

1885

Baboo *Amarendranath Chatterji* for the respondent.

GOPAL
SINGH
v.
JHAKRI BAI.

The arguments sufficiently appear in the judgment of the Court (*FIELD* and *O'KINEALY, JJ.*) which was delivered by

FIELD, J.—Two points are raised in this second appeal. First, it is said, that the Judge in the Court below has received additional evidence without recording his reasons for so doing as required by s. 568 of the Code of Civil Procedure; and that, therefore, this evidence was improperly received, and ought to be treated as if it were not on the record. We think that the provision of s. 568 as to an Appellate Court recording its reasons for admitting additional evidence is mandatory or directory merely, and not imperative; and we think that the fact that the Judge in the Court below did not comply with this provision (with which most certainly he ought to have complied), does not, however, render the evidence irrelevant.

The second point pressed upon us is that, inasmuch as the Judge in the Court below received additional evidence, this appeal ought to be treated as a first appeal, and the learned vakil ought to be at liberty to go into the facts; and in support of this argument a decision of the Madras High Court (1) is relied upon. As at present advised we are not prepared to concur in this contention.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

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August 10.

DHARM SINGH AND OTHERS (DEFENDANTS) v. HUR PERSHAD SINGH AND OTHERS (PLAINTIFFS).*

Possession—Limitation Act (XV of 1877), Arts. 143, 144—Conflicting evidence of possession—Presumption of Title.

Where two adverse parties are each trying to make out a possession of twelve years, and the evidence is conflicting and not conclusive on either side, held, that the presumption that possession goes with the title must prevail.

* Appeal from Appellate Decree No 2048 of 1884, against the decree of H. W. Gordon, Esq., Judge of Sarun, dated the 12th of July 1884, affirming the decree of Baboo Kali Prasuana Mukherji, First Subordinate Judge of Sarun, dated the 9th of March 1883.

(1) See *Hinde v. Brayon*, I. L. R., 7 Mad., 52.

THIS suit was brought to recover possession of 12 bighas of land, under the following circumstances :—

The plaintiffs claimed the land in question as part of a plot of 48 bighas, descended to them as heirs of one Ram Dyal Singh, by whom the said plot had been acquired. The defendants denied this, and contended that the 48 bighas had been acquired by one Baij Nath Singh, the father of Ram Dyal Singh; and that he had made over the 12 bighas in dispute to his daughter's son Rawul Singh by a deed of gift; and they claimed to be entitled to them as his heirs. They further contended that they had been in adverse possession of the land for more than 12 years, and that therefore the plaintiffs' claim was barred by limitation.

The case was tried by the Subordinate Judge of Chupra, who, on the 9th March 1883, gave judgment for the plaintiffs with costs. The defendants appealed, and their appeal was heard by the Judge of Sarun, who delivered judgment on the 12th of July 1884.

The material part of his judgment is as follows :—“The parties are at issue on two points, *viz.*, (a) as to title, and (b) as to possession; and these points have to be determined in this appeal. The Subordinate Judge finds that the alleged gift of the land by Baij Nath Singh to Rawul Singh has not been proved by the defendants. I agree with him. There is only oral evidence on this head, and that is mostly hearsay, which cannot be admitted as legal evidence.

“The question then arises, by whom was the *mokurari* tenure acquired,—whether by Baij Nath Singh or by Ram Dyal Singh? The *rubakqri* of 14th December 1827 (Exhibit p. 7) shows that the *mokurari* stands in the name of Ram Dyal Singh, and one of the defendants' witnesses admitted in the former suit that the *mokurari* was acquired by Ram Dyal. The Subordinate Judge's view, therefore, that the property belonged to Ram Dyal, and not to Baij Nath, is clearly correct. Further, even if it be admitted that Baij Nath gave the property to his grandson (daughter's son), such gift was not valid, because he had no interests in the property, which he could transfer to him; and plaintiffs, being the lineal descendants of Baij Nath and Ram Dyal, are entitled to the property by right of inheritance. The plaintiffs then

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having established their title, there remains the question of possession. The defendants plead limitation, and therefore it rested on the plaintiffs to make out a *prima facie* case. The title being with the plaintiffs, the Subordinate Judge thinks—and I am of opinion rightly thinks—that the reasonable presumption is that they have been in possession under this title. He finds that the evidence of possession on the plaintiffs' side is, on the whole, reliable when coupled with the presumptions and probabilities of the case; and holds therefore that they have made out a *prima facie* case of possession within twelve years, which it lay on the defendants to rebut." The Judge then stated that he agreed with the reasons of the Subordinate Judge for regarding the defendants' evidence as suspicious and untrustworthy, and dismissed the appeal with costs. The defendants then appealed to the High Court.

Mr. G. Gregory and Munshi Mahomed Yusuf for the appellants.

Baboo Mohesh Chunder Chowdry for the respondents. .

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—The question argued in this case is one of limitation. It has been pressed upon us that the Judge in the Court below has disposed of the question of the plaintiffs' possession within twelve years with reference only to the presumption arising from the title which the Judge found to be in the plaintiffs. Now if the Judge had pursued this course, he would undoubtedly have been wrong. But beyond all doubt there is positive evidence of the plaintiffs' possession upon the record—evidence to which the Subordinate Judge very distinctly alludes; and it must be borne in mind that the Judge was confirming the judgment of the Subordinate Judge. We think then that what really was done is this; There was evidence of possession on both sides, and the Courts below preferred the evidence given by the plaintiffs, because it accorded with the title which was found to be in the plaintiffs. In doing so, that is in taking this course, they have followed the principle laid down by the Privy Council in the case of *Runjeet Panday v. Goberdhan Ram Panday* (1), a case

the facts of which are very similar to those of the present case. Their Lordships of the Privy Council there said: "In the midst, therefore, of this conflicting evidence, their Lordships think it right to consider whether there is any presumption to be derived from the other parts of the case in favour of the one side or the other. Now the ordinary presumption would be that possession went with the title. The presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession, as there is here on the part of the respondents, opposed by evidence, apparently strong also, on the part of the appellant, their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded; and that with the aid of it, there is a stronger probability that the respondents' case is true than that of the appellant."

We see, therefore, no reason to interfere, and we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

S. CAMPBELL (DEFENDANT) v. J. A. JACKSON, MANAGER OF THE
JOKAI ASSAM TEA COMPANY, LIMITED, (PLAINTIFF.)*

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June 19.

*Plaint, Form of—Practice—Form of Suit by Company—Corporation, Suit by—
Plaintiff, Misdescription of—Civil Procedure Code (Act XIV of 1882),
s. 435—Indian Companies Act (VI of 1882), s. 41.*

A plaintiff was filed in which the plaintiff was described as Mr. J., Manager of the X Company, Limited, and in the body of the plaint several allusions were made to the "plaintiff-company," and the claim made in the plaint was a claim made on behalf of the Company.

It was not suggested that the X Company was a Company authorised to sue or be sued in the name of an officer or trustee, nor was it shown that it was registered as a corporation under s. 41 of the Indian Companies Act.

Held, that the suit was badly framed and that it should be dismissed.

* In this case the plaintiff was described as "Mr. J. A. Jackson, Manager of the Jokai Division of the Jokai Assam Tea Company,

* Appeal from Appellate Decree No. 1259 of 1884, against the decree of C. J. Lyall, Esq., Officiating Judge of the Assam Valley Districts, dated the 18th of April 1884, affirming the decree of F. St. C. Grimwood, Esq., Subordinate Judge of Debrugar, dated the 11th of September 1883.