1884

QUEEN EMPRESS v. DHANANJOI CHAUDHURI.

their evidence. If the Deputy Magistrate in the first instance considered, under s. 257 of the Code of Criminal Procedure, that the application for summons for these witnesses was made for purposes of vexation or delay, or for defeating the end of justice, he might have refused to summon them at all. But having once granted the processes, he was bound to assist the accused in enforcing the attendance of the witnesses. The conviction and sentence must therefore be set aside, and the trial must proceed, processes being issued for the attendance of these witnesses.

*Conviction quashed.*

## APPELLATE CIVIL.

*Before Mr. Justice Field and Mr. Justice Pigot.*

1884
*June* 30.

ASSANULLAH (DEFENDANT) *v.* HAFIZ MAHOMED ALI (PLAINTIFF).*

*Judgment of the Appellate Court, Contents of—The Code of Civil Procedure (Act XIV of 1882), s. 574—Remand under ss. 566 and 587.*

Where the lower Appellate Court omits to give reasons for its decision, the High Court will retain the case in second appeal, and either require the Judge to state his reasons, or, in the event of his absence, refer the questions to his successor for fresh trial.

ONE Hafiz Mahomed Ali brought this suit to recover possession of a share in certain lands of mouzah Atrap, which had been washed away in 1275; but of which, since their re-formation in 1276, the plaintiff had possession until the Bengal year 1282. The defendant claimed the lands as his sole and undivided property, denied they were re-formation on the original site of mouzah Atrap, and stated that the lands in question commenced to accrete in 1260, of which the plaintiff or his predecessors had never been in possession.

The following issues were framed: (1) whether the boundaries were incorrect; (2) whether the claim was barred by limitation; (3) whether the allegation of possession and subsequent dispossession was

* Appeal from Appellate Decree No. 2231 of 1882, against the decree of T. M. Kirkwood, Esq., District Judge of Mymensingh, dated the 3rd of August 1882, affirming a decree of Baboo Nobin Chunder Ghose, Roy Bahadur, Subordinate Judge of that District, dated the 28th of July 1881.

1884

ASSAN-ULLAH v. HAFIZ MAHOMED ALI.

false; (4) when the disputed land commenced to accrete, and when it became fit for cultivation; (5) was the land in suit a re-formation on the original site of the plaintiff's mouzah Atrap, or re-formation on the original site of the defendant's mouzah Jhulkai.

On these issues the Subordinate Judge held that the plaintiff's right to the disputed land as the land of Atrap, and his possession within twelve years had been proved, and decreed the claim.

Various grounds, which are enumerated in the judgment of the High Court, were taken in appeal to the District Judge, who dismissed the appeal with these remarks: "The plaintiff sued for possession with mesne profits of certain lands, on the allegation that they were re-formation on the original site of village Atrap within the 5 annas 1 gunda 1 cowrie 1 krant share of pergunnah Attia belonging to plaintiff and defendant No. 1. Defendant No. 2, Nawab Assanullah, pleaded that the lands were re-formation on the original site of, and alluvial accretion to, mouzah Jhulkai within his zemindari. Atrap and Jhulkai are contiguous, and the Subordinate Judge found that the disputed land was a re-formation on the original site of mouzah Atrap; that plaintiff and defendant No. 1 were down to the diluviation in possession of 9 annas and 7 annas respectively; and that subsequently to the re-formation, down to 1280, they were in possession. He therefore gave the plaintiff a decree. There is no ground whatever for appeal. The lands belong to Atrap, and the plaintiff is not barred."

It was contended on appeal to the High Court that the decision passed by the learned Judge was opposed to the provision of s. 574 of the Code of Civil Procedure, and that the lower Appellate Court had assigned no reasons for its conclusion.

Baboo *Chunder Madhub Ghose* and Baboo *Sreenath Banerjee* for the appellant.

Baboo *Jogesh Chunder Roy* for the respondent.

The judgment of the Court (FIELD and PIGOT, JJ.) was delivered by

FIELD, J.—In this case the plaintiff sued to recover possession

1884

ASSAN-ULLAH v. HAFIZ MAHOMED ALI.

of certain lands, alleging that they were re-formations on the original site of mouzah Atrap, which belonged to him and the defendants jointly, in the respective shares of 9 annas and 7 annas.

The defendants pleaded limitation, and, amongst other matters, alleged that the lands were re-formations, not on the original site of mouzah Atrap, but upon the original site of mouzah Jhulkai, which was, and is, in the exclusive possession of the defendants themselves. A number of questions were raised in the pleadings, which were embodied in six issues raised by the Subordinate Judge who tried the case.

