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on behalf of the respondent, has convinced us by his very able and lucid arguments that the principles embodied in *Munster* v. *Lamb*(1) are equally applicable to this country and that to depart from the rule enunciated in England would be to affect the administration of justice in this country. The decision of the Madras Full Bench in the case of *Sullivan* v. *Norton*(2) completely supports the arguments of Mr. *Baikuntha Nath Mitter*.

I have considered all the decisions on the point, and I am not prepared to differ from the decision of the Madras High Court in the case to which I have referred. In my opinion the view taken by the learned District Judge is right and ought to be affirmed. I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Coutts and Ross, J.J.

SABRAN SHEIKH

v.

ODOY MAHTO.*

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February, 5.

Evidence Act, 1872 (*Act I of* 1872), *section* 13—*document executed by third persons admitting plaintiff's right, admissibility of.*

In a suit in which the plaintiffs claimed the land in dispute as their *man* land and the defendant claimed it as his *jote*, the plaintiffs produced an *ekrarnama* addressed by a third person to an ancestor of the plaintiffs in which the land in suit was described as *man* land. *Held*, that the *ekrarnama* was admissible under both clauses (*a*) and (*b*) of section 13 of the Evidence Act, 1872.

Abdul Ali v *Syed Rejan Ali*(3), doubted.

* Appeal from Appellate Decree No. 195 of 1920, from a decision of B. Nut Bihari Chaterji, Subordinate Judge of Purulia, dated the 17th November, 1919, setting aside a decision of B. Shiwa Nandan Prasad, Munsif of Purulia, dated the 9th July, 1919.

(1) (1882-83) 11 Q. B. D. 588. (2) (1887) I. L. R. 10 Mad. 28.
(3) (1914-15) 19 Cal. W. N. 468.

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Jones v. *Williams*(1), *Marquis of Anglesey* v. *Lord Hatherton*(2), *Daitari Mohanti* v. *Jugo Bundhoo Mohanti*(3), *Vythilinga* v. *Venkatachela*(4), *Earl of Egremont* v. *Pulman*(5) and *Governors of Magdalen Hospital* v. *Knotts*(6), followed.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Coutts, J.

Abani Bhushan Mukerji, for the appellant.

Hari Bhushan Mukerji, for the respondents.

COUTTS, J.—The plaintiffs in this case are the *darpatnidars* of a *taluk* in which the land in dispute lies. They claim that the land is their *man* land and that they have always been in possession up till the 9th of *Agrahan*, 1325, when they were dispossessed by the defendant who is a tenant of the village and who claims the land as his *jote* land. The suit was dismissed in the court of first instance but has been decreed on appeal by the Subordinate Judge of Manbhum. The defendant has appealed.

The sole point before the lower appellate court was whether the land was the plaintiffs' *man* land or the defendant's *jote* land and the learned Subordinate Judge based his decision, that the land was the plaintiffs' *man* land, on an *ekrarnama* (*Ex.* 1) as well as on other evidence in the case.

In appeal before us the contention is that the learned Subordinate Judge was not entitled to use the *ekrarnama* as evidence and that consequently his decision is vitiated. If in fact *Ex.* 1 were not admissible in evidence, as the decision of the Subordinate Judge is very largely based on this document, it would be for consideration whether the appeal should not be remanded for rehearing after excluding this document from

(1) (1837) 2 M. & W. 326; 150 E. R. 781.
(2) (1842) 10 M. & W. 218; 152 E. R. 448.
(3) (1875) 23 W. R. 283.
(4) (1893) I. L. R. 16 Mad. 194.
(5) (1877-78) 3 Q. B. 622.
(6) (1878) 8 Ch. D. 709.

consideration. If, however, *Ex.* 1 be evidence the finding of the Subordinate Judge is a finding of fact based on legal evidence with which we cannot interfere. The question then is whether *Ex.* 1 is evidence or not.

Ex. 1 is an *ekrarnama* by one Asiroad Mahto addressed to an ancestor of the plaintiffs and in the document the land in suit is described as *man* land. It is contended, however, that the document is not evidence because it is not *inter partes*. On the other hand it is contended that the document is admissible under section 13 of the Evidence Act. Section 13 runs as follows :—

"Where the question is as to the existence of any right or custom the following facts are relevant :—

(*a*) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(*b*) Particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from."

Now in the present case the question is of the existence of a right and the *ekrarnama* comes both within clauses (*a*) and (*b*); it is both a transaction in which the right was claimed and an instance in which the right was exercised. If authority that such a document is relevant were needed there are the cases of *Jones* v. *Williams* (1), *Marquis of Anglesey* v. *Lord Hatherton*(2), *Daitari Mohanti* v. *Jugo Bundhoo Mohanti*(3) and *Vythilinga* v. *Venkatachela*(4). We have, however, been referred by the learned Vakil for the appellant to the case of *Abdul Ali* v. *Syed Rejan Ali*(5). I confess that this decision appears to lend support to the contention of the learned Vakil for the appellant, but if it lays down the proposition that in such a case as the one before us a transaction by which a right is claimed or asserted or a particular instance

(1) (1837) 2 M. & W. 326; 150 E. R. 781. (3) (1875) 23 W. R. 293.
(2) (1842) 10 M. & W. 218; 152 E. R. 448. (4) (1893) I. L. R. 16 Mad. 194.
(5) (1914-15) 19 Cal. W. N. 468.

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in which the right is exercised is not evidence under section 13 of the Evidence Act. I must respectfully differ from this view. The law appears to me to be perfectly clear both from the section itself and from the decisions to which I have already referred, and in my opinion the *ekrarnama*, *Ex.* 1, is evidence. This being so, the decision of the learned Subordinate Judge is based on legal evidence and is a finding of fact with which we cannot interfere in second appeal. I would accordingly dismiss this appeal with costs.

ROSS, J.—I agree. There is direct authority for the admissibility of the counterpart of a lease executed in favour of a third party, in proof of title, in *Earl of Egremont* v. *Pulman*(1) and *Governor of Magdalen Hospital* v. *Knotts*(2).

Appeal dismissed.

PRIVY COUNCIL.

RAI BAIJNATH GOENKA

v.

1923.

February, 9.

MAHARAJA SIR RAMESHWAR PRASAD SINGH.*

(and connected appeal).

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 47—*Execution of Decree—Decree for possession of* ijmali *share of* mahal—*Prior partition of* ijmali.

The respondent and other owners of an *ijmali* share of a *mahal* obtained in 1904 a decree of a Subordinate Judge setting aside a revenue sale of the *ijmali* and decreeing to the plaintiffs their respective shares in it. That decree was set aside by the High Court but restored in 1915 on appeal to the Privy Council. Before the decree of 1904 was made the *ijmali* share had been partitioned under the Estates Partition Act (Ben. Act V of 1897), specific portions of the land being substituted for the shares respectively held in the *ijmali*.

* PRESENT.—Lord Atkinson, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.

(1) (1877-78) 3 Q. B. 622.

(2) (1878) 9 Ch. D. 709.