Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Tudball.

MUHAMMAD SIDDIQ (PLAINTIFF) *v.* MAHMUD-UN-NISSA BIBI AND ANOTHER (DEFENDANTS).*

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January, 10.

Civil Procedure Code (1908), *order XLI, rule 27—Additional evidence called for by appellate court—Re-summoning of witness already examined before the court of first instance.*

Held that order XLI, rule 27, of the Code of Civil Procedure, 1908, is not intended to enable an appellate court to recall and re-examine before it a witness who has already been examined and cross-examined before the court of first instance.

THE facts of this case are fully stated in the judgement of the Court. Briefly, and so far as the purposes of this report are concerned, they were as follows:—The plaintiff's suit was for pre-emption, based upon the Muhammadan law. The suit was brought in the Munsif's court, where the plaintiff appeared as a witness and was examined and cross-examined. The Munsif decreed the claim. The defendants appealed to the District Judge who made an order, purporting to be under order XLI, rule 27, for the examination of the plaintiff before him. The plaintiff was accordingly examined by the District Judge, who then proceeded to dismiss the suit.

The plaintiff appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailas Nath Katju*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.:—This appeal is connected with Second Appeal No. 239 of 1915. The appeals arise out of suits for pre-emption Having regard to certain matters which transpired during the litigation, it is necessary to set out the facts at some length. It appears that there were four sales. The first sale was made on the 6th of January, 1913. This was a sale in favour of Muhammad Siddiq (the appellant). The vendor was Musammat Abdul-un-nissa. The second sale was made on the 16th of March, 1913, in favour of Mahmud-un-nissa and Abdul-Wali by Musammat Bashir-un-nissa. The third sale was made on the 11th of October, 1913, in favour of the plaintiff Muhammad Siddiq by Abdul Wali and others. The fourth sale

* Second Appeal No. 238 of 1915, from a decree of L. Johnston, District Judge of Meerut, dated the 4th of February, 1915, reversing a decree of Vishnu Ram Mehta, Munsif of Meerut, dated the 9th of November, 1914.

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was of the 18th of January, 1914, in favour of Mahmud-un-nissa and Abdul Wali by Azmatullah. All four sales were of shares in the same mahal in which none of the vendees were previously co-sharers. The first persons to institute a suit were Musammat Mahmud-un-nissa and Abdul Wali, who sought to pre-empt the sale made in favour of Muhammad Siddiq. In this suit pre-emption was sought of both the sales in favour of the plaintiff. This suit was instituted on the 3rd of January, 1914. It was dismissed by the first court on the 31st of March, 1914. Muhammad Siddiq instituted his suits (out of which the present appeals arise) on the 9th of May, 1914. The suits were decreed by the court of first instance. Muhammad Siddiq based his claim on Muhammadan law. He alleged that, having become a co-sharer by virtue of the sale of the 6th of January, 1913, he was entitled to claim pre-emption against Mahmud-un-nissa and Abdul Wali and that he duly performed the conditions of the Muhammadan law as to pre-emption. In his plaint he did not specify the day when he made his demands, and the defendants in their written statement called attention to this fact, suggesting that particulars were purposely omitted to prevent them being able to meet the plaintiff's case by proper evidence. We may here mention that, whatever foundation there might have been for this suggestion, the defendants, although they had many opportunities, never demanded particulars from Muhammad Siddiq, nor asked the court to order that they should be furnished. On the 28th of October, 1914, after issues had already been framed and after the case had been before the court more than once, Muhammad Siddiq was examined. He there stated all the particulars of his demand, including the day (and the time) on which he received notice of the sale. All the plaintiff's witnesses were examined that day. The defendants had in court six witnesses, but the only witness whom they examined was the defendant Abdul Wali himself. Their other witnesses they exempted. They made no application to the court, even then, to postpone the hearing of the case to enable them to produce evidence to rebut the evidence given on behalf of the plaintiff. The case, however, was, for another reason, postponed until the 6th of November, when arguments were heard; judgement in favour of the plaintiff

was delivered on the 9th of November. The defendants appealed to the learned District Judge, and on the case coming before him he made an order that he required Muhammad Siddiq to be examined "in order to enable him to pronounce judgement." He did not record any reason why additional evidence should be produced. He has, however, in his judgement (which he subsequently delivered) given his reasons for calling Muhammad Siddiq. He there says :—"After reading the records in the two cases and finding that the learned Munsif had largely accepted the evidence tendered to prove the demands in the two cases, because the plaintiff was a respectable pleader practising in his court, yet had not subjected him to any special examination to sift his evidence, I deemed it necessary, under order XLI, rule 27, to enable me to pronounce judgement, to examine Muhammad Siddiq myself."

