## PRIVY COUNCIL.

1923.

*May, 15.*

INDRAJIT PRATAP SAHI

*v.*

AMAR SINGH AND OTHERS.*

*Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XLI, rule* 27—*Admission of additional Evidence on Appeal—Privy Council practice.*

The jurisdiction of an Appellate Court under Order XLI, rule 27(1)(*b*), of the Civil Procedure Code, 1908, to admit additional evidence is not confined to cases in which the Court itself discovers a lacuna or defect and requires evidence to fill up or remedy it. Under the words "or for any other substantial cause" an appellate Court has a discretion to admit further evidence upon the application of a party.

The Judicial Committee has unrestricted power to admit documents where sufficient ground is shown for their not having been produced at the initial stage of the litigation.

*Kessowji Issur* v. *Great Indian Peninsula Railway*(1), distinguished.

Judgment of the High Court reversed.

APPEAL (No. 70 of 1921) from a judgment and decree of the High Court (June 25, 1919) affirming a decree of the Additional Subordinate Judge of Gaya.

The suit was brought by respondents 1 to 3 for a declaration of their *mukarrari* title to two *mauzas*, and for possession with mesne profits.

The sole question was whether, as the first defendant alleged, a grant of May 30, 1880, included the two villages under the designation Damodarpur Lakhawar.

The trial judge held that the villages were not included in the grant and decreed the claim. The High

* Viscount Finlay, Lord Atkinson and Mr. Ameer Ali

(1) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.

Court affirmed the decree, rejecting an application to admit further documents in evidence in circumstances stated in the present judgment.

1923. March 15, 19.—*De Gruyther, K. C.* and *Dube*, for the appellant.

*Dunne, K.C.* and *Wallach*, for the respondents.

May, 15.—The judgment (1) of their Lordships was delivered by—

MR. AMEER ALI.—The facts of this litigation are set out in detail in the judgments of the Courts in India; it is consequently not necessary to state them here at any length. The suit relates to two villages, named, respectively, Lakhawar Khas and Lakhawar Faridpur, lying within Mahal Margaon, appertaining to the Tikari estate, in the Province of Bihar. It appears that in 1843 there was a Government survey of Mahal Margaon, in the course of which a *khasra* map was prepared by the *amin* of these two villages along with another called Damodarpur Lakhawar. The map is *Exhibit 14* in this case, and the memorandum on the back is marked *14A*.

In the middle of the nineteenth century the Tikari estate belonged to one Raja Mode Narain Singh. He died somewhere in the year 1856 or 1857 without any male issue, leaving him surviving two widows named, respectively Rani Asmedh Koer and Rani Sumit Koer, a brother's son, Ran Bahadur Singh and a sister's grandson, Krishna Pratap Sahai, the ancestor of the present appellant, often named in these proceedings as the Raja of Tankuhi. On Raja Mode Narain Singh's death, in the absence of any direct male heir, natural or adopted, his widows took possession of the estate for their lives. Ran Bahadur Singh, who, under the circumstances, was the reversioner, appears, however, to have acquired possession by some arrangement with the widows.

(1) This report is directed only to the question of procedure appearing in the headnote; passages in the judgment are accordingly omitted where indicated.

1923.

INDRAJIT PRATIP SAHI v. AMAR SINGH.

In 1875 Raja Krishna Pratap Sahai brought a suit against Ran Bahadur Singh and the two widows of Raja Mode Narain Singh, for recovery of the whole estate, on the allegation that he had been adopted by the widows subsequent to the death of the Raja under authority given by him in his lifetime. This suit was dismissed by the Subordinate Judge; from his decision an appeal was preferred to the High Court of Calcutta. Whilst the appeal was pending the parties came to a settlement and an *ekrarnama*, dated May 30, 1880, was executed by Krishna Pratap in which were embodied the terms of the compromise. By the terms of this agreement Raja Krishna Pratap Sahai undertook to withdraw all claims to the estate, in consideration of the grant to him by Ran Bahadur Singh, of a *mukarrari* settlement of certain villages set out in detail in that document. Pursuant to this agreement Ran Bahadur Singh, by a *patta* of even date, granted to Krishna Pratap Sahai, the *mukarrari* of the villages named in the *ekrarnama* and set out specifically in the grant. The *patta* recites the agreement already referred to and then proceeds to describe the properties demised thereunder. One of these is named as "Damodarpur Lakhawar."

The controversy in the present suit relates solely to the question: what does "Damodarpur Lakhawar" denote?

It should be noted here that the rental fixed for the *mukarrari* was Rs. 2,701 *per annum*.

Raja Krishna Pratap Sahai, the grantee, appears to have taken possession, under the *patta*, of the properties conveyed to him thereunder by Ran Bahadur Singh. The plaintiffs' claim that under the designation of Damodarpur Lakhawar only one village was granted to Raja Pratap Sahai and that the grantor retained possession of the other two—namely, Lakhawar Khas and Lakhawar Faridpur—and that they, on January 24, 1914, obtained a grant of the same from the present owner of the 7½-annas share of

the Tikari estate within whose property these villages lie; and they ask, as against the first defendant, the representative of Raja Krishna Sahai, recovery of possession of these two villages with mesne profits. The defendant No. 2 is the present possessor of the 7½ annas share and she supports the plaintiffs' claim.

