1881

BINDESHRI CHAUBEY v. NANDU.

relates to orders "returning plaints for amendment or to be presented to the proper Court" passed by the Court of first instance, and not to a decision of an Appellate Court upon an appeal to it against the judgment of a first Court on general grounds. The proper course for the appellants to have pursued was to file a special appeal, and accordingly this second appeal as from an order must be dismissed with costs. But we direct that the memorandum of appeal be returned to the appellants for filing, as a special appeal, upon payment of the requisite court-fees.

Appeal dismissed.

1881
January 28.

Before Mr. Justice Pearson and Mr. Justice Spankie.

SIRDAR SAINEY (PLAINTIFF) *v.* PIRAN SINGH (DEFENDANT).*

Absent co-sharer—Wajib-ul-arz—Trust.

S and his brother owned an eight annas share of a village, and *H* and *D* owned the other eight annas share, the parties being related to each other by blood. In 1865 (Sambat 1921), at the settlement of the village, the following statement was recorded by the settlement officer in the *wajib-ul-arz* at the instance of *H* and *D*, with whom the settlement was made, *S* and his brother being absent from the village and having been absent for some ten years:—"We *H* and *D* are equal sharers of one eight annas and *S* and (his brother) of the other eight annas in the village according to descent: ten years ago *S* and (his brother) went away into Orai; their present residence is not known: they have not left woman, child, or heir of any kind in the village: on that account the entire sixteen annas of the village are in possession of us *H* and *D*: at the time of the preparation of the *khewat* we made a gift of four annas of our own eight annas to *P* and have given him possession of four annas of the eight annas belonging to *S* and (his brother), keeping the remaining four annas in our own possession: when *S* and (his brother) return to the village we three who are in possession shall give up the eight annas share of the aforesaid persons." In March 1880 *S* sued *P* for possession of the four annas mentioned in the *wajib-ul-arz* as having been made over to him by *H* and *D* out of the eight annas share belonging to *S* and his brother. He based his suit upon the *wajib-ul-arz*, but did not expressly state that the share in suit had been intrusted to *H* and *D* on the understanding that it should be returned to him when he reclaimed it. The lower appellate Court dismissed the suit as barred by limitation on the ground that *P*'s possession of the share in suit became adverse in 1866 or 1867, more than twelve years before the institution of the suit, when *S*, having returned to the village, had claimed the share and *P* had refused to surrender it. On second appeal it was contended by *S* that under the terms of

* Second Appeal, No. 827 of 1880, from a decree of J. Liston, Esq., Deputy Commissioner of Lalitpur, dated the 17th June, 1880, reversing a decree of W. J. Greenwood, Esq., Extra Assistant Commissioner of Lalitpur, dated the 13th April, 1880.

1881

SIRDAR SAINEY v. PIRAN SINGH

the *wajib-ul-arz P's* possession was that of a trustee and his possession could not be held to be adverse.

Per SPANKIE, J.—That, inasmuch as there was no direct evidence that the share in suit had been intrusted by *S* to *H* and *D* on the understanding that it should be returned to him when he reclaimed it, and as such a trust could not be implied from the terms of the *wajib-ul-arz*, which amounted to nothing more than an acknowledgement of *S's* title and an offer to surrender possession when he returned, and as when he did return in 1866 or 1867 *P* refused to surrender possession, *S* was bound to have sued to recover the share in suit within twelve years from the date of such refusal, and as he had failed to do so, the suit was barred by limitation.

