

APPELLATE CIVIL.

1886
December 23*Before Mr. Justice Straight.*KHUDA BAKHSH AND OTHERS (DEFENDANTS) *v.* IMAM ALI SHAH (PLAINTIFF)*.

*Practice—Dismissal of suit by first Court without examining defendants' witnesses—
Reversal of decree on appeal—Duty of appellate Court to direct examination
of witnesses before reversing decree.*

Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal,—*held* that before doing so, the lower appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court, by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants.

The Court directed the first Court to examine the defendants' witnesses, and, having done so, to return their depositions to the lower appellate Court, which was to replace the appeal upon its file and dispose of it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Mr. *W. M. Colvin* and *Munshi Kushi Prasad*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

STRAIGHT, J.—This was a suit brought by the plaintiff-respondent, to have his title declared to certain land, and to have demolished certain erections which he alleged the defendants had placed thereon. A body of oral and documentary evidence was recorded by the Munsif, and, in respect of oral evidence, four witnesses were examined on behalf of the defendants. Upon the 18th May, 1885, the Munsif recorded in a *rukbar* that it was unnecessary that any other witnesses should be examined on the part of the defendants, and therefore a large number of witnesses who had been summoned by the defendants were not called or examined in the Munsif's Court. He dismissed the plaintiff's claim, and the plaintiff appealed to the Subordinate Judge. The Subordinate Judge, after an examination of all the oral and documentary evidence upon the record, came to the conclusion that the

* Second Appeal No. 457 of 1886 from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Azamgarh, dated the 22nd December, 1885, reversing a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 31st August, 1885.

1886

KHUDA
BAKHSII
v.
IMAM ALI
SHAH.

plaintiff had established his claim, and therefore, decreeing his appeal, reversed the Munsif's decision and decreed the plaintiff's claim. In the course of his judgment the learned Subordinate Judge refers to the evidence of the witnesses called for the defendants, and apparently disbelieves their statements for reasons stated in his judgment, *viz.*, that they appear all to be the creatures of the defendants, who are the zamindars of the mauza. Whether the learned Subordinate Judge's attention was called to the fact that the Munsif had made a *rubkar* on the 18th May, 1885, does not appear from the record. But it seems to me that before reversing the decision of the Munsif, and discrediting the evidence on the record presented by the defendants, the Subordinate Judge should have taken pains to afford the defendants an opportunity to supplement the evidence which they had given in the first Court by the testimony of those witnesses whom the Munsif had declared it unnecessary to hear. I think the case must be regarded, and should have been so regarded by the learned Subordinate Judge, as one in which the first Court had refused to examine the witnesses tendered by the party. I think the first plea taken in appeal and, in fact, the only plea which was urged by the learned counsel for the appellants has force, and should be allowed to prevail. What I am now going to do, and what the Subordinate Judge should have done before, is to direct the Munsif to examine the defendants' witnesses, and when he has done so, return their depositions to the Court of the Subordinate Judge, who will then replace the appeal on his file of pending appeals, and dispose of it according to law, and with regard to all the evidence appearing on the record. The costs incurred will be costs in the cause.

Cause remanded.

1886
December 23.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GIRRAJ BAKHSII (DEFENDANT) v. KAZI HAMID ALI (PLAINTIFF).*

Guardian and minor—Muhammadian mother—Act XL of 1858 (Bengal Minors Act), s. 18.—Mortgage by certificated guardian without sanction of District Court—Mortgage money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Act IX of 1872 (Contract Act), s. 65—Obligation of person receiving advantage under void agreement—Restitution.

S. 18 of the Bengal Minors Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian

* First Appeal No. 123 of 1885 from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Agra, dated the 18th March, 1885.