We have gone through the evidence of Muhammad Siddiq in the court of first instance and we there find that he was examined and cross-examined upon practically all the matters on which the learned District Judge subsequently examined him (or rather cross-examined him).

Order XLI, rule 27, is as follows :—"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (*b*) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined. Wherever additional evidence is allowed to be produced by an appellate court the court shall record the reason for its admission."

In numerous cases it has been pointed out how slow the courts ought to be in allowing the production of additional evidence in the appellate court. The cases on the subject will be found in Messrs. Woodroffe and Ameer Ali's work on the Code of Civil Procedure, page 1268. In the present case the witness, as already stated, had been already a witness in the court below, had been examined at some length and cross-examined at great

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length. There was no gap in the evidence or new matter about which it was necessary to examine him. The learned District Judge merely cross-examined him on his previous evidence. It seems that Muhammad Siddiq was sitting in court near his pleader, and that the learned District Judge, finding he was there, thought that he might be able to get to the bottom of the matter by cross-examination. We have not the smallest doubt that the learned District Judge's intentions were the best. At the same time we have no hesitation in saying that the provisions of order XLI, rule 27, clause *(b)* were never intended to be exercised under circumstances like those we are now dealing with. Furthermore, the learned Judge seems to have mixed up the evidence in the two pre-emption suits. The property in each of these suits was different, the sales were different and some of the witnesses were different. One may have been true and the other false, or both may have been true and both false. But the cases were separately tried and ought to have been separately disposed of. The view which the learned Judge took in one case appears, practically speaking, to have caused him to reject the evidence in the other case. We think Muhammad Siddiq was prejudiced by the action which the learned Judge took. It was his duty (unless he was justified in calling additional evidence) to decide each case upon the evidence as it stood. The fact that he took upon himself to call Muhammad Siddiq and to cross-examine him seems to have to a large extent led him away from the consideration of the evidence that was already on the record. For example, he seems largely to have forgotten that the plaintiff's evidence in the first pre-emption suit was supported by his brother and one other witness, and, but for the statement of one witness called on behalf of the defence, stood unrebutted. There was just as much reason for recalling the other witnesses for the plaintiff for cross-examination as for calling the plaintiff. In fact it would have been much fairer to the plaintiff, if, having recalled the plaintiff for cross-examination, he had recalled all the witnesses. If he had done so, the learned Judge would then have been in a position to judge of the plaintiff's case as a whole rather than on the unfavourable impression produced by the sudden cross-examination of Muhammad Siddiq about matters which had occurred two

years before. In this connection we may add that we think that the action of the learned Judge in calling the plaintiff, was a little calculated to make the latter nervous. The learned Judge's action indicated that he doubted the truth of the plaintiff's evidence. We think that the plaintiff might have felt nervous even if he had in the first instance told the truth. If the learned District Judge had decided the case as a court of first instance, Muhammad Siddiq would have had the right of an appeal to another court. The District Judge was nominally deciding the case as a court of appeal when to a very large extent he was basing his judgement upon evidence which he was taking himself. Under all the circumstances of the case we think that the ends of justice require that we should set aside the order of the learned District Judge. We further think that it would not be fair either to the learned Judge, or to the parties, that this case should be remanded to him for decision. It would mean useless expense and protracted litigation. We, therefore, propose to dispose of the case ourselves.