Per PEARSON, J.—That although no mention was made in the *wajib-ul-arz* of such a trust as was contended for, yet the terms of that document strongly suggested the creation of such a trust. Having regard to the terms of the *wajib-ul-arz* and to the fact that *S* and his brother were not strangers to *H* and *D*, nor merely co-sharers, but near blood relations, probably residing together on the same premises and partners in agricultural labors, further inquiry should be made with the view of elucidating the nature of the acquisition of *H* and *D* of the share and of their subsequent possession.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Lala *Lalta Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The High Court (PEARSON, J., and SPANKIE, J.,) delivered the following judgments:—

SPANKIE, J.—The suit (1) was for a four-anna share in mauza Bedora under the provisions of paragraph 12 of the village administration-paper. The plaint avers that Sirdar Sainey (plaintiff) and Sabsukh Sainey (deceased) were brothers and were both absent from the village at the last settlement serving as customs chaprasis in Orai: they never heard of the settlement operations and could not be present to secure possession of their eight-anna share: Hirdey and Dariao Singh were the owners of the remaining eight annas and were found in possession of the eight annas belonging to plaintiff and Sabsukh: these two persons sold a four-anna share to Piran Singh defendant: plaintiff and Sabsukh were recorded in the *khewat*, or record-of-rights, as "absentees" out of possession: in Sambat 1926 (March 1869—April 1870) plaintiff and his brother

(1) Instituted on the 5th March, 1880.

1881

SIRDAR SAINEY v. RAN SINGH.

returned to Bedora and got back four annas out of their eight annas, but Piran Singh, defendant, would not give up the four-anna share now in suit: Sabsukh died in Sambat 1928 or 1871 A.D.: the plaintiff procured record of his name, but defendant Piran Singh would not give up possession of the four-anna share: the plaintiff sold his own four-anna share (reserving a small plot of land as *haq-i-malikana*) to Mannu Lal and Piarey Lal: he now brings this suit under paragraph 12 of the administration-paper. I quote the terms of the administration-paper relative to the shares of absent proprietors:—"Paragraph 12—Of owners out of possession.—We Hirdey and Dariao Singh are equal sharers of one eight annas and Sabsukh and Sirdar Sainey the owners of the other eight annas share in the village according to descent: ten years ago Sabsukh and Sirdar went away into Orai: their present residence is not known: they have not left any woman, child, or heir of any kind in the village: on that account the entire sixteen annas of the village are in possession of us Hirdey and Dariao: at the time of preparation of the *khewat* we made a gift of four annas out of eight annas of our own to Piran Singh, and have given possession of four annas out of eight annas, the property of Sabsukh and Sirdar in our possession, to the said Piran Singh, keeping the remaining four annas in our possession: when Sabsukh and Sirdar return to the village and claim their property, we three who are in possession shall give up the eight annas share of the aforesaid persons." The defendant Piran Singh replied that plaintiff had been absent thirty-two years from the village: the settlement was made with Hirdey and Dariao Singh: when the *khewat* was written they recorded Sabsukh and Sirdar as proprietors of four annas each out of possession: the administration-paper provided for the return of the shares to them on their return: in the meantime Hirdey and Dariao Singh constituted defendant a sharer of eight annas: they sold four annas out of their own share and four annas out of the eight annas of Sabsukh and Sirdar: defendant then spent Rs. 500 on restoring the village: in Sambat 1923 (March 1866—April 1867) plaintiff and Sabsukh returned to Bedora, and defendant offered to give up the four annas in suit to them, but they refused to take the share and again left the village: again in Sambat 1929 (April 1872—March 1873)

they returned and disposed of the share by sale to Mannu Lal and Piarey Lal, retaining a plot of land as *haq-i-malikana*: as plaintiff has parted with the share the donees alone can sue for possession.