The contesting defendant, on the other hand, alleges that:

"in the *mufassal* all the three villages are known by the name of Damodarpur Lakhawar,"

that they were "measured together" (in the survey of 1843) and that all three were entered under the name of "Damodarpur Lakhawar" in the *zamindari* office of the Tikari Raj; and he claims that what was granted to Raja Krishna Pratap, under that name, was not one village only but all the three bearing the common designation of Lakhawar. He further alleges that the grantee and his heirs have ever since been in possession of the three villages and that the present suit has been falsely instituted against him. As already stated, the sole question at issue between the parties is what does the name "Damodarpur Lakhawar" denote; in other words, whether it refers to only one village or to the three villages together.

This is an action in ejectment; in the proceedings under section 145 of the Criminal Procedure Code in 1912 the defendant was found to be in possession of the villages in dispute, against the claim of the plaintiffs; and in the cadastral survey proceedings taken under the provisions of the Bengal Tenancy Act, 1885, they again failed to establish their allegation. Their failure in those proceedings led in fact to the institution of the present action in August, 1914. The onus thus lay heavily on the plaintiffs to show that the defendant was not in possession of these properties by virtue of the title he alleges. And this they could easily have done, in order to shift the onus, by proving that the rent for the two *mauzas* was paid separately into the estate office, and that the three villages were

1923.

INDRAJIT PRATIP SAHI v. AMAR SINGH.

separately entered in the estate records. Their Lordships have not observed in the judgments of the Courts in India a reference to this aspect of the case.

In both the Courts the matter in controversy has been dealt with as involving a simple construction of the words of the *patta*. Both the Subordinate Judge and the learned Judges of the High Court of Patna have found that the three properties form separate *mauzas*, that the two disputed villages are not appurtenant hamlets (*dakhihilis*) of Damodarpur, that consequently what was granted under the *patta* was only one village specifically named in the grant. They put aside the documentary evidence adduced by the defendant of the dealings with the three *mauzas* as a composite property, mainly on the ground of a lacuna in the evidence which made the transactions look suspicious.

The Subordinate Judge decreed the plaintiffs' claim, and his decree has been affirmed by the High Court, though it has held he had fallen into error on several findings of fact.

The present appeal to His Majesty is from the judgment and decree of the High Court.

In dealing with this case it is necessary to bear in mind two undisputed facts. First, that in the survey of 1843 the lands of the three *mauzas* were measured together. The learned judges of the High Court find it impossible to say why this was done. But *Exhibit 14A*, the memorandum on the *khasra* map prepared by the *amin* for purposes of the regular survey, which was to follow, contains the explanation. The three *mauzas* were measured together, as the lands were inter-mixed (*makhlût*). In this circumstance may be found the key to the whole history of these villages. Though the areas found on measurement are given separately, all three bear the same number in the Collector's register.

The appellate Court thinks that this is due to the fact that the three villages appertain to one *mahal*,

This explanation seems hardly well-founded. Besides, were this the correct view, all the other villages described in *Exhibit 14A* which also bear the name of "Lakhawar" would have borne one and the same number. Their Lordships have no doubt that the three *makhlût* villages bearing one number in the Collector's register were regarded as one composite revenue unit. The revenue assessed on these *mauzas* appears also to be a consolidated amount.

As stated already the grant was made on May 30, 1880. In it the name of the property is given as "Damodarpur Lakhawar." In the schedule which contains the details of the *mauzas* the names of the *thikadars* (lessees), who were in possession at the time, and the *jama* at which settlement was made are set out. The particular property forming the subject of the grant is described thus :

"Damodarpur Lakhawar, Pargana Okri, Mahal Sufi, District Gaya."

[The judgment then stated certain facts and, after setting out passages from the judgments of the lower Courts, continued] : The conclusion of the Indian Courts being thus based on the absence of evidence on the part of the defendant to show what arrangement had been made by Ran Bahadur Singh in respect of the demands of Harihar Narain Singh, who held the usufructuary mortgage, the appellant tried to trace further transactions to elucidate the gap to which the Subordinate Judge and the High Court referred, and on which practically the case was decided. It appears that before judgment was delivered by the High Court he traced, after diligent search, certain documents contemporaneously executed by Ran Bahadur Singh by which he had made effective provision for meeting the demands of the usufructuary mortgagee and the claims of the *mukarraridar*; and obtained copies from the registry office where the documents, executed by Ran Bahadur Singh, were registered, and applied to the appellate Court for their admission as material evidence in proof of his case. One of these documents

1923.

