In *Attorney General* v. *Biphosphated Guano Co.* (1) the Court of appeal said that the defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it, and the Court was of opinion that the objection was well-founded, that the trial Judge was not justified in deciding the case upon want of notice to persons as regards whom the fact of notice was not put in issue. This decision was followed by Farwell, L.J. in *Wilkes* v. *Spooner* (2). Both decisions are referred to and relied upon by Mukherji, J. in *Akshoy Kumar Bannerji* v. *Corporation of Calcutta* (3) where he held that if the defendants wished to avail themselves of the defence that they were purchasers for value without notice, they should have pleaded it. It is sufficient on this part of the case to say that, without deciding the question whether a charge is or is not available against a bona fide purchaser for value without notice, the argument is not open to the appellants because this defence was not taken and the issue was not raised.

The appeal is dismissed with costs.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Ross, J.

HARI RAM

v.

FORI RAM.* 1928.

March, 20.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* XIII, *rule* 1, *scope of—trial court, discretion of, to admit evidence at a late stage—appellate court, interference by, with that discretion.*

The provision of Order XIII, rule 1, Code of Civil Procedure, 1908, which requires the parties or their pleaders to

*Appeal from Appellate Decree no. 1335 of 1925, from a decision of Babu Promotho Nath Bhattacharji, Subordinate Judge of Saran, dated the 30th April, 1925, confirming a decision of Maulavi Saiyid Armad, Additional Munsif of Siwan, dated the 1st March, 1924.

(1) (1879) 11 Ch. D. 327. (2) (1911) 2 K. B. 473, 486.

(3) (1915) I. L. R. 42 Cal. 635.

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produce at the first hearing of the suit all the documentary evidence of every description in their possession or powers on which they intend to rely, does not exclude the discretion of the court to receive any such documentary evidence at any subsequent stage.

Imambandi v. *Mutsaddi* (1), followed.

The discretion, to receive evidence at a subsequent stage lies however, with the trial court and, ordinarily, where a document referred to in Order XIII, rule 1, has been admitted, the appellate court ought not lightly to interfere with that discretion.

Appeal by the plaintiffs.

The plaintiffs were a firm carrying on business as shop-keepers and cloth merchants at Siwan in the district of Saran. They instituted the suit out of which this appeal arose in April, 1923, claiming a sum of Rs. 610 from the defendants who were their customers for the balance of an account for cloth supplied. It appeared that between March, 1920, and January, 1922, they supplied goods to the value of over Rs. 3,000. Certain payments were made on account, leaving a balance of Rs. 569 and some odd annas which together with interest amounted to Rs. 610.

The plaintiffs with their plaint filed copies of the bahikhata which was a sort of ledger containing entries from the roznamcha and the rokar as in their opinion this ledger was a document which had to be filed with their plaint under Order VII, rule 14 of the Civil Procedure Code. They did not, however, apparently produce the original books. When the case came on for trial as it did on the 19th February, 1924, the original documents were then filed and so far as the evidence shows the documents then produced corresponded exactly to the copies which had been filed with the plaint. Some objection was taken to their production at that time by the defendants on the ground that they were produced late, that they ought to have been produced at the time when the

(1) (1918) I. L. R. 45 Cal. 876.

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plaint was filed and compared by the Sarishtadar of the Court with the copies left behind attached to the plaint, and as this had not been done they objected to the documents going in at that late stage. The Munsif before whom the case came over-ruled the objection and considered that as the copies had been filed at a very early stage, namely with the plaint and as the books themselves corresponded to the copies it would not be fair to shut out the evidence and he, therefore, admitted them in evidence.

Various defences were raised at the trial, the defendants going so far as to say that they had no transactions with the plaintiffs' shop at all. However, the Munsif found all the material facts in favour of the plaintiffs. He considered that the account books produced which supported the plaintiffs' case were genuine and he saw no reason to disbelieve them. He further stated that he saw no reason to disbelieve the evidence adduced on behalf of the plaintiffs and so far as the facts on that issue were concerned he found them all in favour of the plaintiffs. On the question of limitation, however, which was raised at the trial he took the view that the period of limitation began to run on the 23rd March, 1920, and notwithstanding the fact that certain sums had been paid on account and certain goods were ordered later than that date, he considered that the whole cause of action arose at the earlier period and consequently dismissed the suit on the ground of limitation.