The first Court found that the alleged gift by plaintiff of the four annas to Mannu Lal and others did not affect the case: plaintiff was recorded as owner of the share and by the terms of the administration-paper defendant was bound to restore it. The Assistant Commissioner therefore made a decree in plaintiff's favour. Upon this the defendant appealed to the Deputy Commissioner, who thought it necessary to make some further inquiry. But he observed that on the 4th September 1872 Hirdey and Dulari son of Dariao Singh and Sirdar (the plaintiff) gave by a deed of gift twelve annas to Mannu Lal and others, but when giving possession it appeared that Piran Singh was in possession of Sirdar's four annas share. I take this to mean that no effect was given to the gift, and I would add here that I agree with the Munsif that, as between the plaintiff and defendant in this suit, this alleged gift to other persons who are not before the Court is no part of the case. The Deputy Commissioner did not believe that Piran Singh had spent Rs. 500 in improving the village, and if he did spend Rs. 500 he did so for his own benefit, well knowing that by the terms of the record-of-rights he would have to restore the four-anna share of Sabsukh and Sirdar on their return, and that there was no stipulation in the record-of-rights as to expenditure. But the first Court had not considered the question of limitation raised by Piran Singh, and therefore it remained to inquire on what date Sirdar returned to the village, for from that date will the time allowed by law run. In order to ascertain this point the Deputy Commissioner himself examined Sirdar and Piran Singh and others, and amongst them the patwárí; and upon the statement of Sirdar himself and from the patwárí's evidence and settlement papers he found that the suit was barred by limitation, inasmuch as Sirdar admitted that he returned two years before the famine of 1868-1869, *i. e.*, in 1866 or 1867. The Deputy Commissioner therefore decreed the appeal.

It is contended in special appeal that the possession of defendant under the terms of the administration-paper was not adverse but

1881

SIRDAR SAINEY v. PIRAN SINGH.

that of a trustee on behalf of appellant: therefore the suit was not barred by lapse of time. If by the appeal it is intended to rely upon the administration-paper as declaring or constituting a trust, I do not think that it does anything of the kind. I have already cited its terms. The share-holders in possession are called upon by the Settlement Officer to state what they know about the share. They make their statement for the information of the Settlement Officer who is bound to record the shares, and paragraph 12 of the administration-paper records the statement made by the share-holders on the point; and paragraph 12 of the administration-paper in this suit records that the plaintiff and Sabsukh owned eight annas: that they are out of possession for ten years: that Hirdey and Dariao Singh are in possession of the entire sixteen annas in consequence of their absence; that Piran Singh has got posession of eight annas under an agreement with them, but that all three would restore the shares after Sabsukh and Sirdar returned and claimed them. They do not profess to be holding the shares under any trust from Sabsukh and Sirdar nor to be under any agreement with them to restore the share when they returned. They simply do not deny but admit the ownership of Sabsukh and Sirdar Singh, and they account for their own possession of all the lands by the fact that ten years previously these persons had abandoned the village "leaving no woman, child or heir behind them." The plaintiff himself in this case does not come into Court upon a claim founded on a trust declared by himself and his brother Sabsukh when they left the village. There is no evidence called to support any trust. The twelfth paragraph of the administration-paper does as already found profess that the parties in possession are holding for the benefit of Sabsukh and Sirdar. In one sense the parties in possession may be said not to expect their return for they left ten years before, and from the patwárí's evidence the *khewat* and the administration-paper were prepared in 1865. They are dated on the 26th January, 1865, though they were not attested until July, 1868, so that when the statement was made concerning their shares these men had already been absent from the village for ten years, during which time Hirdey and Dariao Singh had been in possession and enjoying the profits. Because Hirdey and Dariao Singh acknowledged that by descent Sabsukh and Sirdar were owners

1881

SIRDAR SAINEY v. PIRAN SIN

of eight annas, because they were willing to give up the shares on the return of the absentees, their willingness to do this cannot be carried further than the statement goes. The record in the administration-paper is not a trust by implication. It is not as if it was the writing of a trustee stating the trust or written in language clearly expressing a trust. The record is nothing more than a simple statement of facts made at the bidding of a Settlement Officer. It was ruled by this Court in a very similar case—*Doorjun* v. *Chaina* (1)—as follows: "As to the existence of a trust, none is suggested. The plaintiffs' ancestors quitted the village many years ago. The defendants, co-sharers, entered into possession of their lands, and have since held them. The records still continued, however, to make mention of the names of the absentees; * * * * The mere entry in the Collector's records of the names of the absentees could not of itself avail to alter the character of the holding. It is admitted by the respondents' pleader that no other evidence appears on which the supposition can be supported that there was any trust or confidence between the absentees and the respondents." Here the plaintiff does not allege a trust and the only apparent difference between this case and the one cited is that the parties in possession say that if Sabsukh and Sirdar return they would give up the lands. This I cannot think is an admission that they held the share as trustees for the absent owners having undertaken to do so when Sabsukh and Sirdar left the village, or that they constituted themselves as trustees for them in 1865. In another case—*Nahana* v. *Dya Ram* (2)—where the plaintiffs sued to recover a share in a village on the allegation that it had been taken by the other share-holders of the village in trust for their father, according to custom, on his absconding from the village by reason of his inability to pay his quota of Government revenue, it was held that the only evidence of custom was a provision in the administration-paper that the share of a person should be held in trust for him for twelve years only. It was held that, as the father of the plaintiffs did not reclaim his share within twelve years, the plaintiffs' right was forfeited. The trust was described in the settlement record as a "*sipurdagi.*" The Court remarked that "there is no evidence except the administration-paper of 1851 from which we can gather what the terms of the custom were under which the

