Privy Council Appeal No. 65 of 1924.

Goh Choon Seng - - - - - - - - *Appellant.*

v.

Lee Kim Soo - - - - - - - - *Respondent.*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY, 1925.

Present at the Hearing:

LORD WRENBURY.

LORD PHILLIMORE.

LORD CARSON.

[*Delivered by* LORD PHILLIMORE.]

The defendant-appellant was the owner of a cocoanut, fruit and rubber estate near Singapore, and the plaintiff-respondent was the lessee of a small adjacent property upon which were certain pottery works and kilns. The respondent's property was to the N. and W. of the appellant's property, and the two properties were conterminous along the S.E. boundary of the respondent's land as far as that extended. Then came some Crown land left waste and uncultivated, wedged in between the S.W. boundary of the respondent's property and the continuation of the appellant's property, from which latter it was divided by a bamboo hedge.

On the 28th July, 1922, a fire or fires for the purpose of burning branches, jungle trees and other vegetable rubbish was or were kindled close to the bamboo hedge and spread across the wedge of Crown land on to the respondent's land, and burnt down a number of the buildings upon it.

For the damage thus sustained the respondent sued the appellant, alleging that the fire or fires had been negligently kindled or allowed to spread by the servants of the appellant. The appellant denied that his servants had kindled any fire, and

suggested that it was kindled on the Crown side of the hedge and might have been done by squatters.

From the evidence given at the trial it appeared that there were three heaps of vegetable refuse fit for burning on the appellant's side of the hedge, but that light had not been set to two of these, and that the third had been burnt out probably some time before. There were also three heaps on the Crown land side of the hedge, all of which had been recently kindled and were seen to be smouldering later on in the same day.

The learned Judge who tried the case came to the conclusion that the damage was caused by one or all of the fires on the Crown land and not by any fire on the appellant's land, but that the fires which did the mischief had been kindled by the servants of the appellant, who had come through the bamboo hedge and made their heaps on the Crown land. He gave judgment for the respondent, referring the amount of the damages to the registrar for assessment.

Appeal was taken to the Supreme Court of the Straits Settlements, where the judgment was affirmed. From this affirmance the present appeal has been brought.

The first point taken is that the learned Judge was wrong in holding that there was sufficient proof that the fire was kindled by the servants of the appellant. As to this matter, their Lordships can express their opinion quite briefly.

Where there are concurrent findings of fact by the Court of first instance and the Court of Appeal, it is only in rare cases and upon special grounds that their Lordships advise that the decision should be reversed. Upon the evidence as recorded in this case there was ample ground for the decision on this point of fact, and it must stand.

The appellant, however, raised a further point in the Court of Appeal, both by his memorandum of appeal and by the argument of the counsel, to this effect: that the Judge was wrong in holding that, if the fires were kindled by the defendant's servants, they were acting within the scope of their authority.

The argument takes its foundation from the fact that the fires were not kindled on the appellant's land, but upon that of a third party, and it is said that, as this involves a trespass and therefore an illegality by the appellant's servants, no authority from the master can be implied.

It does not appear that this point was taken at the trial, and it may be that, if it had been taken, evidence could have been adduced sufficient for the Court to infer that leave and licence had been given by the Crown or by somebody in occupation under the Crown to carry the rubbish through the hedge and burn it on waste spots in the uncultivated land; in which case there would have been no trespass.

Their Lordships will, however, assume that there may have been a trespass. Still, they would agree with the Judges of the

Supreme Court that the kindling of the fires was not outside the scope of authority of the appellant's servants, and that he is responsible for the negligent way in which the fires were kindled and controlled.

The authority upon which learned counsel for the appellant principally relied was *Bolingbroke* v. *Swindon Local Board* (9 C.P., p. 575, decided in 1874). In that case the manager of the sewage farm for the Local Board, having extensive powers of management, when cleaning a watercourse which served as a boundary, took upon himself to cut away the bank on the further side so as to widen it, and in doing so cut down brushwood, underwood and trees which impeded the course of the stream. An action for the trespass being thereupon brought against the Local Board, it was held by the Court that the manager had exceeded his authority, which, though ample for anything to be done upon the land of the Local Board, was confined to that land, and that the Local Board was therefore not responsible for his acts. Upon the construction which the Court put upon the special facts of the case, the decision seems to follow; but these facts are unlike those of the present case.

To begin with, the action in that case was not for negligence, but one brought for trespass by the party upon whose land the trespass had been committed. This distinction is pointed out in the judgment of the Supreme Court. The trespass as Brown, J., observed, was an essential element in the acts complained of. Here it is merely an incident. There is no rule of law that it cannot be within the implied scope of authority of a servant that he should not in the course of his work commit some minor act of trespass. In the present case it is not disputed that the men working on the appellant's plantation had authority to pile the rubbish in heaps and to set fire to it, and that if the fires had been on the other side of the hedge there would have been no such defence to the action.

The principle is well laid down in some of the cases cited by the Chief Justice, which decide that " when a servant does an act which he is authorised by his employment to do under certain circumstances or in a manner which are unauthorised and improper, in such cases the employer is liable for the wrongful act."

As the learned Chief Justice says, the manager of the plantation was authorised by his employment to burn the weeds, and that he did it in a manner and at a place which was not authorised by his employer, makes no difference. Time and place are only circumstances or incidents. It is not even suggested that it would have made any difference to the mischief done if the fires had been kindled on the appellant's side of the hedge.

As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads:—(1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the

master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads 2 and 3. Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it. In these cases the master is, nevertheless, responsible.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

GOH CHOON SENG

v.

LEE KIM SOO.

DELIVERED BY LORD PHILLIMORE.

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