The Subordinate Judge on appeal took the view that the accounts which were admitted in the trial Court ought not to have been admitted at all because they were produced late. He relied upon the provisions of Order XIII, rules 1 and 2 which provide that the parties shall produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely and which has not already been filed in Court, and considering that under the second rule of that Order no documents which had not been produced in

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accordance with the first rule should have been admitted at any later stage, held that the account books were not admissible. One of the reasons which he gave for arriving at that decision was that although the evidence might in such circumstances be admitted it could only be admitted if good cause was shown to the satisfaction of the Court for the non-production at an earlier period and in such cases it was provided by the rules that the Court receiving any such evidence shall record the reasons for so doing.

Hareshwar Prasad Sinha, for the appellants.

S. Jafar Imam, for the respondents.

DAWSON MILLER, C. J.—(after stating the facts as set out above proceeded as follows:) The learned Subordinate Judge was under the impression apparently that the trial Court had not recorded any reasons for admitting the documents. It is true that there is no mention of it in the judgment of the learned Munsif, but in the order sheet there appears an order dated the 19th February, 1924, when the hearing of the evidence first began, that order stating the reasons why the learned Munsif admitted the documents at that stage. I have already referred to that order and need not repeat it again. The learned Subordinate Judge discussed the effect of a number of cases dealing with the interpretation of these rules and found that the documents in question were not in fact admissible. It is sufficient, I think, to refer only to one decision and that is the case of *Imambandi* v. *Mutsaddi* (1). It was there held that Order XIII, rule 1 of the Civil Procedure Code requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely, but it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. There is no doubt therefore that a discretion to receive evidence at a subsequent stage

(1) (1918) I. L. R. 45 Cal. 976.

lies with the trial Court. Moreover I consider that ordinarily where a document of this sort has been admitted which supports the case of one side or the other, the Appellate Court ought not lightly to interfere with the discretion of the trial Court which admitted the document. The result of so doing in the present case is that although the learned Munsif accepted entirely the verbal evidence of the plaintiffs which was supported in fact by the documents, the exclusion of this document by the Appellate Court has had the effect of precluding the recovery of the claim by the plaintiffs on the ground of limitation, for apart from the documents themselves it is impossible for the plaintiffs to prove that their claim is not barred by limitation. The result of that is that the plaintiffs, without any further opportunity of proving their case apart from the documents having relied principally upon these documents in the trial Court, have now been defeated solely upon the ground of limitation when, had the documents been excluded in the trial Court they might have had an opportunity of calling verbal evidence to supply the deficiencies due to the exclusion of the documents. If these documents are admitted, and I think they ought to be, then the question of limitation still remains to be decided. The documents are on the file, but they have not been translated and no copies of them are produced in this second appeal from which we could satisfy ourselves whether the claim or any portion thereof is in fact barred by limitation.

The only course is to set aside the judgment of the Appellate Court and send the case back to that Court to reconsider the appeal both on the evidence and upon the question of limitation in the light of the documents which I think ought to have been admitted.

I should like to add that in my view the documents in question in this case were not those of the nature contemplated in Order VII, rule 17. The plaintiff is not suing upon these documents as in the case of a mortgage or a conveyance or an agreement or any

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document of title. The documents in question are not such as it was necessary for him to produce in Court with the plaint. They were, however, documents on which he relied and therefore they came within Order VII, rule 14, clause (*2*) and should have been entered in a list added to or annexed to the plaint. As in fact however he attached a copy of the document itself to the plaint there was no real failure to comply with the provisions of clause (*2*), rule 14 of Order VII. The documents also were such as came within the provisions of Order XIII, rules 1 and 2 and if they were not produced at an earlier stage they ought to have been produced in the ordinary course at the first hearing. But as I have said there were good reasons given by the trial Court for admitting them at a later stage and I do not think that the Appellate Court ought in the circumstances to have overruled the discretion of the Munsif.

The costs of this appeal will abide the result of the final hearing in the Appellate Court. Whoever succeeds in the Appellate Court on remand will be entitled to the costs incurred in this appeal.

ROSS, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Das and Adami, JJ.

1928.

May, 8.

KUMAR KAMAKHAYA NARAIN SINGH

v.

BHUVANESHWAR LAL SINGH.*

Bengal Decennial Settlement Regulation, 1793 (*Bengal Regulation VIII of* 1793), *sections* 4, 5, 6 *and* 7—"*proprietor of the soil*", *meaning of—Permanent Settlement, whether establishes proprietary right in the land—effect of*

*Appeal from Original Decree no. 203 of 1924, from a decision of M. Saiyid Muhammad Zarif, Subordinate Judge of Hazaribagh, dated the 20th June, 1924.