

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Roy Nundiput Mahta v. Kartick Nath
Panday, from the High Court of Judica-
ture at Fort William in Bengal; delivered
Saturday, 5th April 1873.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal in which Roy Nundiput Mahta is the Appellant, and Kartick Nath Panday is the Respondent. The Appellant was the Plaintiff in the suit below, and the Respondent was the Defendant. The suit below was brought not only against the present Respondent, but was also brought against Purahoo Bhugut as a second party, and Manogee Roy a third party, as a *pro formâ* Defendant. The suit was brought to recover the possession or the value, if the possession could not be obtained, of 561 logs of timber, valued at Rs. 9,982 and 8 annas. The Plaintiff stated that he had purchased that timber of the Defendant Purahoo Bhugut, who was the second Defendant in the suit, and that he purchased it in the name of Manogee Roy, who was his servant, and who was made a party *pro formâ*. We may put Manogee Roy altogether out of the question. The Plaintiff alleges that, having purchased those 561 logs of timber, the Defendant Kartick Nath Panday, in collusion with Purahoo Bhugut, the second Defendant, took the timber away and converted it. The Plain-

tiff's pleader stated, "That the circumstance
 " which led to the institution of the suit
 " against the Defendant No. 1 is, that the
 " Defendant No. 1 carried away the timber from
 " the ghat referred to in the petition of plaint
 " in collusion with, and with complicity of,
 " Defendant No. 2. Our suit against Defendant
 " No. 2 is not in consequence of his being the
 " vendor, but for his complicity with the Defen-
 " dant No. 1 in taking illegal and forcible
 " possession. It was a mistake of the writer to
 " apply the word 'principal' exclusively to the
 " Defendant No. 1, for both Nos. 1 and 2 are
 " principal Defendants." The Plaintiff's case
 therefore was that Purahoo Bhugut, who was
 the second Defendant in the suit, joined with
 Kartick Nath Panday, the first Defendant, in
 carrying the timber away. The Plaintiff set up
 that he had purchased the timber from the
 Defendant Purahoo Bhugut on the 10th Kartick
 1274, which would be, I think, about October
 1866. He says he purchased it for Rs. 9,982 and
 8 annas; that he paid the consideration money,
 and that the receipt was given for that amount.
 The purchase by the Plaintiff was disputed, but
 it was found by both courts that the Plaintiff did
 purchase the timber and pay for it to the second
 Defendant Purahoo Bhugut, and their Lordships
 see no reason to doubt that the Plaintiff did
 purchase the timber as alleged. But the defence
 of Kartick Nath Panday, who is the Respondent
 in this appeal, is this. He says that a contract
 was entered into with him on the 5th of Magh
 1273 by Deoraj Bhugut on behalf of Purahoo
 Bhugut, Deoraj being the brother and gomashtha,
 and it was a question whether he was not
 also a partner of Purahoo Bhugut. The De-
 fendant Kartick Nath Panday claims the
 right to this timber under that contract of the
 5th Magh, 1273, which was prior to the purchase
 by the Plaintiff in 1274.

The zillah judge, who tried the case in the first
 instance, came to the conclusion that that docu-

ment, the suttā of the 5th Magh 1273, was not a genuine document, partly on the ground that it referred to a previous suttā of the 23rd October 1865, which had not been produced. On the other hand, the judges of the High Court held that the suttā of the 5th Magh 1273 was a genuine document. The zillah judge also found that Deoraj Bhugut was merely the gomashā of Purahoo Bhugut, and that he had no authority to enter into that contract. The judges of the High Court differed from him on that point, and held that Deoraj Bhugut was authorized to enter into the contract.

Now, with reference to the point as to the non-production of the suttā of the 23rd October 1865, it appears to their Lordships that, notwithstanding the non-production of that document, there is sufficient to satisfy them that the suttā of 1273 was a genuine document. The Defendant Purahoo Bhugut, who was a party to the suit, was examined as a witness, and he does not deny in his evidence that the suttā was executed. He merely says, that his brother was only his gomashā and had no authority to enter into such contracts, but he does not dispute the fact that the document was executed. The document recited that Deoraj Bhugut had entered into an agreement with Baboo Kartick Nath Panday, who is the first Defendant, a contractor for the timber on the 23rd October 1865, to supply him with "1,500 logs of timber of 16 cubits each, " such as would be approved of and suited to the " measure of the Opium Godown at Patna, at " the rate of 22 rupees for each log, as provided " by the terms of the said agreement." Then it recites—" By reason of the transaction being one " for a large sum of money, and also that the money " had to be taken under receipts after the date of " the agreement above mentioned, and it being " necessary to have the conditions, according to " which the timber is to be supplied, reduced to " writing, the occasion arose for the execution of " a formal document in respect of the aforesaid

