

in that behalf within the meaning of the Limitation Act, and in the event of finding that question in favour of the plaintiff it will try the other questions raised in the suit.

Appeal decreed.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

JAGANNATH PRASAD (PLAINTIFF) v. BADRI PRASAD AND OTHERS (DEPENDANTS.)*

Partition—Abadi not formally divided, but separate portions thereof taken possession of by the various owners—Agreement amongst owners—Rights of owners as to portions in possession of each.

A village was divided into three mahals, with the exception of the *abadi*, as to which it was found that it had not been divided between the mahals by demarcation on the village map, or on the spot, but the owners of the mahals had been in separate possession of portions of it.

Held that the only possible inference from this finding was that the parties had agreed among themselves as to their possession of the *abadi*, and that, so long as the agreement continued, each party was entitled to use the portion in his possession in any way he pleased, so long as such user or possession did not interfere with the user or possession of the owners of the other mahals. *Kumudini Mazumdar v. Rasik Lal Mazumdar* (1) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of Karamat Husain, J. The facts of the case sufficiently appear from the judgement under appeal which was as follows:—

“The plaintiff brought an action against the defendants and asked for the following reliefs:—‘It may be declared that the plaintiff is the owner and in possession of the land in dispute; that the defendants have no right whatever to interfere with and offer obstructions to the plaintiff; that they have no right to offer obstructions to the plaintiff in building walls, &c., on the land in dispute and that they have no right of any kind whatever against the plaintiff.’ The main defence was that the property was joint. The court of first instance decreed the plaintiff’s claim and that decree was affirmed by the lower appellate court. That court found as follows:—‘I find that the land in suit is part of the *abadi* of mauza Sisolar, which consists of three mahals, and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot; but that the owners of the mahals have been in separate possession of portions of it, and that the plaintiff has been in possession of the land in suit. The defendants have no right to prevent him putting a wall round it.’

Appeal No. 42 of 1911, under section 10 of the Letters Patent.

(1) (1906) 11 C. W. N., 517.

1911

ZAYB-UN-
NISSA BIBI
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MAHARAJA
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“A second appeal is” preferred by the defendants, and it is argued by their learned counsel that, the property being joint, the plaintiff has no right to build, and that, he is not entitled to the decree given him. This objection is in my opinion sound. The learned vakil for the respondent, however, argues that having regard to the law laid down in *Madan Mohun Shaha v. Rajab Ali* (1) the decree of the lower appellate court should not be [disturbed. The ruling relied on by the learned vakil does not go the length of laying down that a co-sharer who is in exclusive possession of a portion of joint property can build upon it without the consent of the co-sharers.

“I therefore allow the appeal; set aside the decrees of the courts below, and dismiss the plaintiff’s suit with costs in all courts.”

The plaintiff appealed.

Munshi *Damodar Das*, for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

RICHARDS, C. J. and BANERJI, J.:—This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to continue in possession of a plot of land in the *abadi* and that the defendants had no right to interfere with his building a wall. The court of first instance decreed the suit. The lower appellate court affirmed that decree. On appeal to this Court, however, the decrees of the lower courts were set aside and the plaintiff’s suit dismissed. The findings of the lower appellate court, which are binding upon us, are quoted in the judgement of the learned Judge of this Court as follows:—

“I find that the land in suit is part of the *abadi* of mauza Sisolar, which consists of three mahals, and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot, but that the owners of the mahals have been in separate possession of portions of it and that the plaintiff has been in possession of the land in suit.”

The clear meaning of this finding is that the owners of each mahal have a separate portion of the *abadi* of which they are in exclusive possession. This was the defendants’ own case in the lower appellate court. The dispute there was that the defendants claimed that the particular plot on which plaintiff wanted to build the wall was in their possession and not in the possession of the plaintiff. The learned Judge of this Court says:—“A second appeal is preferred by the defendants, and it is argued by their learned counsel that the property being joint, the plaintiff has no right to build and he is not entitled to the decree given him. This objection is in my opinion sound.” It seems to us

(1) (1900) I. L. R., 28 Cal., 228.

that the learned Judge altogether lost sight of the finding that the owners of the different mahals were all in exclusive possession of particular plots. The only inference which can be drawn from this is that the parties by mutual consent allowed the owners of the different mahals to separately enjoy the different parts of the *abadi*, in other words, that there was an agreement between the parties. This agreement must be inferred from the action of the parties themselves. So long, therefore, as this agreement continues, the parties in exclusive possession of a part of the *abadi* are entitled to use it and enjoy it in such way as they please, so long as such use or possession does not interfere with the use of owners of other mahals of what is in their separate possession. This principle was fully recognized in the case of *Kumudini Mazumdar v. Basik Lal Mazumdar* (1). We think that the decisions of the courts below were correct and ought to be restored. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both appeals to this court.

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 JAGANNATH
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Appeal allowed.

REVISIONAL CRIMINAL.

1911
 October 20.

Before Mr. Justice Champier.

EMPEROR *v.* SARDAR AND OTHERS.*

Criminal Procedure Code, section 423—Appeal—Power of appellate court to alter finding of acquittal into one of conviction.

An appellate court can, under section 423 of the Criminal Procedure Code in an appeal from a conviction, alter the finding of the lower court, and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen-Empress v. Jabanulla* (2) followed.

In this case several persons were charged by a Magistrate with offences under section 147 read with section 225 and section 353 of the Indian Penal Code. The Magistrate convicted six of them under section 147 read with section 225 of the Code and sentenced them to three months' rigorous imprisonment.

* Criminal Revision No. 505 of 1911 from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 7th August 1911.

(1) (1906) 11 C. W. N., 517. (2) (1896) I. L. R., 23 Cal., 975.