

ALLAHABAD HIGH COURT

Shiv Sahai

Vs.

Har Nandan

Second Appeal No. 4033 of 1958

(S.S. Dhavan, J.)

21.09.1962

JUDGMENT

Dhavan, J.

1. This is a plaintiffs' second appeal from the decision of the Additional Civil Judge, Farrukhabad dismissing their suit for recovery of damages against the defendants. The dispute relates to the value of mango fruit alleged to have been illegally plucked from a grove by the defendants. The plaintiffs alleged that they and the first defendant were the joint grove-holder of the grove, the plaintiffs' share being one half. They complained that in the year of the suit, there was a good crop of mango but the defendants misappropriated the whole of it which they were not entitled to do. The plaintiffs valued the crop at Rs. 220/- and claimed Rs. 110/- as the value of their share.
2. The defendants contested the suit and raised a number of pleas in defense. They denied that the land was a grove and alleged that they have been cultivating it exclusively and had become sirdars after the abolition of *zamindari*. They also denied that they had plucked any mangoes from the trees standing on the land.
3. As the plaintiffs had claimed to be bhumidhars and the defendants sirdars of the land, these two issues were remitted to the revenue Court which decided them against the defendants. The trial Court accepted the finding of the revenue Court and also held that the land was grove-land of which the plaintiffs were joint bhumidhars. It also held that the defendants had misappropriated the entire crop and awarded the plaintiffs a sum of Rs. 100/- as damages.
4. On appeal the learned Judge reversed the finding of the trial Court that the and was

a grove and held that it was not. He was also of the opinion that even if the defendants had plucked the mangoes from the trees standing on the land, the plaintiffs had failed to prove that the fruit was plucked from trees standing on their portion of the land. He allowed the appeal and dismissed the suit of the plaintiffs who have come to this Court in second appeal.

5. I have read the judgments of both the Courts below and the pleadings of the parties. I think the finding of the lower appellate Court that the land is not a grove cannot be upheld. The plaintiffs had alleged that 14 trees were standing on the land which has an area of 1.92 bighas which is equal to less than 1¼ acres. The defendants on the other hand alleged that there were only 9 or 10 trees on the land. A Commissioner was appointed who reported that the plot contained 13 mango trees which were old and big in size. He also reported that they covered the major portion of the land. The learned Judge, however, rejected the report of the Commissioner on two grounds first, because, the defendants had filed an objection alleging that the Commissioner's inspection was made behind their back and secondly there was nothing to show that the Commissioner had not inspected the wrong plot. I think both these reasons were invalid. The Commissioner, who was a member of the Bar, had stated in his report that he had made the inspection in presence of the parties, but the defendants alleged in their objection that this statement was not true. The allegation was not supported by an affidavit. The learned Judge acted improperly in accepting the bare word of an interested litigant against that of a lawyer executing a commission on behalf of the Court. His whole approach was due to a lack of appreciation of the status and function of the bar which has been assigned an important role in the judicial process, in addition to being the main recruiting ground for the High Court and the Supreme Court bench. The statement of counsel is always given weight by the Court, so much so that this Court has frequently directed an inquiry into the conduct of a judicial officer on the basis of counsel's statement. In rejecting the report of its own Commissioner on the bare word of a litigant the lower appellate, Court departed from the well-established tradition of the Courts that the word of a member of the bar who has executed a commission on behalf of the Court should be believed unless there is cogent evidence against it. The approach of the learned Judge in addition to being improper offends against common sense. A lawyer executing a commission is disinterested, like the Court itself, in the controversy between the parties, whereas an average litigant will not hesitate to make all sorts of allegations in attacking a Commissioner's report if it is against him. I must not be misunderstood as laying down

that it must be presumed that a Commissioner can never misconduct himself; but the Court should not take notice of allegations made by a biased litigant against the conduct of the Commissioner unless it is supported by an affidavit or statement of counsel or other cogent evidence. There was none in this case.

6. The learned Judge observed,

"there is nothing on the record to show that the commission was executed in the presence of the defendants". In making this observation he committed several errors. In the first place it is not correct that there was no material to show that the commission was executed in the presence of the parties. The formal report of the Commissioner submitted to the Court detailing the circumstances in which the Commission was executed is a part of the record of the Court and the statements contained in it should be accepted as correct unless there is cogent evidence to the contrary. There was none in this case. Secondly, in making this uncalled for observation the learned Judge virtually insinuated that the Commissioner, a member of the Bar, had made a false statement in this report. Thirdly, the learned Judge placed the onus on the Commissioner to prove the veracity of his report instead of requiring the litigant to prove its inaccuracy. Fourthly, - and this is a very serious irregularity - the learned Judge disbelieved the Commissioner without giving him an opportunity of being heard in his defence. He does not appear to have realized that this sort of unfair attitude is calculated to discourage members of the bar from assisting the Court by accepting commissions from it. I think the trial Court made the correct approach in taking no notice of an objection imputing misconduct to the Commissioner which was unsupported by any evidence whatsoever. For these reasons. I hold that the learned Judge had no justification in law in rejecting the Commissioner's report.

7. The Commissioner had reported that the land contained 13 mango trees which were fully grown and big in size and covered the major portion of the land. It was, therefore, obvious that the land was grove land within the definition contained in Section 3 (6) of the U. P. Tenancy Act which provides in effect that grove land means any piece of land which has trees in such numbers that when fully grown they will preclude any considerable portion of the land being used primarily for any other purpose. In this case, the Commissioner had reported that the major portion of the land was covered by the trees; it followed that the trees preclude a considerable portion of

the land from being used primarily for the purpose of cultivation. The learned Judge was influenced by the fact that there had been some cultivation on the land. But the definition of grove land in the Act does not exclude cultivation altogether but merely says that the number of trees should be large enough to prevent the land from being used primarily for any other purpose. The learned Judge overlooked the word "primarily". For these reasons I hold that the learned Judge misdirected himself in determining whether the land in dispute was grove-land or not, and his finding must be reversed. I hold that the land was grove land. It would follow that the defendants could not have acquired any adhivasi rights in it.

8. Alternatively, the learned Judge held that even if the land was a grove, the plaintiffs had not proved that the mangoes had been plucked from the plaintiffs' portion. He completely disregarded the pleadings of the parties. The plaintiffs had alleged that the defendants had plucked the fruit of the entire grove whereas the defendants denied this allegation and asserted that the mangoes had been plucked by the villagers. The trial Court rejected the defendant's story as incredible. The defendants did not plead that they had plucked mangoes from their own portion, and thus the finding of the appellate Judge is based on a misreading of the pleadings. It can, therefore, be reviewed in second appeal. Disagreeing with his view I concur with the finding of the trial Court that the defendants plucked the entire crop of the grove and kept the proceeds to themselves. The plaintiffs are, therefore, entitled to damages to the extent of their half share.

9. I allow this appeal with costs, set aside the decision of the lower appellate Court and restore the decree of the trial Court.

Appeal allowed.