We have been carefully through the evidence and we see no reason to differ from the view taken by the learned Munsif, who had the advantage of seeing and hearing the witnesses. It is suggested that it is remarkable that the plaintiff waited so long before instituting the suit for pre-emption. One explanation of this would be that if Mahmud-un-nissa succeeded in her suit the plaintiff would have no right of pre-emption and the plaintiff waited till the decision of this suit. It has also been suggested that it was curious that the plaintiff never made written mention of the fact that he had claimed pre-emption under the Muhammadan law and made the demands. If the plaintiff had sent a written communication in which he made no mention of his having complied with the Muhammadan law his letter would be open to the comment that he had not complied. If on the other hand reference was made in such written communication to the claim under the Muhammadan law and the due performance of the *talabs*, it is almost certain that it would have been suggested against him that he wrote the letter *pesh bandi* because he was conscious that he had not made the demands according to Muhammadan law. We do not think that any legitimate

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inference can be drawn against the plaintiff because he did not follow up his demand by a written communication. It is said that he was very vague about the day upon which he heard of the sale by Bashir-un-nissa. If the plaintiff had been making an absolutely false case it would seem pretty certain that he, a pleader, would have made quite sure that there should be no mistake about this when he came to give his evidence. He could safely rely upon his own brother to support him in detail if the brother was willing to support him in a false case. It is true that the plaintiff did not give the exact date, but he fixed it by saying that it was the day his brother told him that the document was being registered. The brother in his direct evidence made some confusion between the execution of the sale and its registration. But in cross-examination the matter was cleared up, and the plaintiff's brother distinctly stated that he came to know of the sale by seeing the Registrar and that he then informed his brother. Another point which was suggested was that the plaintiff never made any inquiry as to the price. It is well known that the rules of Muhammadan law as to the making of the different demands are extremely technical. It might well be urged that if before making the demands the pre-emptor began to ask questions about the price the subsequent demand would be bad. The probabilities are that any person making the demands required by the Muhammadan law would be careful to confine himself to the actual demand required. If the pre-emptor happened to be a pleader he might well think that it would be extremely dangerous to make any statement which would lend colour to the argument that the demand was conditional. Furthermore, it must be remembered that if Muhammad Siddiq had found that the price was altogether unreasonable or beyond what he was able to or willing to pay, there would be nothing to prevent him letting the matter drop and not proceeding with his claim for pre-emption. We think that the learned Munsif, who had all the witnesses whom the plaintiff examined and the single witness whom the defendant examined before him, was in a far better position than this Court or any other to decide this question of fact. It is somewhat significant that the defendants withdrew five out of their six witnesses. We agree with the learned Munsif that the demands were made. It remains to consider whether these

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demands were sufficient in law. There is no special formula laid down by the Muhammadan law. There cannot be the least doubt that if the plaintiff made the demands, the vendee knew perfectly well to what property the demands related. We think under the circumstances of the present case that so long as the demands were made as deposed to by the plaintiff that they were sufficient to entitle him to maintain the present suit.

We accordingly allow the appeal, set aside the decree of the learned District Judge and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

BISHESHAR AHIR (PLAINTIFF) *v.* DUKHARAN AHIR (DEFENDANT).*

1916 *January*, 11.

Act (Local) No. II of 1901 (Agra Tenancy Act), section 22—Occupancy holding —Hindu female in possession as such of occupancy holding—Succession.

There is nothing in the Agra Tenancy Act to enlarge the estate in an occupancy holding of a Hindu female in possession at the time the Act of 1901 was passed, beyond the ordinary estate of a Hindu female. The Act not having provided for the devolution of the interest in an occupancy holding where it was, at the passing of the Act, in the possession of a Hindu female as such, the rights of the parties claiming such holding on the death of the last female occupant must be ascertained according to the ordinary Hindu Law.

THIS was an appeal under section 10 of the Letter Patent, from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows :—

"The dispute between the parties to this appeal relates to the succession to an occupancy holding. It appears that one Katwaru originally held the land in suit as occupancy tenant. He died more than twenty-four years ago, leaving him surviving two daughters, namely Musammat Dilasi and Musammat Sumitra. Musammat Dilasi died about fourteen years ago, and Musammat Sumitra on the 11th of September, 1913. The defendant appellant is the son of Musammat Sumitra. The plaintiffs are the son and grandson of Masammat Dilasi. They instituted the suit out of which this appeal has arisen in the court of the Additional Munsif of Azamgarh for the recovery of joint possession over this occupancy holding. They alleged that they were entitled to one-half of the holding as they were descended from Musammat Dilasi one of the daughters of Katwaru. The principal plea in defence was that the provisions of Act II of 1901 relating to succession to an occupancy holding barred the

* Appeal No. 60 of 1915, under section 10 of the Letters Patent.