1912

JUGAL KISHORE SAHU v. KEDAR NATH.

puisne mortgagee might be seriously prejudiced if the prior mortgagee had released part of the property from his mortgage for less than its due proportion of the mortgage money and had nevertheless obtained a decree for the whole of the balance due on the mortgage.

It seems to us that the decisions of the Calcutta and Madras High Courts cited above are correct, and that whether they are correct or not, a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. It may be suggested that this should be the rule only where the mortgagee has notice of the puisne mortgage when he gives the release. It is unnecessary to consider this, for there is no question that the appellants had notice or must be deemed to have had notice of the puisne mortgages when they gave the release. In our opinion, the decision of the District Judge is correct. We dismiss this appeal with costs.

Appeal dismissed.

1912
July, 12.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

HABIB-ULLAH KHAN AND ANOTHER (DEFENDANTS) *v.* LALTA PRASAD AND ANOTHER (PLAINTIFFS.)*

Civil Procedure Code (1908), *order XXI, rule 23—Remand—Finding that burden of proof has been wrongly laid, without finding that the decision of the first court is wrong.*

It is not a good ground for passing an order of remand under order XLI, rule 23, of the Code of Civil Procedure, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision is wrong.

THIS was a suit for possession of certain alluvial land, the question at issue being whether the land accrued to a certain village as a whole so as to become the property of the zamindars (the plaintiffs) or whether it accrued specially to certain *muafi* land of the defendants. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land, and finding that they had failed to do so

* First Appeal No. 55 of 1912, from an order of I. B. Mundle, Additional Judge of Bareilly, dated the 1st of March, 1912.

dismissed the suit on this ground only. In appeal the Additional District Judge did not determine whether the suit was or was not barred by limitation, but on the finding that the court of first instance had laid the burden of proof on the wrong party, decreed the appeal and remanded the suit under order XLI, rule 23, of the Code of Civil Procedure. From this order of remand the defendants appealed to the High Court.

Mr. *B. E. O'Conor*, for the appellants.

Mr. *J. M. Banerji* (for Dr. *Satish Chandra Banerji*), for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—The plaintiffs in this case are the proprietors of village Bakhshpur in the Pilibhit district, and the defendants are the holders of certain *muafi* lands situated within the same village. It appears that the *muafi* lands held by the defendants are on the boundary of the village, at a point where it is subject to fluvial action by the Khakhra river. The real dispute between the parties is whether certain land, accreted to village Bakhshpur by alluvion through the action of the Khakhra river at this point, accrues to the *muafi* lands of the defendants and becomes a part of their *muafi* holding, or accrues to the village of Bakhshpur as a whole and becomes a portion of the village lands of which the plaintiffs are proprietors. This was the first point raised by the pleadings. The defendants further pleaded that the plaintiff's suit was barred by limitation, as they had never been in possession within 12 years of the institution of the suit of any portion of the land claimed. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land, and, finding that they had failed to do this, dismissed the suit on the issue of limitation only. On appeal the learned Additional Judge has neither held that the suit is barred by limitation nor that it is not so barred. He says that the court of first instance has mislaid the burden of proof and that it was for the defendants to show that they had been in possession for more than 12 years before the institution of the suit. On this he has decreed the plaintiff's appeal, and remanded the case under order XLI, rule 23, of the Code of Civil Procedure, for disposal on the merits, the effect of his order is to put the parties in a difficulty as it is open to question whether the learned Munsif accepting the directions of the lower appellate court regarding the burden of

1912

HABIB-UL-LAH KHAN v. LALTA PRASAD.

proof, could still find that the suit is barred by limitation. In any case, it is not a good ground for passing an order of remand under order XLI, rule 23, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision was wrong. Regarding this question of the burden of proof we have heard both parties, and we think it desirable to make one or two remarks. The suit as framed was undoubtedly one to which article 142 of the first schedule of the Indian Limitation (Act No. VIII of 1908) would apply, and the learned Munsif was right in saying that on the suit thus framed, it lies on the plaintiffs to prove both title and possession within limitation. We think, however, that the first court did not fully realize the sort of evidence which might, perhaps, have been sufficient to discharge the burden of proof laid on the plaintiff in this matter. If the suit is to be disposed of on the limitation issue alone without any finding on the question of title (and we are not sure that this is, in fact, a suitable way of disposing of the present case), that issue will have to be disposed of on the assumption that the plaintiffs are right and the defendants are wrong on the issue of title. Looking at the case in this way, it could be open to the plaintiffs to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than 12 years before the institution of the suit it had remained within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title. The law on this point is laid down in *Jagadindra Nath Rai* v. *Hemanta Kumari Devi* (1). We may remark on this point that the evidence of the settlement papers as to actual possession does not seem to have been considered at all by the lower appellate court, there is a presumption that the possession of the parties was correctly shown in those records until the contrary is proved.

We set aside the order of the Additional Judge and direct that court to readmit the appeal to its file of pending cases and dispose of it according to law, with due regard to the remarks made in this order. If the lower appellate court is of opinion that the case cannot be disposed of on the question of limitation without a finding on some other issue, it will, of course, be open to it to exercise

(1) (1912) 8 A. L. J., 1176.

its powers under order XLI, rule 25, of the Code of Civil Procedure. But the case should not be remanded under rule XXIII of that order unless the finding on the question of limitation is definitely reversed. Costs here and hitherto will abide the event.

Appeal allowed—Cause remanded.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

KRISHNA JIVA TEWARI AND OTHERS (DEFENDANTS) *v.* BISHNATH KALWAR AND OTHERS (PLAINTIFFS).*

Act No. I of 1872 (*Indian Evidence Act*), *section* 69—*Proof of document—Document required by law to be attested—Death of attesting witnesses—Hindu law—Joint Hindu family—Parties.*

On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe, who also signed the document himself. *Held* that, it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe, it was sufficient to prove the handwriting of the scribe. *Radha Kishen* v. *Fateh Ali Ram* (1) referred to.

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit. *Hori Lal* v. *Munman Kunwar* (2) and *Nathu Lal* v. *Lala* (3) referred to.

The plaintiffs in this case sued as heirs of the original mortgagee of a mortgage executed on the 9th of August, 1883, for sale of the mortgaged property. The defendants were the representatives of the original mortgagors, who were four out of five brothers, members of a joint Hindu family, and certain subsequent transferees. The court of first instance (Subordinate Judge of Ghazipur) decreed the plaintiffs' claim, exempting, however, a one-fifth share from the operation of the decree. The defendants appealed, but their appeal was dismissed by the District Judge. Some of the defendants then appealed to the High Court.

Mr. *Muhammad Ishaq Khan* and Babu *Surendro Nath Sen*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Gobind Prasad*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This was a suit for sale upon a mortgage of August the 9th, 1883, brought by the heirs

* Second Appeal No. 1175 of 1911, from a decree of Sri Lal, District Judge of Ghazipur, dated the 28th of June, 1911, modifying a decree of Chajju Mal, Subordinate Judge of Ghazipur, dated the 17th of March, 1911.

(1) (1898) I. L. R., 20 All., 532. (2) (1912) I. L. R., 34 All., 549.
(3) (1912) I. L. R., 34 All., 572.