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so is no bar to her rights of inheritance. Accordingly, the contingency for which the will provides not having occurred, and there being no gift over, the testator must be regarded as intestate, and his widow as heiress-at-law entitled to succeed.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

WOMES CHUNDER CHATTERJEE AND ANOTHER (DEFENDANTS) v. CHUNDEE CHURN ROY CHOWDHRY AND ANOTHER (PLAINTIFFS).*

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Second Appeal—Improper Reception of Evidence by Lower Court—Remand.

On second appeal, the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.

The only cases which can be with propriety disposed of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds.

Watson v. *Gopee Soonduree Dossee* (1) dissented from.

THIS was a suit brought to recover possession of certain lands which the plaintiff, one Chundee Churn Roy Chowdhry, contended belonged to his zemindari, he having held possession of the same through his tenants. The defendant No. 1, previously to this suit, claimed the land in question as forming part of his nimhowla, and had brought a case under s. 530 of the Criminal Procedure Code; and the Criminal Court had held that he was entitled to remain in possession until such time as a Civil Court should decide the question of title. The plaintiff, therefore, brought this suit to have the question decided.

* Appeal from Appellate Decree, No. 2479 of 1879, against the decree of Baboo Kedaressur Roy, Subordinate Judge of Jessore, dated the 9th June 1879, affirming the decree of Baboo Manmotho Nath Chatterjee, Munsif of Bagirhat, dated the 2nd May 1878.

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The defendants, with the exception of one Sidam, contended, that the land in suit belonged to their ancestral nimhowla, and was comprised within the howla of one Parbut Sirdar.

Sidam, the son of Parbut Sirdar, however, filed a written statement, denying that the disputed land ever belonged to the howla of his father. The original patta relating to the nimhowla was not produced, but a copy of the same was admitted in evidence. The plaintiff produced a judgment in a case between Raja Suttyanund Ghosal and the present defendants, in which the Raja alleged, that his land forming a portion of the lands alleged to have been included in the nimhowla, had been made over to the defendant No. 1, under the order of the Deputy Magistrate, under s. 530 of the Criminal Procedure Code; in this judgment the nimhowla had been rejected as spurious, and a decree given in the Raja's favor.

The Munsif held, that the defendants' allegation as regards the nimhowla had already been disbelieved in the case of Raja Suttyanund Ghosal and themselves, and that the written statement of the defendant Sidam was also contradictory to the allegation of the other defendants, and that the evidence of the plaintiff's witnesses had clearly proved the disputed land belonged to the plaintiff's zemindari, whilst the evidence of the defendants' witnesses, as regards possession, was conflicting. He therefore gave a decree in favor of the plaintiff.

The defendants appealed to the Subordinate Judge, who held, that the plaintiff had satisfactorily proved, both by oral and documentary evidence, that the disputed lands belonged to his zemindari, and that he had been in possession of the same through his tenants, whilst, on the question of title, the written statement of Sidam was contrary to the contention of the other defendants, and that although this was not, strictly speaking, evidence as against them, yet, as they had been unable to disprove this statement, the presumption was against their contention; that they had also failed to prove the genuineness of the nimhowla; and that there was no such satisfactory evidence, either oral or documentary, on the record, on behalf of the defendants, as would justify the reversal of the decision of the Munsif. He, therefore, dismissed the appeal.

The defendants appealed to the High Court.

Baboo *Rashbehary Ghose* for the appellants.

Baboo *Durga Mohun Das* for the respondents.

The following judgments were delivered :—

GARTH, C. J.—I have had considerable doubt as to whether we ought not to remand this case for retrial.

The plaintiffs sue to recover possession of certain land which they say belongs to their zemindari.

The defendants, on the other hand, contend, that the land in question forms part of certain property which they hold under a nimhowla, subordinate to the howla of one Parbut Sirdar.

Both the lower Courts have found in favor of the plaintiffs; but it has been contended on appeal to this Court, that the Subordinate Judge has based his judgment upon certain documentary evidence, which was not legally admissible against the defendants. One document is a written statement filed in this suit by Sidam, one of the defendants, the son of Parbut Sirdar, in which he says, that the disputed land does not appertain to the howla of his father. This statement of Sidam, the Subordinate Judge appears to have treated as evidence against the other defendants, which he clearly had no right to do.

The other evidence consists of the proceedings in a suit brought by Raja Suttyanund Ghosal against the present defendants, in which a decision was given unfavorable to them, as regards their alleged nimhowla patta. These proceedings not being between the parties to this suit, were also improperly received as against the defendants.

The question which we have now to determine is, whether we ought to remand the case on account of the improper reception of this evidence.

The 167th section of the Evidence Act provides, that "the improper admission of evidence shall not be ground of itself for a new trial, if it shall appear to the Court before which the objection is raised, that, independently of the evidence objected to there was sufficient evidence to justify the decision." It

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seems to me, however, that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal, and the difficulty arises thus.

On second appeal we have no power to deal with the sufficiency of the evidence; we have only a right to entertain questions of law. And our duty being thus confined, it seems to me, that when evidence has been wrongly admitted by the Court below, this Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.

We cannot decide that question, as it seems to me, without examining in detail that other evidence, and determining, as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding.

I am sorry to say I have great doubt whether, in the case of *Watson* v. *Gopee Soonduree Dossee* (1), Mr. Justice Birch and myself were justified in deciding, as we did, that there was sufficient evidence (other than that improperly admitted) to justify the lower Court's judgment. I confess that it never struck me, until some time after that case had been decided, how much difficulty there was in most cases of second appeal in our attempting to deal with the sufficiency of the evidence.

On further consideration, I think that the only cases which we may with propriety dispose of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clearly from the judgment, a remand is unnecessary, because then the error committed by the lower Court has not affected the decision upon the merits. (See s. 578 of the Civil Procedure Code.)

It, therefore, only remains for us in this case to see whether, independently of the evidence improperly admitted, the Subordinate Judge has arrived at his conclusion upon other grounds. Now, both Courts appear to have found, upon the evidence of a

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large number of witnesses, that the land in question forms part of the plaintiff's zemindari.

The evidence improperly admitted related to the proof, or rather the disproof, of the defendants' nimhowla patta. But the defendants, as it seems to me, were bound to prove that patta affirmatively. The onus of proving it lay on them; and without such proof their case must of necessity fail.

Now, as to this patta, the Subordinate Judge finds, as I understand him (quite irrespectively of the documents which have been improperly admitted), that "no reliable evidence had been adduced by the defendants of the genuineness of their nimhowla patta;" and he says further, "as that patta has not been proved, the disputed land could not be held to be the right of the defendants, even if it were within the boundaries given in the patta."

He also says in conclusion, that "there is no such satisfactory evidence on the record on behalf of the defendants, either documentary or oral, as would justify me in reversing the finding of the first Court."

I am of opinion, therefore, that, in the present case, as the lower Court has found for the plaintiffs, upon evidence quite independent of that improperly admitted, a remand is unnecessary; and consequently that the appeal should be dismissed with costs.

MCDONELL, J.—I concur in holding that in this case a remand is unnecessary.

The Subordinate Judge has found that the defendants, upon whom the onus lay, have produced no satisfactory evidence, either documentary or oral, to prove that the lands in dispute formed part of their "nimhowla;" whereas the plaintiff had clearly proved not only his zemindari right to, but his possession of, the said lands within twelve years of suit. It is clear, therefore, that the Subordinate Judge has, quite independently of the evidence improperly admitted, upon other grounds, confirmed the Munsif's decision, and decreed the plaintiff's claim. This second appeal must, therefore, be dismissed with costs.

Appeal dismissed.