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the provisions of Art. 136 of the Limitation Act, and also that the Appellate Court was wrong in reversing the first Court's finding as to the passing of the consideration and the *benami* nature of the transaction between the plaintiff and the defendants.

As regards the last two points, we think that the findings of the Appellate Court are unassailable in second appeal. The onus lay upon the defendants to prove that consideration had passed, and that the transaction was *benami*; and in the evidence the lower Courts found against the defendants.

As regards the point of limitation we think that the appellant's vakil is wrong in contending that the case falls under Art. 136 of the Limitation Act. It is true that the defendants' vendors were not in possession at the time of the sale, but we think that the Article is not intended to apply to a suit brought against the vendors themselves upon their recovering possession. It appears to us that the lower Appellate Court was right in applying Art. 144 of the Act. That being so, we see no reason to interfere with the decision of the Court below. The appeal will be dismissed but without costs, as no one has appeared for the respondent.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BISVANATH MAITI (PLAINTIFF) *v.* BAIDYANATH MANDUL AND ANOTHER (DEFENDANTS).*

1885 *August* 11.

Judgment, Contents of—Appeal from Appellate Decree—Second appeal, Grounds for—Omission to state reasons in judgment—Civil Procedure Code, (Act XIV of 1882), *ss.* 574, 584.

The fact that the judgment of an Appellate Court is not drawn up in the manner prescribed by s. 574 of the Civil Procedure Code is no ground for a second appeal under s. 584 unless it can be shown that the judgment has failed to determine any material issue of law.

THE plaintiff in this suit, as sub-lessee under the defendant No. 3, sued to recover possession of a *chuck* named Nallar, with

* Appeal from Appellate Decree No. 315 of 1885, against the decree of H. Gillon, Esq., Judge of Midnapore, dated the 17th of November 1884, affirming the decree of Baboo Gonesh Chandra Chowdhuri, Subordinate Judge of that district, dated the 27th of February 1884.

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mesne profits. His case was that his lessor Mritunjoy Das, defendant No. 3, held possession of the *chuck* as *mourasi pattidar* under the zemindar; that he cleared the jungle, erected embankments and brought some portion of it under cultivation; that while thus in possession he let the *chuck* to him, the plaintiff, by a *mourasi mokurari* lease, dated the 2nd Falgun 1287 (12th February 1881); that he the plaintiff remained in possession up to Asar 1289 (June 1882) when he was dispossessed by the defendants Nos. 1 and 2.

The defendants Nos. 1 and 2 denied that the plaintiff or his lessor were ever in possession of the *chuck*, and pleaded that the suit was barred by limitation. They alleged that one Lukhikant Bidyabhuson was in possession of the *chuck* under an *amalnama* granted to him by the zemindar in the year 1273 (1866-67); that in the year 1275 (1868-69), the tenure was purchased from Lukhikant by Narain Mandul, father of the first defendant; that after that purchase Narain Mandul and after him the defendants cleared the jungle and cultivated the lands partly in *nij jote* and partly by tenants, and they claimed to have been in possession for upwards of twelve years. They further alleged that in the year 1281 (1874-75) Mritunjoy granted an *amalnama* to Narain Mandul and received rent from him, and they contended that the suit could not be mantained inasmuch as no notice of ejectment had been served on them.

The following issues were framed:—

(1.) Is the suit barred by limitation?

(2.) Was the plaintiff bound to serve the defendants with notice of ejectment?

(3.) Is the *potta* propounded by the plaintiff genuine?

(4.) Has the plaintiff's lessor, Mritunjoy Das, any right to the disputed *chuck*?

(5.) Have the defendants a right of occupancy in the disputed *chuck*?

(6.) If the plaintiff be held entitled to get *khas* possession, are the defendants entitled to any and what sum as compensation for clearing the jungle?

(7.) Is the plaintiff entitled to recover any and what amount of mesne profits from the defendants?

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The first Court decided the 1st, 3rd, 4th and 5th issues in favour of the plaintiff, but held that the defendants had been in possession of the disputed *chuck* for upwards of twelve years as tenants, though they had not acquired a right of occupancy, and being thus in possession as tenants and not as trespassers they were entitled to notice to quit, which had not been given them and, therefore, that Court dismissed the suit.

Upon appeal the lower Appellate Court delivered the following judgment :—

"The facts of the case are given in the lower Court's judgment.

Even supposing that the lower Court misapprehended certain portions of the evidence, I concur in the finding that the defendants were tenants of some kind and not mere trespassers. Furthermore granting, for the sake of argument, that the defendants are merely tenants-at-will, I cannot accept the appellant's contention that notice to quit was unnecessary, and that the institution of this suit was sufficient notice on the point. The cases of *Hem Chunder Ghose* v. *Radha Pershad Paleet* (1), *Rajendronath Mookhopadhya* v. *Bassider Ruhman Khondkhar* (2), and *Ram Rotton Mundul* v. *Netro Kally Dassee* (3) have been referred to and considered. I do not consider that it has been established that the defendant's tenure is of such a nature that formal notice to quit was unnecessary. I find nothing in the reported cases or in the Land Transfer Act to support the appellant's contention that the institution of this suit was sufficient notice to quit in the case of this particular tenancy.

I accordingly dismiss the appeal with costs."

Against that decree the plaintiff now preferred a special appeal to the High Court.

Mr. *W. Garth*, and Baboo *Kasikanta Sen*, for the appellant.

Baboo *Rashbehari Ghose*, and Baboo *Jogesh Chunder Dey*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

We have been pressed to set aside the decree of the lower

(1) 23 W. R., 440. (2) I. L. R., 2 Calc., 146.
(3) I. L. R., 4 Calc., 339.

