## APPELLATE CIVIL.

*Before Bhide and Din Mohammad JJ.*

GHANAYA AND OTHERS (PLAINTIFFS) Appellants

*versus*

MEHTAB, DECEASED, THROUGH HIS REPRESENTATIVES, AND OTHERS (DEFENDANTS) Respondents.

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*June 12.*

**Civil Appeal No. 436 of 1929.**

*Indian Evidence Act, I of 1872, section 35 : Report by* Tahsildar *under section 202, Criminal Procedure Code, 1898— and report by local commissioner to a Civil Court—whether admissible in evidence under the section as public documents.*

*Held*, that a report submitted by a *Tahsildar* under section 202, Criminal Procedure Code, to a Magistrate in a criminal case, or a report presented by a local commissioner to the Court of the Subordinate Judge in another civil suit, without the authors of those reports being examined as witnesses, were not admissible in evidence in the present civil case, under section 35 of the Evidence Act.

*Jagdat* v. *Sheopal* (1), and *Baldeo Das* v. *Gobind Das* (2), not followed.

*Ghulam Rasul Khan* v. *Secretary of State* (3), followed.

Powell's Principles and Practice of the Law of Evidence, 10th Edition, referred to.

*First Appeal from the decree of* Sheikh *Abdul Aziz, Senior Subordinate Judge, Hoshiarpur, dated 6th November, 1928, dismissing the plaintiffs' suit.*

SUNDAR DAS and GULLU RAM, for Appellant.

SHAMAIR CHAND and DEWAN MEHR CHAND, for Respondents.

DIN MOHAMMAD J.—In this case the three appellants are members of the proprietary body of village Saloh while the forty-four respondents are some of the tenants residing there. On the 25th of August, 1927,

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the plaintiffs instituted this suit in their representative capacity under Order I, rule 8 of the Civil Procedure Code on behalf of the whole proprietary body claiming Rs.6,000 from the defendants. Their allegations were that out of the total area of 22,857 *Kanals*, 4 *Marlas* of land, which is described in the revenue papers as *Khad*, *ban* and *banjar* they had reserved 12,295 *Kanals*, 11 *Marlas* of land for their personal use and what remained was left as a common pasture land. In 1922, however, the defendants devastated their reserved grass on which a criminal case under section 447, Indian Penal Code, was lodged against them. This case was dismissed on the ground that under the terms of the *Wajib-ul-arz* the tenants and non-proprietors of the village had a right to graze their cattle in the whole of the *Shamilat* land. They again filed a suit against some of the occupancy tenants and on the 8th of June, 1927, obtained a decree specifying 2,999 *Kanals*, 16 *Marlas* for pasturage and prohibiting the tenants from trespassing into the remaining area of the *Shamilat* land. On these allegations the plaintiffs assessed the value of the damage done by the defendants at Rs.2,000 a year and claimed damages for a period of three years only prior to the institution of the suit.

The defendants traversed these allegations and denied that any area was actually reserved by the proprietors for their personal use or could be so reserved by them under the conditions of the *Wajib-ul-arz*. They also refuted the plaintiffs' allegations relating to the devastation of the reserved grass and pleaded that they had been exercising their right in good faith in the whole of the village *Shamilat*. They further added that the plaintiffs have not been able to state which of the tenants did the damage, if any, and in

which portion of the land in dispute and how much damage was caused by them individually.

The learned Subordinate Judge, after going through the evidence produced by the parties, came to the conclusion that the *Wajib-ul-arz* conferred on the tenants and non-proprietors of the village unfettered rights to graze their cattle in the whole of the *Shamilat* and that the plaintiffs had failed to prove that any particular area was reserved by the proprietors of the village for their exclusive use or that any damage had been done by the defendants. On this ground he dismissed the suit and from this decree the plaintiffs have preferred the present appeal.

The learned counsel for the appellants has, in the first place, relied on the oral testimony of the witnesses produced by the plaintiffs, but a perusal of their statements would show that it does not help them in the least. Soondhi (P.W.1) has stated that tenants and proprietors, in fact all the inhabitants of the village, had destroyed the *rakh* (reserved grass). Nizam-ud-Din (P.W.2) has made a vague statement holding all tenants responsible for this damage. Anant Ram, *Patwari* (P.W.3), has admitted that there is no mention of any *rakh* in the revenue papers. Suraj (P.W.4), who is alleged to have been appointed as a watchman in the *rakh* has stated that all tenants in a body destroyed the *rakh*. Harnam Singh (P.W.5) has merely stated that there used to be a *rakh* five or six years ago but it was devastated by the tenants. Diwan Singh (P.W.6) and Tulsi Ram (P.W.9) have not referred to any devastation at all. Prabhu (P.W.7) has professed ignorance of the existence of any *rakh* whatsoever. Kanshi (P.W.8), Pirthu (P.W.10) and Lachhman (P.W.11) have proved certain *bahi* entries relating to the alleged sales of

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grass in the jungle. Udham Singh, *Lambardar* (P.W.12), himself a proprietor in the village, has stated that the non-proprietors destroyed the *rakh*. Sohan Singh (P.W.13) is one of the three plaintiffs and has appeared as a witness for himself. He has admitted that there are 500 houses of tenants and non-proprietors in the village and about 300 men belonging to the Gujjar tribe were present at the time the *rakh* was destroyed and since then the defendants have not allowed them to reserve any grass. On this evidence, I am afraid, it cannot at all be urged that the plaintiffs have succeeded in establishing that they had any right to reserve any portion of the *Shamilat* for their exclusive use or that any specified portion had been so reserved or that the forty-four respondents now before us had been responsible for any damage done to the plaintiffs' grass.

