1929

SANGAM MADHO v. RAM NARAIN.

I am, therefore, not disposed to interfere with the judgment of the court below either in the interests of the appellant or in that of the respondent, and I dismiss both the appeal and the cross-objection with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice A. G. P. Pullan.*

MOHAMMAD KHAN AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* SHEO BHIKH SINGH AND OTHERS (DEFENDANTS-RESPONDENTS.)* 1929 *August*, 8.

*Findings of fact, when liable to interference in second appeal —Evidence Act (I of 1872) sections 65 and 91—Secondary Evidence of a document, when admissible—Parti land—Presumption of possession on parti land.*

Where the findings of an appellate court, in so far as they are findings of fact, have no effect on the suit and in so far as they go beyond the findings of fact, they are demonstrably wrong, and are based on a most inadequate appreciation of the facts, they cannot make the decision insusceptible to failure in second appeal, and the court of second appeal can interfere.

Under section 91 of the Evidence Act, the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible. Secondary evidence can only be admissible under section 65, clause (*c*) of the Act, which is not applicable where there is no evidence on the record to show that the document had been lost.

*Parti* land of a village is presumed to be in possession of the zamindar and though another person be in physical possession of it if he has not been able to set up any title the zamindar must be held to be in possession.

*Second Civil Appeal No. 77 of 1929, against the decree of Pandit Gulab Singh Joshi, Subordinate Judge of Partabgarh, dated the 24th of January, 1929, reversing the decree of Babu Avadh Behari Lal, Munsif of Kunda at Partabgarh, dated the 5th of November, 1928, decreeing the plaintiff's suit.

1929

MOHAMMAD KHAN v. SHEO BHIKH SINGH.

Mr. *Ali Zaheer*, for the appellants.

Mr. *Radha Krishna*, for the respondents.

PULLAN, J. :—In this case the plaintiffs obtained a lease from the Court of Wards managing the estate of the Raja of Dalippur in respect of two numbers which are described in the revenue papers as *parti* land. The case was brought because possession was contested by the defendants who alleged that the greater portion of this land had been granted to them by the Raja himself by means of an *ijazatnama* for the purpose of planting a grove and that furthermore they had a right to burn their dead on the land.

The first court decreed the suit but the lower appellate court reversed this finding and I am asked in appeal to restore that of the court of first instance.

There can be no question that the judgment of the court below is in many respects defective but I could not on this ground alone interfere with it if it were held to be based on findings of fact arrived at by the court below. I have considered all the findings of the court below very carefully and I am of opinion that in so far as they are findings of fact they have no effect on the suit, and where they go beyond being findings of fact they are demonstrably wrong. The defendants base their title on an *ijazatnama* which they said they lost and which is supposed to have been granted to them six years ago by the Raja of Dalippur before his estate was taken under the Court of Wards. Under section 91 of the Evidence Act the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible. Secondary evidence could only be admissible under the terms of section 65 of the Evidence Act and the clause applicable could only be clause (*c*), but this clause is not applicable because there is no evidence on the record to show that the

1922

MOHAMMAD KHAN v. SHEO BHIKH SINGH.

document is lost. Thus any finding of the lower court based upon the existence of the *ijazatnama* is erroneous in law.

The second finding is that the defendants used some portion of this land as *chiari* that is to say they had on occasions burnt corpses on the land. Failing evidence that there was some special custom by which this land was reserved to the defendants for the purpose of burning their dead, I am unable to hold that the mere fact that certain dead bodies had been burnt there gives the defendants any title to resist the plaintiffs' claim to occupy the land in virtue of the lease.

*Pullan, J.*

The other two findings of the court appear to be, first that the Court of Wards was not in possession and secondly that the defendants were in possession, but the Subordinate Judge does not say when the Court of Wards was not in possession, or how the defendants came into possession. Mere possession is admitted by the plaintiffs but possession without title cannot give any right to the defendants. Nor can it be understood how it could be found that the Court of Wards was not in possession. They represented the zamindar. The *parti* land of the village is presumed to be in the possession of the zamindar, and as the defendants have been unable to set up any title, although there may have been physical possession, the Court of Wards must be held to be in possession as zamindar.

I cannot therefore hold that the findings of fact arrived at by the court below make a decision based as it is on a most inadequate appreciation of the facts of the case, insusceptible to failure in second appeal. On the facts I have no doubt that the plaintiffs obtained a valid lease from the Court of Wards for a plot of land which the Court of Wards was entitled to give on lease, and the defendants had no title whatever on which to resist the plaintiffs. The

1929

MOHAMMAD KHAN v. SHEO BHIKH SINGH.

*Pullan, J.*

evidence of the Raja himself in so far as it is admissible is of very little value. He did not even remember if the land was *parti* or a grove and although he attempted to help the defendants by writing a letter to the Court of Wards after the plaintiffs' lease was granted, and he ventured also to say that the land appeared to be *chiari*, he could only say that he had been told that the *ijazatnama* had been lost, and he was unable to state on what ground he held the land to be *chiari*. In my opinion the court of first instance was right and the lower appellate court was entirely wrong.

I allow this appeal set aside the order of the lower court and restore that of the court of first instance with costs throughout.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice A. G. P. Pullan.*

* 1929 *August*, 23.

SAT NARAIN MISIR AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* DEPUTY COMMISSIONER, MANAGER, COURT OF WARDS, AJODHYA ESTATE (DEFENDANT-RESPONDENT.)*

*Adverse possession—Tenant's possession, if can be adverse—Tanks—Fishing in tank, right of—Underproprietary rights—Exclusive right of fishing in tank, whether gives under-proprietary rights in the land of the tank—Pre-emption decree—Possession obtained under a pre-emption decree, if adverse—'Hostile possession' meaning of.*

The possession of a tenant cannot amount to adverse possession and the mere fact that he was formerly village zamindar does not give him any title.

An exclusive right of fishing in a particular tank does not amount to a right in the land below the water and the

*Second Civil Appeal No. 102 of 1929, against the decree of Pandit Krishna Nand Pande, Subordinate Judge of Sultanpur, dated the 17th of December 1928, upholding the decree of Pandit Shiam Manohar Tewari, Munsif of Musafirkhana at Sultanpur, dated the 28th of July, 1928, dismissing the Plaintiffs' claim.