(1) N.-W. P. H. C. Rep., 1870, p. 43. (2) N.-W. P. H. C. Rep., 1873, p. 170.

1881

SIRDAR SAINEY v. RAN SINGH.

trust is alleged to have been constituted." The Court, however, accepted it as a record of a pre-existing custom. Now this would seem to show that the custom of that particular village-community was that, if parties who were absent at settlement did not return within a certain time after they had gone away leaving their lands with the share-holders who were present, they would lose their right altogether. The custom does not support the theory that, because *A* is holding lands in consequence of *B*, the owner, having abandoned the village, leaving no wife, child, or heir, that *A* thereby constitutes himself, in the absence of any agreement between the parties, as a trustee for *B* for ever. On the contrary, the particular reference to twelve years goes to show that the community did not recognise the right of any sharer to leave his lands, without any special trust, in the hands of the sharers, and to claim them after the general limitation law of the country had barred their claim to re-enter.

But now I turn to another case—*Piarey Lal* v. *Saliga* (1)—which is very pertinent to the present case. In this suit a clause of the administration-paper stated in general terms that absconders from the village should receive back their property on their return, and certain persons, who absconded from the village before the administration-paper was recorded, sued to enforce the clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to the administration-paper, alleging that their property had vested in such co-sharer for them. But it was held that, before such co-sharer could be taken to have held their property as a trustee, there must be evidence that he accepted such trust, and this fact could not be taken to be proved by the administration-paper. Again it was held lately—*Harbhaj* v. *Gumani* (2)—that a village administration-paper, which provides for the surrender to the absent share-holders on their return to the village of the lands formerly held by them, does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust. It was also ruled, where a village administration-paper provided for the surrender to certain absent share-holders on their return to the village

(1) I. L. R., 2 All., 394. (2) I. L. R., 2 All., 493.

of the lands previously held by them, but did not contain any declaration of a trust as existing between such share-holders and the occupiers of their lands, at the time such administration-paper was framed, that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers. The clause in that suit was very similar to that on which the present suit is brought. It recited the names of the persons absent from the village and declared that when they returned they should be placed in possession of their shares, and that the persons occupying should not object to relinquish their occupation: there was to be no account of profit and loss. It was observed that "the arrangement as to the re-entry of an absentee was made amongst the co-sharers present in the village: possibly the main object in making it was to secure possession to those in occupation of the shares of absentees, * * * If an administration-paper containing a clause such as that before us is to be regarded as constituting a trust, it would appear to be a trust created by the share-holders of the estate, ostensibly for the benefit of absentees, though the latter really derive no present benefit from their land remaining in the possession of the share-holders in the estate, whereas the share-holders are at once benefited by taking up the shares of the absentees which they may possibly be never called upon to surrender without, as in this case, the institution of a suit. Moreover the arrangement may be one which the share-holders actually present when it is made may afterwards, if they please, revoke or omit to record in a future settlement."

I have found one case—*Durga Parsad* v. *Asa Ram* (1)—in which the Court held, looking at all the circumstances of the case, that the parties who took possession of a house which belonged to two persons transported for life had done so subject to a constructive trust in favour of the transported persons. The first Court found that there was an express trust. The second Court held that there was no proof of any such express trust. Oldfield, J., remarked that there were circumstances which the lower appellate Court had overlooked which amounted to fraudulent conduct on the

(1) I. L. R. 2 All., 361.