INDRAJIT PRATIP SAHI v. AMAR SINGH.

is the *hukumnamah* (authority) addressed by Ran Bahadur Singh to Harihar Narain Singh, which bears date May 31, 1880. The other is a *tunkhah* (authorization) addressed by Raja Ran Bahadur to one Telkhari Singh, dated January 24, 1880. [After setting out in full the documents sought to be admitted, the judgment continued as follows]: There can be no question as to the genuineness of these documents. They appear to have been duly registered on their execution, the copies produced have been obtained from the registry office under the rules and regulations framed by authority. The only question is whether they can be admitted as evidence. If they are admissible they place beyond dispute the fact that the grant was in respect of all three villages which are known under the composite name of "Damodarpur Lakhawar." But the learned judges have held that they had no jurisdiction under Order XLI, rule 27, of the Code of Civil Procedure, 1908, to admit in evidence these documents.

Rule 27 runs as follows:

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if:

(*a*) 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 judgment, *or for any other substantial cause.*

The Appellate Court may allow such evidence or document to be produced, or witness to be examined."

The matter does not come under clause (*a*). With regard to clause (*b*) the High Court construed the rule with the assistance of the decision in *Kessowji Issur* v. *Great Indian Peninsular Railway* (1), that it implies a prohibition against the admission of additional evidence except where the Appellate Court has itself discovered some inherent lacuna or defect, and required evidence to fill up the gap or remedy the

(1) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.

defect. They have apparently not considered the question that the suitor may be entitled for any "substantial cause" to apply to the Court for the admission of such additional evidence. That case, on which the learned judges have relied, was peculiar in its character. A suit had been brought on the original side of the Bombay High Court against the railway company to recover damages for injuries sustained in consequence of an accident occasioned by the laches of the officials of the railway. The suit had been decreed by the Court of first instance; the railway company then, on discovery of some new evidence, applied for a review of judgment before the learned judge who had decreed the claim; he refused the application. Then the company filed an appeal, and applied to the High Court in its appellate jurisdiction for leave to produce the same evidence they had presented to the first Court and which had been rejected. The High Court not only gave permission to the appellants in that case to produce the evidence, but extended the permission to other evidence. As this Board pointed out, the procedure adopted by the appellate Court was quite irregular. In the course of their judgment the Board laid stress on the limitations to the power of an appellate Court to require additional evidence on their own motion to supplement what had been produced by the parties. In their Lordships' opinion *Kessowji's* case (1) has no bearing on the present debate. In this connection it may be useful here to refer to the remarks of Lord Westbury in *Sreemanchunder Dey* v. *Gopalchunder Chuckerbutty* (2), where, dealing with the power of the Appellate Court to require additional evidence under the provisions of the cognate section (section 355) in the Civil Procedure Code, 1859, he said as follows: "When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting

(1) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.

(2) (1866) 11 Moo. I. A. 28, 48, 49.

1923.

INDRAJIT PRATIP SAHI v. AMAR SINGH.

apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly, because, where it is done, not at the instance of the parties but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original inquiry by the High Court may be in itself inperfect, and not sufficiently extensive to answer the purposes of justice."

In both those cases their Lordships were dealing with the power of the Appellate Court to require evidence to be produced for the purpose of enabling the Court to pronounce judgment. Those cases did not refer to the right of one or other of the parties to produce evidence which he considered essential for the determination of the action. Under Order XLVII, rule 1, which reproduces section 623 of the Civil Procedure Code, 1882, a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in rule 1. In the present case an appeal had been preferred and a review, therefore, was out of the question; and the defendants took the only and proper course—namely, to apply to the High Court, which was in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of rule 27, which lays down that the appellate Court may for any other substantial cause (namely, other than those particularly specified) allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of

1923.

INDRAJIT PRATIP SAHI v. AMAR SINGH.

hindering justice. As the application is now before their Lordships for the admission of the documents to which reference has already been made, it is desirable to observe that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. It is only necessary to refer to page 289 of Mr. Bentwich's Privy Council Practice, where he has set out the cases in which the power has been exercised.

Their Lordships, therefore, have admitted the two documents in respect of which the application is made, and on these two documents they have no doubt that Ran Bahadur Singh, by the words "Damodarpur Lakhawar," denoted all the three villages, and that he purported to give, and gave in *mukarrari* all three of them to the grantee. On the whole, therefore, their Lordships are of opinion that the decrees of the Courts below should be set aside and the plaintiffs' suit dismissed. The appellant will be entitled to his costs both here and in the Courts in India, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *W. W. Box & Co.*

## APPELLATE CIVIL.

*Before Dawson Miller, C. J. and Foster, J.*

THAKURAIN FULBATI KUMARI

*v.*

MAHARAJ KUMAR RAO MAHESHVARI PRASAD SINGH.*

1923.

*April*, 17.

Ghatwali *tenure—succession to, when owned by joint Hindu family*—ghatwali mukararri *tenures in* Taluk *Dumri*, Pargana *Gidhour, district Monghyr, alienability of.*

* First Appeal No. 112 of 1920, from a decision of Babu Satish Chandra Mitra, Subordinate Judge of Monghyr, dated the 20th February, 1920.