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declaratory relief there is sought some consequential relief in respect of immovable property but such relief is not capable of valuation in money, then court-fee should be paid as if the relief was one for possession of immovable property.

We therefore agree with the view taken by the learned Judge of the court below and dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

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January, 30

DAYANAT ULLAH AND OTHERS (APPELLANTS) *v.* NAWAB ATIA KHANAM (RESPONDENT)*

Civil Procedure Code (Act V of 1908), section 100—Second appeal—Finding of fact—Documents filed in evidence and not documents of title, interpretation of—Interpretation of documents produced in evidence, whether a ground for second appeal—Oudh Courts' Act (Local Act IV of 1925), section 12(2)—Certificate of fitness for further appeal when to be granted—Interpretation of documents filed in evidence, whether ground for grant of certificate.

The rule that the High Court has no jurisdiction under section 100, Civil Procedure Code, to reserve the findings of fact of a lower appellate Court unless the findings are vitiated by error of law, applies although the findings are inferences of fact drawn, wholly or in part, from documents. A decision of fact by a first appellate court does not involve a question of law so as to be open to reconsideration upon second appeal under section 100 of the Code of Civil Procedure, merely because documents, which were not relied on as instruments of title or the direct foundations of rights, have to be construed for the purpose of deciding the question. *Wali Mohammad and others* v. *Mohammad Bakhsh and others* (1), and *Secretary of State for India in Council and others*, v. *Rameshwaram Devasthanam Trustree* (2), relied on.

*Section 12(2) Oudh Courts Act appeals Nos. 7 and 8 of 1937, against the order of Hon'ble Mr. Justice G. H. Thomas, Judge, Chief Court of Oudh, Lucknow, dated the 7th of January, 1937.

(1) (1929) L.R., 57 I.A., 86. (2) (1934) L.R., 61 I.A., 163.

Ganesh Lall v. *Bisesar Pandey* (1), *Jewan Mal—Gian Chand* v. *Hari Ram—Ram Lal* (2), *Municipal Board, Benares* v. *Kanhaiya Lal and others* (3), referred to.

A certificate of fitness for further appeal under section 12(2) Oudh Courts Act, should be granted only when the decision for which a further appeal is proposed to be preferred is (1) opposed to any general principle of law, or (2) involving a question of public interest, or (3) is contrary to any recognized precedent. A particular interpretation put upon a particular document by a Judge in second appeal is no ground to grant a certificate that the case is a fit one for third appeal. Such a point is not even a substantial question of law, much less a point of general importance.

Yusuf Ali Beg v. *Nathu* (4), *Bisheshwar Dayal* v. *Lachman Ram and others* (5), *Mohan* v. *Parmai* (6), *Ramzani* v. *Bansidhar* (7), *Rajana* v. *Musaheb Ali* (8), *Ziauddin Ahmad* v. *Mohammad Abdul Haseeb* (9), and *Janka Kuar* v. *Anant Singh* (10), referred to and relied on.

Mr. *Mohammad Ayub*, for the appellants.

Messrs. *Hydar Husain* and *Mohammad Hyder*, for the respondent.

ZIAUL HASAN and YORKE, JJ.:—These are third appeals under section 12(2) of the Oudh Courts Act from the judgment of a single Judge of this Court in second appeals Nos. 289 and 290 of 1935.

The present litigation arose out of the fact that on the 13th August, 1922, one Khwaja Wahid Uddin who had become the owner of a house and land abutting Victoria Street, Lucknow, mortgaged it in favour of the present plaintiff. Subsequently the plaintiff instituted a suit on foot of her mortgage, brought the property to sale, and purchased it herself on the 6th July, 1931. On the 4th July, 1932, a sale certificate Ex. 1 was issued. The property in question consists of a house standing on old settlement plots Nos. 53 and 57, situated on the east side of Victoria Street in Lucknow. Along the west side of the said plot No. 53 and the next plot to the

(1) (1926) A.I.R., Pat., 49.
(2) (1930) A.I.R., Lah., 712.
(3) (1931) A.I.R., All., 499.
(4) (1926) 3 O.W.N., 574
(5) (1926) I.L.R., 1 Luck., 483.
(6) (1926) 3 O.W.N., 639.
(7) (1937) I.L.R., 13 Luck., 76.
(8) (1937) I.L.R., 13 Luck., 178.
(9) (1937) O.W.N., 241.
(10) (1937) I.L.R., 13 Luck., 270.

