Puttangowda, v. Nilkanth Kalo*[1] where it was held:We are of opinion that the authorities rightly decide that a Court of Small Causes can entertain a suit, the principal purpose of which is to determine a right to immovable property, provided the suit in form does not ask for this relief but for payment of a sum of money.

4. The particular case in which the question had arisen was a suit to recover from the defendant Rs. 12 the value of certain trees felled by the defendant which stood on the plaintiff's yard, and the defendant denied that the yard and the trees belonged to the plaintiff. In the referring order there was a reference made to Section 23 on p. 677, but there is no reference made to Section 23 in the judgment of the Full Bench on pp. 680 and 681, and the reference made is to Section 15 and to Section 33 and these two sections are mentioned in the head note to the case as the sections in regard to which the decision is given. In this High Court there is no decision in favour of the view advanced by the appellant. In the General Clauses Act, Section 3(25) it is stated:Immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

5. Under this definition it is clear that the trees when they were growing were immovable property. In Umed Ram v. Daulat Ram (1883) 5 All. 564, it was held for the purpose of the Muffassil Small Cause Courts Act, Act 11 of 1865, that standing timber was not moveable property. Reference was also made by learned Counsel to Cheda Lal v. Mulchand (1891) 14 All. 30, in which it was held that standing crops were immovable property in the sense of the General Clauses Act, and of Clause (6), Schedule 2, Small Cause Courts Act, Act 9 of 1887. That however was a case for the enforcement of a lien on the hypothecated sugar-cane crops which were still standing in the field, and it was held that these crops were immovable property, and that a Court of Small Causes was not competent to try a suit which was barred by Clause (6), Schedule 2. It is appears to me that Section 23 lays down that a suit is barred from the jurisdiction of the Small Cause Court when the right of the plaintiff and the relief claimed by him depend upon the proof or disproof of a title mentioned in that section. I do not consider that I should follow the ruling of the Bombay High Court which appears to lay down that if the relief is merely a money relief, the fact that it depends on a question of title of the nature indicated by the section does not matter. The word used in the section is the word, 'depend" and the section does not require that the relief should be itself a relief in regard to title but that the relief should depend upon the proof or disproof of title. In the present case there is no doubt that the relief of damages for which the plaintiff asks does depend upon the proof or disproof of the title of the plaintiff to the trees in question, and that those trees constituted, when they were standing, immovable property, For these reasons I consider that the lower Courts were correct in entertaining this suit. The second point that was urged was that the custom was unreasonable and harsh and one which should not have been enforced by a Court of law. The custom in question is embodied in the Wajibularz of 1287-F, and is translated as follows:All groves belonging to the tenants are recorded in the supplementary jamabandi. Tenants who have planted or are in possession of the trees have no right of selling or mortgaging the trees, but they can appropriate the wood with the permission of the zamindar.

6. This Wajibularz dates from the year 1879-80, and therefore is prior to the time when these trees were planted. The trees therefore must be presumed to have been planted with knowledge of this custom recorded in the Wajibularz. I do not consider that the custom is unnecessarily

harsh, that it is not an uncommon custom specially when applied to isolated trees planted in the holding of tenants, as is found in the present case. No doubt if tenants desire to plant a grove they may take the special permission of the zamindar. But even if the expression "grove-holder" were correct in the present case as used by the lower appellate Court, Section 197 of the Agra Tenancy Act, Act 3 of 1926, provides that Clause (b) does not apply if there is any custom or contract to the contrary. I do not think however that the isolated trees in question can be considered to form a grove or that the defendants can be considered to be grove-holders. For these reasons I dismiss this second appeal with costs. Permission is granted for a Letters Patent appeal.

Cases Referred.

1(1913) 37 Bom. 675