“ transaction.” By the contract of the 23rd October 1865, Purahoo Bhugut had entered into a contract to supply 1,500 logs of timber at the Godown of Patna on behalf of Kartick Nath Panday, for which Kartick Nath Panday was to pay, according to the terms of the agreement; afterwards Kartic Nath Panday advanced money to Deoraj to enable him to get the timber from the authorities at Nepaul. It was, therefore, very reasonable that a new contract should be entered into by which, instead of Kartick Nath Panday’s agreeing to pay for the timber on delivery, he was to have the benefit of the advances which he had made. And so this contract provided that Kartick Nath Panday was to have the benefit of the advances which he had made, and interest upon those advances in settlement for the payment of the timber. Deoraj says “ I shall, agreeably to the conditions of the “ aforesaid agreement, after the same shall have “ been measured, take the price thereof from “ you, and I shall take back such timber as shall “ not be approved of, and shall prefer no claim in “ respect to the value thereof. And for carrying “ out the said contract, according to the terms “ of the former agreement and under receipts “ subsequent thereto, I have received the sum of “ Rs. 10,000, and I am this day taking Rs. 2,000, “ making in all Rs. 12,000, for which amount I “ am accountable as an advance from you. I “ shall make a calculation of this entire amount “ and of such further additional sums, if any, “ which you may pay me with interest at the “ rate of Rs. 3 per cent. per month upon the “ gross amount, whatever such amount may be. “ On the date when the timber is measured, the “ account of the value thereof shall be settled. “ On that day if, after payment of the “ interest, any balance remains against me, that “ shall be credited to the amount of the original “ sums advanced to me, and if any excess “ balance is shown in my favour, after deducting “ that from the amount of principal and interest,

“ I shall receive such excess balance from you.” So that then there was to be a settlement of account when the timber was delivered. If there should be a balance coming to the vendor Purahoo Bhugut he was to receive it. If on the other hand there should be a balance due to the other side, it was to be paid. Well then, having made that arrangement with regard to the settlement for the timber, it was necessary that some provision should be made to secure to Kartick Nath Panday the re-payment of the advances which he had made for the timber; and therefore the document proceeds—“ Until “ such time as the conditions of this agreement “ are fulfilled, in exchange for the advances “ received, I have mortgaged the 1,500 logs of “ timber, at present stacked on the banks of the “ Narainee, and the 900 logs of timber, at present “ in Chupkia and Tajpore on the bank of the “ Bagmuttee, all which timber I shall not sell or “ mortgage, or dispose of in any manner, until “ the completion of the terms of this agreement ; “ and if I do not fulfil the terms of this agree- “ ment, or if I carry them out in an unsatisfac- “ tory manner, and make any delay or neglect “ in delivering the timber, then the price of such “ timber shall be at the rate of 15 rupees for “ each log.”

Now, if this contract was entered into, and if Deoraj had authority to enter into it, it is clear that the Defendant had the security of the timber for the advances which he had made. It appears clear that 1,500 logs of timber were at Nepaul. That appears from the evidence of the Soobah, and also from the evidence of the karindah at Nepaul. It appears that the 1,500 logs were detained by the Nepaul Government until the duties on the timber should be paid, and that the advances were made by Kartick Nath Panday for the purpose of getting the release of the timber.

It is not necessary to go more fully into the evidence upon that point, because it is

clear from the evidence that the advances for the release of the timber were made by Kartick Nath Panday. The karindah says, that 571 of those 1,500 logs were sent down, and that a servant on the part of Kartick Nath Panday went with it. That servant has been called as a witness, and he proved that he did not actually go down with it, but that it was sent down the river, and at a certain point of the river it was marked with the name of Kartick Nath Panday. The Plaintiff has given no specific evidence as to the timber that was actually seized, or as to the marks which were upon it. But there can be no doubt in the minds of their Lordships upon the evidence, that the 561 logs of timber for which the Plaintiff is suing is a portion of the 571 logs of timber which were brought down from Nepaul, and which were cleared by means of the advances made by Kartick Nath Panday.

Now, as to the authority of Deoraj to make the contract, it is clear that Purahoo Bhugut could not have got the timber down from Nepaul unless the advances had been made by Kartick Nath Panday. But the advances having been made by Kartick Nath Panday, the timber was brought down and placed on the banks of the river at Simerwari. The timber would not have been at Simerwari, but for the advance which had been made by Kartick Nath Panday to enable Purahoo Bhugut's servants to clear it from Nepaul. Then, the timber being on the banks at Simerwari, Purahoo Bhugut is said to have sold 561 logs of it to the Plaintiff, and it is said and proved by the witnesses, and also stated, by the Plaintiff's pleader, that, when the logs were sold to the Plaintiff, the Plaintiff's servant was put in charge of them, he says, "Between the period from 10th to 25th Kartick 1274, F.S., the timbers," (that is the 561 timbers) "were counted out and delivered " by the Defendant No. 2, to Plaintiff's men on " that very spot where they were kept. As no