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south of it No. 52 there was a long strip which was plot No. 6 described in the same old settlement khasra of 1862 as "chabutra". In the sale certificate the western boundary of the house was given as "*chabutra makan haza labe sarak Chirya Bazar*". On the west side of the "chabutra" there was open ground, part of which belonged to the said road. The settlement map which goes with the settlement khasra, Ex. A-9 is Ex. A-8. There is another settlement map on the record of Mohalla Nakhas which shows Nos. 109 and 291 as Victoria Street. The width of 291 at the north end where plot No. 6 is, is 132 feet. At some subsequent date the Municipal Board of Lucknow decided that it did not need the whole of this 132 feet for the road. It set apart 40 feet in the middle for the paved road and two strips of 35 feet on each side for a 15 feet lawn with two foot-paths, each 10 feet wide, one on each side of the strips of lawn. This distribution required 110 feet width only, and therefore a width of 22 feet remained which was apparently taken to be half and half on each side of the road, and this strip the Municipal Board appears to have offered to the owners of the houses immediately behind. In consequence on the 4th July, 1926, the Municipal Board sold *Patri* land 61 feet 6 inches long by 11 feet 2 inches wide to Khwaja Wahid Uddin under the sale deed, Ex. A-1, There is nothing to show whether in fact the measurements of these strips on each side of the road, specifically of the strip which was sold to Wahid Uddin, were taken from any fixed point, or whether it might not have been the case that at that particular point the whole of the remaining strip of 22 feet should not have been taken from the west side of the road instead of from the east side of the road. If owing to the alignment of the road it was all on the west side, then there was nothing available on the east side to be sold to Khwaja Wahid Uddin. Be that as it may, subsequent to the court sale of his house property at the instance of the plaintiff, Wahid Uddin in 1930 transferred the

property purchased by him from the Municipality to his own wife, Mst. Ajmer-un-nisa, who on the 7th September, 1933, transferred it to Mohammad Afaq defendant No. 3, whose father is the defendant No. 1, and thereafter the defendant No. 1, commenced the constructions on this property which led the plaintiff to institute the present suit. In this suit she claimed that her own "chabutra" which formed part of the property purchased by her in auction sale extended over the whole of the property upon which the defendants were making their constructions. She therefore alleged that the defendants had taken wrongful possession over a part of her land and had begun to construct a masonry wall there. She further alleged that the construction by the defendants of a high wall had interfered with the passage of air and light to her house, and obstructed the passage of water, and also obstructed her right of way to the main gate of her house. This is an alternative claim for rights of easement in case it was held that the plaintiff was not the owner of the property on which the defendants were making their constructions.

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In the trial court it was held that only a part of the disputed land formed part of the "chabutra" of the plaintiff, and possession was decreed over this part, and so far as the claim to easement was concerned, it was held that the plaintiff had an easement of necessity in respect of her right of way to the main gate of her house.

The lower appellate court, the Civil Judge of Mohanlalganj, Lucknow, held that the whole of the disputed land formed part of the plaintiff's "chabutra". He incidentally held that, failing her ownership of this property, the plaintiff was entitled to all the easements of light, air and passage claimed by her.

On the case coming up in second appeal in this Court, the learned Single Judge held that the case did not turn on the interpretation of any document of title, but involved pure questions of fact, and therefore the judg-

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ment could not be interfered with. The learned Judge remarked, "In this view it is not necessary for me to decide whether the plaintiff has got a right of easement."

Learned Counsel for the appellants has addressed to us a lengthy argument based on inferences to be drawn from the settlement khasra and settlement map, Ex. A-8 and Ex. A-9, which he says have been read incorrectly by the lower appellate court. His contention is that the plot No. 6, which is 29 gatthas 4 karis, that is 242 feet long, extends along the whole of the west side of plots 53 and 52. The width of this plot is only 1 gattha, that is 8 feet 3 inches. As the khasra shows this plot was covered by a "chabutra" which stood in front of the houses on plots 53 and 52. There is evidence on the record to show that the house of Wahid Uddin which is now the house of the plaintiff stands on plot No. 53 and on plot 57 behind it to the east. The map filed by the plaintiff herself along with her plaint shows that the frontage, that is the length along the west side, of the plaintiff's house is only 62 feet. It is contended that it follows from this that the plaintiff's portion of plot No. 6 is only 62 feet long, corresponding to the frontage of her house, and the proportionate share of the plaintiff in the area of this plot is only approximately one-fourth of the total area of one biswa 9 biswansis 8 kachwansis. The plaintiff's share is thus only 7 biswansis 7 kachwansis, or putting it in another way her share is a strip 8 feet 3 inches wide, that is from east to west, by 62 feet long that is from north to south. It is pointed out that the plaintiff's own map filed with the plaint shows that this is almost exactly the area which lies between the plaintiff's house and the new constructions of the defendants, and is described as "open land" in the map prepared by the Commissioner. Now it may be that this is a very good argument and one which, had it been addressed to the trial court or the lower appellate Court, would have carried conviction, but it is perfectly clear on an

examination of the judgments of the trial court and the lower appellate court that this case was never stated to the trial court at all, and if it was suggested in the lower appellate court, the meaning was not brought home to that court.