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Appellate Court in this case upon the ground that the judgment is not in accordance with s. 574 of the Civil Procedure Code, that is, that the Judge has not categorically set down the points for determination, the decision thereupon, and the reasons for the decision. It is said that in the judgment as it stands there is nothing on which the appellant can satisfy himself whether or not he has good grounds for a second appeal. The lower Appellate Court delivered a very short judgment in which it confirmed the decision of the first Court. We find upon examination that the only point really before the lower Appellate Court was this, whether or not the defendants were tenants or trespassers in respect of the land from which the plaintiff sought to eject them. The learned counsel for the appellant has invited us to observe that the case was a very complicated one as set out in the pleadings and issues, and that the one point decided by the District Judge would by no means dispose of all the points raised. But we find that of the seven issues set down for trial, the 1st, 3rd, 4th, and 5th, were decided in favour of the plaintiff, and the plaintiff who was the appellant in the Court below had no reason to bring those issues up again. Four then out of the seven issues were decided in favour of the plaintiff. Two were decided in favour of the defendant, namely, the 2nd and 7th, or rather the decision on the 2nd issue made the decision of the 6th and 7th issues unnecessary. The 2nd issue was, "was it obligatory on the plaintiff to serve the defendant with notice of ejectment." It is now admitted that, unless the defendants were trespassers, it was obligatory on the plaintiff to serve them with notice of ejectment. If they were tenants at all, however low their station, they could not be ejected without notice. So that really the only point on which the lower Appellate Court's decision was required was, whether the defendants were tenants or trespassers. The Court below has decided that they were not trespassers but tenants of some kind or other. It is objected that the District Judge has not stated the particular evidence upon which he came to this conclusion, and that it was apparent from his judgment that he did not concur with the first Court in the construction put by that Court upon certain portions of the evidence.

We think that it would have been better no doubt if the

lower Appellate Court had stated somewhat more fully upon what its conclusion was based. But we have no doubt upon perusal of its judgment that the Court below had read the evidence and meant to find upon that evidence as a whole that the defendants were not trespassers. The fact that the judgment was not drawn up in the manner prescribed by s. 574 is not, we think, a ground for a second appeal under s. 584, unless it can be shown that the judgment had failed to determine any material issue of law. It is evident, as I have already observed, that there was no material issue of law before the Court, excepting the issue whether tenants-at-will are liable to be ejected without notice, and on that question it is now admitted there can be no dispute. The only issue before the lower Appellate Court was simply one of fact. The manner in which the judgment has been drawn up could not be a substantial error in procedure which may possibly have produced any error or defect in the decision of the case upon the merits, for no doubt the Judge had in his own mind already decided the case before he wrote his judgment.

That this fact is not matter for a second appeal was laid down by the late Chief Justice Sir Richard Couch in *Doolee Chund* v. *Oomda Begum*(1). The proper course to be followed in such a case is said to be to require the Judge, if still holding office, to supplement his judgment by giving the reasons on which it is based. Where the Judge is no longer holding that office, that course cannot be adopted. For that reason it cannot be adopted in this case. The Judge is no longer in the district from which this case came. It is clear, therefore, to us that the principal objection taken is not a ground in this case upon which a second appeal can be based. Another objection is taken in the written petition of appeal, that the lower Appellate Court was wrong in setting up for the defendants a case which they themselves did not set up, namely, that they are tenants-at-will. We find, however, that the lower Appellate Court did not hold that they were tenants-at-will, but simply said that they were tenants, and, even if so low as tenants-at-will, they are still entitled to notice before being ejected.

(1) 18 W. R., 473.

We, therefore, find no reason for disturbing the judgment or decree of the lower Appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

KANIZAK SUKINA (ONE OF THE DEFENDANTS) *v.* MONOHUR DAS (PLAINTIFF.)*

1885 *August* 18.

Civil Procedure Code (Act XIV of 1882), *s.* 317—*Benami system—Fraud—Suit against purchaser buying benami—Sale certificate granted in name of benamidar.*

Certain property belonging to a judgment-debtor was brought to sale and purchased by a person in the benami name of her daughter, then an infant, and the sale certificate was made out in the name of the latter. Subsequently the mother mortgaged the property, and the mortgagee brought a suit, obtained a decree, and had the property sold and purchased it himself. Upon his being resisted by the daughter in attempts to get his name registered as proprietor, he instituted a suit against both mother and daughter to establish his rights to the property. The daughter thereupon objected that such suit would not lie by reason of the provisions of s. 317 of the Civil Procedure Code.

Held, that the provisions of that section, which were intended to prevent fraud, were inapplicable to the facts of the case, and that the suit was maintainable.

THE plaintiff in this case sued to establish his right to, and to obtain possession of a ten-gunda and odd share in a certain village, alleging that he was a creditor of the defendant Takdir-un-nissa, and had purchased the land in suit at a sale in execution of a decree which he had obtained against her. The other defendant was Mussumat Sukina, daughter of the first defendant. The facts of the case were as follows:—One Hyder Ali, father of the defendant Takdir-un-nissa, was the owner of a one-third share in the whole village, and after his death a creditor named Dabi Misser obtained a decree against his widow, three sons and three daughters, whom he left surviving, and caused the whole of the one-third share in the village to be sold. The purchaser at that sale was one Mahomad Saleh, a pleader, who immediately

* Appeal from Appellate Decree No. 385 of 1885, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 23rd of October 1884, confirming the decree of Baboo Koilas Chandra Mukhorjee, Second Subordinate Judge of that District, dated the 29th of November 1880.