## APPELLATE CIVIL.

*Before Mr. Justice Beaman and Mr. Justice Heaton.*

1914. *July* 23.

SITABAI KOM RAGHUNATH (ORIGINAL PLAINTIFF), APPELLANT, *v.* SAMBHU SONU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Land Revenue Code (Bom. Act V of 1879), section 83—Transfer of Property Act (IV of 1882), section 108, clause (h)—Permanent tenant—Right to cut trees—English law of fixtures—No application in this country.*

A permanent tenant, the origin of whose tenancy is lost in antiquity and who has planted trees upon the lands demised, has a right to cut them down and to use them.

The English law of fixtures and the principles upon which it is based have no applicability in this country.

SECOND appeal against the decision of P. J. Taleyarkhan, Acting District Judge of Ratnagiri, confirming the decree of K. H. Kirkire, First Class Subordinate Judge of Ratnagiri.

The plaintiff sued to recover damages for the wrongful cutting of some fruit-bearing trees by the defendants and for an injunction restraining them from cutting other trees in future. The plaintiff also claimed Rs. 20 on account of the rent of fruit-bearing trees planted by the defendants. The plaint alleged that the defendants held the lands in suit as plaintiff's yearly tenants and had no right to cut the trees in the lands, that they wrongfully cut a certain number of fruit-bearing trees standing on some of the lands, that they had also paid no rent for the cocoanut, mango and other fruit trees planted by them, and that they were liable to pay Rs. 20 as rent for the trees over and above what they paid for the lands.

The defendants contended that they were permanent tenants and the trees were planted by their ancestors

* Second Appeal No. 54 of 1913.

and they had a right to cut them, that they disputed the number of trees alleged to have been cut and the amount of damages, and that they were paying only a fixed rent and were not liable to pay anything extra for the trees.

The Subordinate Judge found that the defendants were permanent tenants and were entitled to the trees which they had cut and that they were not liable to pay separate rent for the fruit-bearing trees over and above the rent they paid for the lands. The suit was accordingly dismissed.

The plaintiff appealed and the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

*Jayakar*, with *P. D. Bhide*, for the appellant (plaintiff) :—The defendants are tenants and as such they have no right to cut trees. The plaintiff is the owner of the soil and on the principle of the maxim *quid quid plantatur solo solo cedit* the landlord is the owner of the trees. According to the ruling in *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal*[1] property in trees is by a general rule of law vested in the proprietor of the land unless a contrary custom is proved. The onus of proving custom is on the tenant and no such custom is alleged by them or proved.

The ruling in *Imdad Khatun* v. *Bhajirath*[2] is to the effect that even though the trees are planted by the tenant, he cannot transfer them.

*Coyaji*, with *B. V. Desai*, for respondents 1, 3 and 6 (defendants 1, 3 and 6) :—It is found that the defendants are permanent tenants and that the trees have been planted by them. In the case of permanent tenants the

(1) (1894) 22 Cal. 742. (2) (1888) 10 All. 159.

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landlord is entitled to rent only and the tenants have a right to cut trees. At any rate the tenants have a right to cut trees under section 108, clause (*h*) of the Transfer of Property Act.

The cases relied on were decided under the local Acts. They are therefore not applicable.

BEAMAN, J. :—The only question argued before us is whether the defendants, who are found to be permanent tenants, have a right to cut trees upon the lands demised. The plaintiff is found to be the owner of the lands, but the tenants upon the principle stated in section 83 of the Land Revenue Code are found to be permanent tenants, that is to say, the origin of their tenancy is lost in antiquity. The dispute between the plaintiff and the defendants now centres upon the right of the defendants to cut down trees which, *ex concesis* and by the admission of the plaintiff, they have themselves planted. In these circumstances we entertain no doubt whatever but that the defendants have the right which they claim. The English law of fixtures and the principle upon which it is based have no general applicability in this country. Therefore, before the passing of the Transfer of Property Act, which deals expressly with circumstances like these, we must be referred, in the absence of any special usage, to what we conceive to be principles of equity, justice and good conscience, and none of those in our judgment compel us to say that a permanent tenant who has planted trees upon his lands is precluded from cutting down and making use of them. It is unnecessary to discuss the numerous cases to which we have been referred, since the principle of our judgment is very simple, very clear, and has since found Legislative sanction in section 108, clause (*h*) of the Transfer of Property Act. It has been contended that that section does not apply to agricul-

tural leases, and we are not supposing that it does, but we do think that the principles to which it gives expression are principles which, for the most part, were good law in respect of the facts covered by them before they found Legislative expression in the Transfer of Property Act, and among such would certainly be the principle upon which we found our decision here. We think, therefore, that the decree of the lower appellate Court must be confirmed and this appeal dismissed with all costs.

*Decree confirmed.*

G. B. R.

## CRIMINAL REFERENCE.

*Before Mr. Justice Heaton and Mr. Justice Shah.*

EMPEROR v. VINAYAK NARAYAN ARTE.*

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*Criminal Procedure Code (Act V of 1898), section 349—Trying Magistrate sending up a case to the Sub-Divisional Magistrate on the ground that he cannot pass adequate sentence—Sub-Divisional Magistrate sending up the case to another Magistrate—Committal of the case by such Magistrate to Court of Session—Commitment not valid—Practice and Procedure.*

A Magistrate of the Second Class trying a case sent up the case to the Sub-Divisional Magistrate on the ground that he could not pass an adequate sentence. The latter transferred the case to a Magistrate of the First Class, who committed it to the Court of Session. A question having arisen if the commitment was legal:

*Held*, quashing the commitment, that under section 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub-Divisional Magistrate alone who was competent to deal with the case.

THIS was a reference made by K. B. Wassoodew, Additional Sessions Judge of Thana.

* Criminal Reference No. 31 of 1914.