In the trial court the plaintiff rested her case in the first place on the boundary stated in the sale certificate and the mortgage deed, which shows that the "chabutra" abutted the road. Secondly the plaintiff based her case on the appearances on the ground which showed clear indications that the "chabutra" extended beyond what was called open land outside the plaintiff's house in the Commissioner's map on to the land purchased by Wahid Uddin from the Municipality. This contention based on appearances was supported by the inspection notes of the Munsif himself as well as the report of the Commissioner. For the defence an attempt was made to prove the ownership of the Municipality over the land transferred by it to Wahid Uddin, but the learned Munsif was of opinion that the ownership of the Municipality over the disputed land was not proved.

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Another point taken into consideration was the existence of a grave which was admitted to be part of the "chabutra" of the plaintiff. This grave at the time of the suit fell partly within the open land intervening between the actual house of the plaintiff and the new constructions and partly in the new constructions. The court thought it incredible that this grave should not have been situated entirely within the previously existing "chabutra", whose existence was further shown by the lakhauri brick foundation which partly extended under the new constructions of the defendants. The lie of the land is peculiar and hence it was possible to see how these foundations ran. The final conclusion of the Munsif was that the "chabutra" extended up to the point B in the Commissioner's map and that the plaintiff was entitled to recover possession over the portion H.N.L.B. out of the whole area A.H.N.M. in suit.

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When the matter came to the appellate Court, there is no sign whatever so far as the judgment shows that it was ever argued before that Court that the area of the "chabutra" plot 6 to which the plaintiff was entitled could only be one-fourth of the whole area of plot No. 6. There is no doubt that the learned Civil Judge did base his decision on facts to a considerable extent on his belief that the area of the "chabutra" to which the plaintiff was entitled outside her house on the west side was one biswa 9 biswansis 8 kachwansis. He pointed out that the "open land" had an area of only about $7\frac{1}{2}$ biswansis while the area of the land in dispute was 9 biswansis 13 kachwansis. The total of these only comes to 17 biswansis odd, and he concluded that therefore the land in dispute was unmistakably included in the "chabutra" attached to the house in question. This was not, however, the only ground on which the learned Civil Judge based his decision. He agreed with the trial court in holding that the plaintiff's evidence was better than that of the defendants, and it clearly proved that the land in question had been used as "chabutra" by Wahid Uddin and his predecessor. He also took note of the facts in regard to the old foundations noted by the Commissioner and the Munsif, and he said that the inspection notes of the Munsif were a clear indication of the fact that the entire land in dispute formed part of the old "chabutra". He made some reference to the grave but did not specifically base any argument on its position except that he believed the statement that Khwaja Wahid Uddin's predecessors occupied ground out beynd this grave.

The question is whether Exs. A-8 and A-9 are to be regarded as documents of title in the present case or merely pieces of evidence. If they are documents of title, their interpretation is a question of law and the learned Judge of this Court was not justified in dismissing the appeal as concluded by findings of fact. If, on

the other hand, they are merely pieces of evidence, then there is no question that the findings arrived at by the learned Civil Judge, whether right or wrong, are findings of fact which were not liable to be assailed in second appeal, and the appeal was therefore rightly dismissed by the learned single Judge. In the present case we find it difficult to hold that the settlement khasra and settlement map are documents of title. They are documents which indicate only the limit of possession of certain persons and they are not documents which confer title in any sense. All that is sought to be argued from these documents is not the title of Wahid Uddin's predecessors but how far the possession of those predecessors extended. This could be inferred with certainty from these documents, only if measurements had been taken from permanently fixed points so as to show that the western walls of the plaintiff's buildings coincided with the western edge of plot No. 52. The defence might similarly have shown that the eastern edge of plot No. 291 occupied by Victoria Street reached up to the western side of what is called open land in the Commissioner's map, but it has not been sought to be argued that this was proved. In the first place then these documents are not documents of title, and in the second place even as pieces of evidence, they do not establish to what distance in a westerly direction, that is towards the Victoria Street, the old "chabutra" mentioned as situated on plot No. 6 extended.

We have heard a very full argument on the merits, but we are quite satisfied that the settlement khasra and map on which learned counsel for the appellant now seeks to rely are nothing more than pieces of evidence, and that even therefore if they have been misunderstood by the learned Civil Judge, that was not a ground which could be taken in second appeal. The parties elected to attempt to prove their respective cases by a different kind of evidence, and the case has been decided on the

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basis of that evidence. As pointed out by the learned single Judge it was not the plaintiff who relied on Exs. A-8 and A-9, that is as documents of title, but the defendants who put them forward as evidence to support their defence.