1881

SIRDAR SAINEY v. RAN SINGH.

part of those who took possession of the house, such as would by equitable construction convert their holding into that of trustees. Straight, J., found from all the circumstances and the relationship between all the parties that a constructive trust existed in the two persons who had possession on behalf of the transported owners from the day their imprisonment commenced. He also held that the conduct of the parties had been of a fraudulent character. There is nothing in the judgment that conflicts with the previous decisions. In the case before me there is no evidence whatever of a trust declared by the plaintiff, nor is there evidence which the Court might construe in favour of an intention to create a trust, and this precedent, which, however, was not cited by appellant, does not benefit his case.

It is a rule of law that all declarations or creations of trusts or confidences of any kind should be manifested and proved by some writing signed by the party who is by law entitled to declare such trust. The administration-paper, even if signed by the alleged trustees or admitted by them, is not signed by the absentees who declare the trust; and, as already observed, the record does not state any trust, nor is its language clearly expressive of a trust intended by Sabsakh and Sirdar, and therefore it is neither a declared trust, nor evidence of a trust by implication; and as neither the plaintiff himself has based his suit upon an alleged trust, nor brought any evidence to support such trust, any record such as that in paragraph 12 of the administration-paper, on which he does base his claim, cannot be regarded as conclusive evidence of the existence of a trust, and not even, in my opinion, looking at the terms, as any evidence at all of a trust. The plaintiff himself in the plaint says that he demanded the land back on his return in 1926 Sambat (1869-1870), and defendant would not restore it. The defendant said that he offered to give it back in Sambat 1923 (1866-1867) on the plaintiff's return, but the latter would not take it. As we have seen, the plaintiff was examined by the second Court and he then stated that he had returned two or three years before the famine, which was admittedly in 1868 or 1867. It is quite clear that he was not back in 1865 when the *khewat* and *wajib-ul-arz* were prepared, since they contain the record of his

1881

SIRDAR SAINDY v. PIRAN SINGH

absence and were framed in January, 1865, *i.e.*, in Sambat 1921. The patwâri says he came back in 1923 or 1924, and there is evidence in support of his return at that time. Sirdar, the plaintiff, says distinctly: "I asked for my share when I returned and he (defendant) would not give it up." If this be so, there being no evidence of any trust, and nothing more than an acknowledgment in the administration-paper of title in the plaintiff and an offer to surrender possession when the plaintiff returned, I hold that, when he did return and claim the property and the defendant refused to give up possession, the plaintiff was bound to bring a suit to recover the share within twelve years, and, as he has failed to do so, it seems to me that the lower appellate Court very properly dismissed his suit as barred by limitation, and I would therefore dismiss the appeal with costs.

PEARSON, J.—The defendant pleaded in answer to this suit, *inter alia*, that in Sambat 1929 (April 1872—March 1873) the plaintiff and his late brother Sabsukh had conveyed their eight annas share to Mannu Lal, Piarey Lal, and others. The plea raised a question as to the plaintiff's competency to bring the suit. The lower Courts have failed to appreciate the importance of the plea and to dispose of it; and the omission appears to me to be a material defect in their decisions. The lower appellate Court has dismissed the suit as barred by the law of limitation apparently on the ground that the defendant's possession of the share in suit became adverse in 1866 or 1867 more than twelve years before the date of the institution of the suit. The ruling is impugned by the appellant who contends that under the terms of the *wajib-ul-arz* the defendant's possession was that of a trustee, and that his possession cannot be held to be adverse. How he became possessed of the share in suit has not been stated by either of the parties or ascertained by the lower Courts. The claim is laid on the twelfth paragraph of the *wajib-ul-arz* which does not make express mention of the share having been intrusted to Hirdey and Dariao on an understanding that it should be returned to the plaintiff when reclaimed by him, but nevertheless under the circumstances strongly suggests that such may have been the case. In the paragraph aforesaid Hirdey and Dariao are