The Subordinate Judge gave the plaintiff a decree. Against that decree an appeal was preferred, and the following, amongst other objections, were taken in the grounds of appeal: *First*, an objection as to the boundaries of the two mouzahs; *secondly*, that the plaintiff had not proved his possession within twelve years of any portion of the land in dispute, and that he was, therefore, barred by limitation, and that the finding of the Subordinate Judge on this point was against the weight of evidence; *thirdly*, that the evidence as to the plaintiff's alleged possession was worthless and not reliable; *fourthly*, that the ijarah pottah filed by the plaintiff was collusive and not proved; and even assuming that it had been proved, there was no evidence that the lands in dispute were part and parcel of the lands specified in the pottah; *fifthly*, that a copy of the kabuliat had been improperly admitted as evidence, and that the original kabuliat itself had not been proved; *sixthly*, that the plaintiff's witnesses were his dependants and were not reliable; *seventhly*, that according to the weight of evidence re-formation had commenced in 1269, and had been completed in 1272, in which case the plaintiff would be barred, and that the Subordinate Judge had found against the weight of evidence that the re-formation commenced in 1278, and the land became fit for use and cultivation in 1275; *eighthly*, that the identification of the land by the ameen was imperfect and erroneous, and the ameen ought to have been called and examined as a witness; *ninthly*, that upon the evidence, the proper finding should have been that the land belonged to the defendant's mouzah Jhulkai,

and that the defendants had been in possession of the disputed lands for more than twelve years before the institution of the suit.

These were substantial grounds of appeal, which it was incumbent on the Judge of the Court below to decide. He has, however, disposed of the appeal in a very perfunctory manner. After referring to some of the points dealt with by the Subordinate Judge, he says: "There is no ground whatever for appeal. The lands belong to Atrap, and the plaintiff is not barred. The appeal is dismissed." There can be no doubt that a judgment of this kind is not a sufficient compliance with the requirements of the Code of Civil Procedure, s. 574 of which provides as follows: "The judgment of the Appellate Court shall state (*a*) the points for determination; (*b*) the decision thereupon; (*c*) the reasons for the decision; and (*d*) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled." An Appellate Court is required to record these particulars in its judgment for the purpose of affording the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise, if they see fit, and are so advised, the right of second appeal conferred by s. 584 of the Code. If a District Judge could dispose of appeals coming before him in a judgment of this kind, the right of second appeal might be altogether neutralized. We think that under the circumstances, we ought not, in the present state of the record, to deal with the appeal now before us, and that the best course will be to remand the case to the present District Judge of Mymensingh, in order that, having heard the points taken in the petition of appeal argued, he may determine the questions raised thereby, and submit his finding thereupon to this Court. In the case of *Doolee Chand* v. *Mussumut Oomda Begum* (1), the state of the record was somewhat similar, and Couch, C.J., said: "The proper course, it seems to us, would be, not to reverse the decree, but to require the Judge of the Appellate Court to state the reasons. The Court would retain the case in special appeal, but it would return the proceedings to the lower Court and require the Judge to state the reasons. There may be cases where that could not be done, in

(1) 18 W. R., 473.

1884

ASSAN-ULLAH v. HAFIZ MAHOMED ALI.

consequence of the death of the Judge or of his removal; but where it can be done, that is the course which ought to be adopted." In the present instance we are informed that Mr. Kirkwood, whose decree is now under appeal, is no longer the Judge of Mymensingh. The course suggested in the passage just cited is therefore not open to us. We think, however, that the course which we take is warranted by the provisions of s. 566 read with s. 587 of the Code of Civil Procedure. The lower Appellate Court has, in our opinion, omitted to determine certain questions, namely, the questions raised in the petition of appeal to that Court, which appear to us essential to the right decision of the case; and we therefore now refer these questions for trial to the Court of the District Judge of Mymensingh. The case will remain on our file, and on receipt of the District Judge's findings, we shall proceed to dispose of the appeal. It will be open to the appellant, within seven days after the receipt by this Court of those findings, to amend his grounds of appeal, and to the respondents to take any grounds of cross-appeal which they may be advised.

*Case remanded.*

## CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Macpherson.*

1884

*July* 1.

QUEEN EMPRESS *v.* SADHEE KASAL AND OTHERS.*

*Pardon—Criminal Procedure Code (Act X of 1882, s. 337, read with s. 338) —Offences not exclusively triable by Court of Sessions.*

A Sessions Judge cannot tender a pardon to an accused under s. 338 of the Criminal Procedure Code, where the offence for which he has been committed is not "triable exclusively by the Court of Sessions."

ON inspection of the statement of the Criminal Session of the Judge of Gya for the months of April and May, the High Court, under s. 435 of the Criminal Procedure Code, called for the record of the above mentioned case, in which Chowri Kasal and Sadhee Kasal had been charged under s. 411 of the Penal Code with dishonestly receiving and retaining certain stolen property,

* Criminal Motion 201 of 1884, from a decision of A. Smith, Esq., Judge of Gya, dated 17th May 1884.