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Learned counsel have referred us to a large number of rulings mainly on two points; namely first the effect of misreading of evidence by the appellate court, and secondly the scope of appeals under section 12(2) of the Oudh Courts Act. With reference to the first point learned counsel for the appellants relied on *Ganesh Lall* v. *Bisesar Pandey* (1), in which it was held that "where a finding of fact is based on a piece of a documentary evidence which has been completely misread by the Court, the finding is not binding in second appeal." In this case there were two documents in question. One was a title deed of the plaintiff and the other was a khasra. About this second document, it having been shown that it had been misread, the learned single Judge of the Patna High Court remarked that it was impossible to say what the decision of the Subordinate Judge would have been if he had correctly read Ex. 15. We might remark that Ex. 15 does not seem to have been considered to be a document of title.

He next relied on *Jewan Mal—Gian Chand* v. *Hari Ram—Ram Lal* (2), in which it was held that "a finding of fact by the lower appellate court vitiated by erroneous and unwarranted assumptions of facts and misreading of accounts upon which the suit is based is not binding upon the Court of second appeal." No particular principle of law was quoted in support of this proposition.

Lastly he has relied on *Municipal Board, Benares* v. *Kanhaiya Lal and others* (3), in which it was held that "the misreading or ignoring of important documentary evidence amounts to a substantial error or defect in

(1) (1926) A.I.R., Pat. 49 (2) (1930) A.I.R., Lah., 712.
(3) (1931) A.I.R., All., 499.

procedure within the meaning of section 100(1)(*c*) and the High Court is justified in reversing the finding if it holds such reversal justified on merits."

On the other hand for the respondent reliance has been placed on the two cases quoted by the learned Judge of this Court, namely, *Wali Mohammad and others* v. *Mohammad Bakhsh and others* (1) and *Secretary of State for India in Council and others* v. *Rameshwaram Devasthanam Trustee* (2). In the former case it was held by their Lordships of the Privy Council that "a decision of fact by a first appellate court does not involve a question of law so as to be open to reconsideration upon second appeal under section 100 of the Code of Civil Procedure, 1908, merely because documents, which were not relied on as instruments of title or the direct foundations of rights, have to be construed for the purpose of deciding the question." In the latter case their Lordships held that "the rule that the High Court has no jurisdiction under section 100 of the Code of Civil Procedure, 1908, to reverse the findings of fact of a lower appellate court unless the findings are vitiated by error of law, applies although the findings are inferences of fact drawn, wholly or in part, from documents." In the light of these two decisions we are quite clear that the learned Judge of this Court was justified in holding that the findings of the learned Civil Judge were not contrary to law within the meaning of section 100 of the Code of Civil Procedure.

As regards the second point, that is the scope of appeals under section 12(2) learned counsel for the respondent referred us to three cases reported in *Yusuf Ali Beg* v. *Nathu* (3), *Bisheshwar Dayal* v. *Lachman Ram and others* (4), and *Mohan* v. *Parmai* (5), all of them being judgments pronounced on applications for certificates to enable the applicants to file an appeal

(1) (1929) L.R., 57 I.A., 86. (2) (1934) L.R., 61, I.A., 63.
(3) (1926) 3 O.W.N., 574. (4) (1926) LL.R., 1 Luck., 483.
(5) (1926) 3 O.W.N., 639.

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under section 12(2) and four cases of 1937 reported in *Ramzani* v. *Bansidhar* (1), *Rajana* v. *Musaheb Ali* (2), *Ziauddin Ahmad* v. *Mohammad Abdul Haseeb* (3), and *Jank Kuar* v. *Anant Singh* (4). The view which has been taken in these cases consistently is that a certificate of fitness for further appeal under section 12(2), Oudh Courts Act, should be granted only when the decision for which a further appeal is proposed to be preferred is (1) opposed to any general principle of law, or (2) involving a question of public interest, or (3) is contrary to any recognized precedent. In the second of the above mentioned cases *Bisheshwar Dayal* v. *Lachman Ram and others* (5), it was held that a particular interpretation put upon a particular document by a Judge in second appeal is no ground to grant a certificate that the case is a fit one for third appeal. Such a point is not even a substantial question of law, much less a point of general importance. We are clearly of opinion that the present case does not properly fall within the scope of a third appeal under the provisions of the Oudh Courts Act.

As remarked by the learned single Judge, in the view which we have taken above of the findings of the first appellate court it is not necessary for us to go into the question of easement at all. We accordingly maintain the decision of the learned single Judge and dismiss these two appeals with costs.

Appeals dismissed.

(1) (1937) I.L.R., 13 Luck., 76. (2) (1937) I.L.R., 13 Luck., 178.
(3) (1937) O.W.N., 241. (4) (1937) I.L.R., 13 Luck., 270.
(5) (1926) I.L.R., 1 Luck., 483.