1931

SIRDAR SAINEY v. JIWAN SINGH.

careful to put it on record that Sabsukh and the plaintiff, who had left the village ten years ago, owned a moiety of it, which, in consequence of the absence of the owners, is in the possession of the owners of the other moiety, *viz.*, Hirdey and Dariao themselves; and they go on to say that they have given possession of one-half of their own share and of one-half of the share of the absent owners to the present defendant; and that, when Sabsukh and Sirdar return to the village and claim their property, "we three who are in possession shall give up the eight annas share of the aforesaid persons." The latter provision is remarkable as indicating the care taken when making over a portion of the share of the absent owners to a third party to secure the restoration of that portion as well as of the portion retained by themselves when reclaimed by the owners: and such solicitude on their part is most reasonably explained by the hypothesis that they were bound to restore the share when reclaimed and were sensible of the obligation. It is to be observed that Sabsukh and Sirdar were not strangers to them, nor merely co-sharers but near blood relations, probably residing together on the same premises and partners in agricultural labors. When two members of a family leave their home in search of service, it is less easy to conceive that they should abandon their landed property without making any sort of arrangement about it, to be seized upon as a waif or stray by any body, than to suppose that they may have intrusted it to their cousins and co-sharers on such an understanding as seems to be recognized and admitted by the latter in the *wajib-ul-arz*. Having regard to the circumstances and the tenor of the *wajib-ul-arz*, although no express mention of a trust is found therein or in the plaint, I think that it would have been proper to examine the plaintiff and his cousins Hirdey and and Dariao and to make further inquiry with the view of elucidating the nature of their acquisition of the share and of their subsequent possession. Without such inquiry we are hardly in a position to dispose of the plea in appeal. I would therefore desire the lower appellate Court to try and determine (i) with reference to the instrument executed in 1929 Sambat (April 1872—March 1873) in favour of Mannu Lal and others whether the plaintiff has any *locus standi* and right of suit: and should that issue be decided affirmatively to try and determine (ii) whether

1881

SIRDAR SAINEY v. LE PIRAN SIN

Hirdey and Dariao received the share in suit and held it in trust on an agreement to return it when reclaimed: and should that issue be decided affirmatively to try and determine (iii) whether in 1923 Sambat (March 1866—April 1867) the defendant had offered to return it to the plaintiff, but that the latter had refused to have anything to do with it, and to submit its findings.

1879
July 31.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

WHYMPER AND CO. (PLAINTIFFS) *v.* BUCKLE AND CO. (DEFENDANTS).*

Contract—Condition Precedent—Formally signed contract.

Where two parties have come to a final agreement, the mere fact that at the time of their doing so they intend to embody the terms of such agreement in a formal instrument does not make such agreement less binding on them.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Spankie, J.

Messrs. *Howard* and *Hill*, for the appellants.

Messrs. *Conlan* and *Quarry*, for the respondents.

The following judgments were delivered by the High Court:—

SPANKIE, J.—This was a suit to recover Rs. 32,284-12-0 on the part of Messrs. Whymper and Co. of the Crown Brewery, Mussoorie, against Messrs. Buckle and Co., merchants of Saharanpur and Mussoorie, for whom the senior partner, Mr. Stowell, one of the defendants, is agent at Mussoorie. The action is brought upon an alleged contract made between the parties on or about the 20th December, 1877. The defendants deny that any contract was actually made, but admit that Rs. 2,539-8-6, are due by them as regular customers of the plaintiffs. The main issue between the parties was whether, as averred by the plaintiffs, there was a binding and complete contract, or, as contended by the defendants, there was a precedent condition that the contract should not be considered complete and binding until a written agreement had been formally executed by the parties? The issues in the entire case were thus settled by the lower Court:—"(i). Was such a

* First Appeal, No. 143 of 1878, from a decree of F. B. Bullock, Esq., Subordinate Judge of Dehra Dún, dated the 3rd September, 1878. Reported under the special orders of the Hon'ble the Chief Justice.