“ boats could be procured, my servants counted
 “ out and allowed the timber to remain in
 “ the same place, and the man appointed
 “ to keep watch was our servant.” And
 the Defendant, Purahoo Bhugut, says at page
 50 that Jhooree Mullah was put in posses-
 sion, as the servant of the Plaintiff, to take
 charge of the timber which was sold. Now, as
 the learned judges remark, if that timber had
 been delivered to the Plaintiff in the manner
 stated, and his servants had been put in charge
 of it, how was it possible that 571 logs of timber,
 of 16 cubits each in length and more than a foot
 in thickness, could be removed from the banks of
 the river into the boats for the purpose of being
 carried down to Patna without the man, who was
 present in charge of that timber and watching it,
 knowing of the circumstance? It was impossible
 that 571 logs of timber could have been dealt
 with in that manner without the knowledge
 of the man in possession, if he had actually been
 left in possession or to watch it, as stated in
 that evidence. If he had been in charge and
 the timber was taken away by force, he
 must have known of it at the time, and he
 would have made his complaints at the time;
 but no complaint whatever appears to have been
 made with regard to the removal of the timber
 until it is found on its road to Patna coming
 down the river.

Now Muddun Mohun Bose shows, and I think
 his evidence is exactly in accordance with the
 statement of the Plaintiff's own pleader, that
 Purahoo Bhugut did assist in removing the
 timber. He gives a description of having got the
 timber at Nepaul under the advances. He says “ I
 “ had that timber made into rafts, and had the
 “ ‘ mark ’ of Baboo Cartick Nath, Defendant's
 “ name, put on it, that is to say, the *nishan*,
 “ that is the word ‘ Kartick ’ carved on it, with an
 “ iron chât, and took it away; but on account
 “ of the rainy season I could not carry it on to
 “ Patna, and I kept some of the timber at Ghat

" Simerwari and some at Ghat Mahowah ; and I
 " kept some at Bhowampore, that is, I took it on
 " shore, and I appointed some peadahs, some on
 " my own account and some on account of Baboo
 " Kartick Nath Panday, to look after it." Now
 it is much more probable that the timber, which
 was left there, was left under the charge of the
 servants, of Kartick Nath Panday, than the
 servants of the Plaintiff, for if it had been under
 the charge of the Plaintiff's servant, he must have
 known at the time of its being removed into boats
 for the purpose of being carried down. He goes on
 and says, " I appointed some Peadahs, some on my
 " own account, and some on account of Baboo
 " Kartick Nath Panday, to look after it, and we
 " came away during the rains. After that, in
 " the month of November last, I went there, and,
 " according to Purahoo Bhugut's instructions,
 " for he accompanied me, I had it packed and
 " despatched it to Patna. Subsequently, while
 " on the way, it was detained at first by the police,
 " and after that by the Peahahs." There can be
 no doubt that that is the timber of which the
 Plaintiff is speaking in his plaint, when he charges
 the Defendant with taking away his timber.

If then this evidence is true, that Purahoo
 Bhugut at the time was present and autho-
 rized the removal of the timber for the
 purpose of carrying it down to, and delivering it
 at, Patna, can it be doubted that he was
 carrying it down for the purpose of delivering
 it in accordance with the terms of the sutta
 to the Defendant? And if so, whether Deoraj
 was his partner or not, it appears to be clear that
 he must have known that that timber had been
 obtained by the advances made by Kartick Nath
 Panday, and that the timber was being removed
 in pursuance of the contract entered into by
 Deoraj when he signed the sutta. If so, it
 appears that the sutta was a genuine one, that
 the Defendant Kartick Nath Panday had a lien or
 mortgage upon the timber previously to its
 being sold to the Plaintiff. That being so, the

Plaintiff is not entitled to maintain this suit against Kartick Nath Panday for the purpose of recovering it.

The learned judges of the High Court have held that the sutta to the Defendant was a genuine document; and they held that the Plaintiff was not entitled to recover that timber.

Their Lordships are called upon to reverse that decision upon a point of fact, but their Lordships, so far from saying that there is any reason to doubt the correctness of that decision, are satisfied that the sutta was a genuine one, and that it was ratified by Purahoo Bhugut even if Deoraj had no authority to enter into it. The learned judges found that Deoraj was the brother and partner of Purahoo Bhugut. Whether that is so or not, whether he was the partner, or had authority to enter into the contract or not, there can be no doubt on the evidence that Purahoo Bhugut ratified the contract which Deoraj had entered into with the Defendant.

Under these circumstances their Lordships are of opinion that the decision of the High Court is correct, and they will therefore humbly recommend Her Majesty that the decision be affirmed, with costs.