The learned counsel has further relied on two documents, one of which is a report, dated the 18th of August, 1922, submitted by *Mian* Amir Singh, *Tahsildar*, presumably under section 202, Criminal Procedure Code, to the Court of the Additional District Magistrate in a criminal case under section 447, Indian Penal Code, and the other is a report, dated the 15th of May, 1924, presented by *Lala* Gurdial in the capacity of local Commissioner to the Court of the Subordinate Judge at Hoshiarpur in a civil case between the proprietors and the tenants of this village. These two gentlemen have not been examined as witnesses in the case and only the certified copies of their reports have been placed on the record. It is, however, contended on the authority of *Jagdat* v. *Sheopal* (1), and *Baldeo Das* v. *Gobind Das* (2), that these documents are admissible in evidence under

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section 35 of the Evidence Act. It is no doubt true that in *Jagdat* v. *Sheopal* (1) Hasan J. admitted in evidence a report of a *Qanungo* made under the orders of a Magistrate acting under section 202, Criminal Procedure Code, on the ground that it was an entry by a public servant in the discharge of his official duty, and in *Baldeo Das* v. *Gobind Das* (2) a Bench of the Allahabad High Court held that on the question of the ownership of a certain temple the report of a *Kotwal* who in 1840 had made an enquiry into the ownership of the temple at the instance of the Political Agent was relevant evidence as it was a public record of a public enquiry. But it appears from the report of the judgments cited above that the point was not discussed and these reports were admitted into evidence as a mere matter of course. With all respect, therefore, I hesitate to follow these authorities as, in my humble judgment, the language used in section 35 of the Indian Evidence Act cannot be strained to such an extent as to admit the reports now before us under the provisions of law contained therein. This section runs as follows :—

" An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

Now, as I read the section, the words " an entry " as used here are not intended to apply to the opinions of public officers based on inferences drawn from the allegations made before them in the course of

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enquiries conducted under section 202, Criminal Procedure Code or under Order XXVI of the Code of Civil Procedure, but is confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned in the course of their official duty and are required to be entered in any book, register or record intended for the purpose. This section is apparently an exception to the general rule of evidence and is based on certain principles deduced from the English Law and, although the Indian Law has extended the English Law to some extent, the extension introduced, in my view, does not make it so wide as to admit mere opinions recorded in this manner. Powell in his Principles and Practice of the Law of Evidence, 10th Edition, describes the English rule of evidence as obtained from the authoritative pronouncements of some of the eminent English Judges in the following terms :—

"It is important to observe that whenever it is the duty of a public official either at common law or by statute to record certain facts in any book which is intended to be kept as a register to be referred to ever after, the book is admissible in evidence to prove, not only that such official made those entries, but also that the facts which he recorded in that book are true.....And this rule extends to every public document whether a register or not which is made for the purpose of the public making use of it and being able to refer to it.....
.....The principle is that it should be a public enquiry, a public document and made by a public officer in the discharge of his public duty.....It would be otherwise if the documents were prepared only for a temporary purpose. The mere fact that a document

intended for a temporary purpose is found after a long lapse of years in the archives of a Government office does not constitute it of the authority of a register."

Taylor in his famous commentaries on the Law of Evidence has observed that public documents are entitled to this extraordinary degree of confidence partly because they are required by the law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office or at least under that of official duty by accredited agents appointed for that purpose.

In the light of these observations I am of opinion that it will not be possible to hold that either of the two reports intended to be relied on by the learned counsel fulfils all the conditions laid down above. The Legislature could never have intended to admit as evidence, without their authenticity being confirmed by the usual test of truth, mere conclusions arrived at by the enquiring or investigating officers from the statements made before them during the course of their enquiry or investigation. If once the broad proposition as laid down by the two judgments cited by the learned counsel were admitted to be good law, alarming results are bound to follow. Even in the case of judgments the Legislature has laid down several conditions which should be satisfied before they can be considered relevant in any subsequent case. It would appear most illogical then if mere reports submitted by local commissioners or investigating officers, during the course of the trial of those suits in which such judgments are delivered, will be held admissible under section 35 and be considered sufficient to prove the truth of the assertions made therein without the

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test of cross-examination. As observed by their Lordships of the Privy Council in *Ghulam Rasul Khan* v. *Secretary of State* (1) " statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community." Unless, therefore, a document is of such a public nature as is contemplated in this observation it will not be admissible under section 35 of the Evidence Act. With due deference therefore to the learned judges responsible for the decisions relied on by the appellants I am constrained to hold that the two reports now before us cannot be admitted in evidence. But even if they were, I agree with the learned Subordinate Judge, who has fully discussed them in his judgment, that they do not serve the purpose for which they were intended to be used. I would, therefore, maintain the decree of the Court below and dismiss the appeal with costs throughout.

BHIDE J. BHIDE J.—I agree.

*A. N. C.*

*Appeal dismissed.*

(1) (1925) I. L. R. 6 Lah. 269 (P.C.).