APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

RA'JA'RA'M (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANESH HARI KA'RKHA'NIS (ORIGINAL DEFENDANT), RESPONDENT.* 1895. *September 30.*

Ejectment—Proof of title—Inference of title from acts of ownership—Finding of lower Court on such question—Mixed question of law and fact—Second appeal——High Court's power to interfere—Mámlatdars' Act (Bom. Act III of 1876), Sec. 13—Limitation Act (XV of 1877), Sec. 28, Sch. II, Art. 47—Dismissal of suit by Mámlatdár—Ejectment suit—Title.

In an ejectment suit the evidence of the plaintiff's title to the property consisted of evidence of acts of user, from which the Court was asked to infer ownership in the absence of proof of a better title by the defendant. Upon review of the evidence the District Judge held that the plaintiff's title was not proved.

Held that this finding, which was a mixed one of law and fact, was a finding with which the High Court could not interfere on second appeal.

When from the facts found by the lower Court the legal inference to be drawn is certain, the High Court in second appeal may correct erroneous conclusions drawn by the lower Appellate Court. Where, however, the legal inference to be deduced from facts is doubtful, it is not open to the High Court in second appeal to interfere with the findings of the lower Court. A test which often presents itself to an English lawyer is this: Would a Judge withdraw the case from a jury on the ground that there was no evidence of the question to be found upon, such as adverse possession or title, to go to them; or would he, on the other hand, on certain facts being established, direct them to find in a particular manner? In either of these cases it would be open to the High Court in second appeal to come to a different conclusion from the lower Appellate Court. But where the question upon the facts and law is one which the Judge would lay before the jury to decide, there it is not open to the High Court to consider the propriety of the finding of the lower Appellate Court.

Luchmeswar Singh v. *Manowar* (1) and *Ramgopal* v. *Shamshaton* (2) referred to.

In 1891 the plaintiff brought this suit to eject the defendant from certain land. In 1883 the defendant's predecessor and vendor (Sakhárám Potnis) had sued the plaintiff's tenant Amrit Parasnis in the Mámlatdár's Court, alleging that Amrit had disturbed his possession by putting sweepings upon the land and asking to be protected in his enjoyment. He did not appear on the day fixed for hearing, and his suit was dismissed under section 13 of Act III of 1876. He did not file a suit to set aside this order of dismissal. It was contended in the present suit now brought by the plaintiff that after three years by the combined operation of article 47 and section 28 of the Limitation Act (XV of 1877) the defendant's vendor Sakhárám Potnis had lost his title to the land which thus became vested in the plaintiff.

Held, that except as evidence of the plaintiff's title to the land, the proceedings in the Mámlatdár's Court in 1883 and his decree did not affect the present suit in ejectment. As such evidence they were before the lower Court.

* Second Appeal, No. 371 of 1894.

(1) L. R., 16 Ind. Ap., 48. (2) L. R., 19 Ind. Ap., 228.

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SECOND appeal from the decision of E. M. H. Fulton, District Judge of Sátára, reversing the decree of Ráo Sáheb A. G. Bhavé, Joint Subordinate Judge.

Suit in ejectment. The land in question was formerly unenclosed, but at the date of suit formed part of the defendant's compound. The plaintiff claimed to recover it, alleging that until December, 1890, it had been in the possession of his tenant Amrit Parasnis on his behalf, but that the defendant had then wrongfully dispossessed him.

The defendant denied that the land was the plaintiff's, and alleged that he had purchased it from one Sakhárám Potnis in 1889, to whom it then belonged.

The evidence given by the plaintiff to prove his ownership was evidence of acts of user of the land not by himself but by other persons as his licensees or as licensees of his predecessor in title.

Evidence was also given that in 1883 the defendant's predecessor and vendor Sakhárám Potnis had sued the plaintiff's tenant Amrit Parasnis in the Mámlatdár's Court, alleging that Amrit had disturbed his possession by putting sweepings upon the land and asking to be protected in his enjoyment. He did not, however, appear on the day fixed for hearing, and his suit was dismissed under section 13 of Act III of 1876. He did not file a suit to set aside this order of dismissal. It was contended in the present suit brought by the plaintiff that after three years by the combined operation of article 47 and section 28 of the Limitation Act (XV of 1877) Sakhárám Potnis (the defendant's vendor) had lost his title (if any) to the land which thus became vested in the plaintiff.

The Subordinate Judge found that the plaintiff's title to a portion of the ground was proved, and he awarded the claim to that extent.

On appeal by the defendant the Judge reversed the decree and rejected the claim *in toto*.

The plaintiff preferred a second appeal.

Branson, with *Mahádeo B. Chavbal*, for the appellant (plaintiff) :—The Appellate Court has found that the plaintiff has not proved his title to the land. We contend that that finding does not bind this Court in second appeal; the question is a mixed question of law and fact. The evidence with respect to title is wholly oral, and the Judge has not drawn a correct conclusion from it. The various acts of our ownership deposed to by witnesses and Náro Amrit's continued possession on our behalf were sufficient in law to entitle us to a decree, unless the defendant proved a better title. The defendant admitted our original title. Further, the Judge has not considered the evidence of the witness (No. 43) who was examined on commission. Under these circumstances this Court has authority to review the finding—*Lachmeswar Singh* v. *Manowar*[1]; *Rámgopál* v. *Shamskhaton*[2].

Next we contend that the defendant is now estopped from asserting his title to the property. In 1883 Sakhárám Lakshman Potnis, the defendant's vendor, sued Amrit Parasnis, who was in possession on our behalf, in the Mámlatdár's Court to recover possession of the land, alleging that his possession was disturbed by Parasnis, who put rubbish on the land. On the day of hearing, Potnis did not appear and the suit was dismissed for his default. It has been held that when a suit is dismissed by a Mámlatdár for non-appearance of the plaintiff, his order operates as a refusal to grant relief—*Rámchandra* v. *Bhikibái*[3]; *Chinto* v. *Vishnu*[4]. These rulings have been subsequently followed. Potnis ought to have brought a suit to set aside the Mámlatdár's order within three years from its date—article 47, Schedule II of the Limitation Act (XV of 1877). He did not do so and, therefore, the defendant's right to the property is extinguished under section 28 of the Act.

Mahádeo V. Bhát for the respondent (defendant).

FARRAN, C. J. :—This is an appeal from the appellate decree of the District Court of Sátára dismissing the plaintiff's suit. It was an ejectment suit, in which the plaintiff sought to recover possession of a piece of land formerly uninclosed, but now enclosed

(1) L. R., 19 Ind. Ap., 48.
(2) L. R., 19 Ind. Ap., 228.
(3) I. L. R., 6 Bom., 477.
(4) P. J. for 1883, p. 131.

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so as to form part of the defendant's compound. The District Judge has found that the plaintiff has not proved his title to the land in dispute.

Counsel for the appellant has pressed us to review that finding, contending, upon the authority of *Lachmeswar Singh* v. *Manowar*[1] and *Rámgopál* v. *Shamskhaton*[2], that we have jurisdiction to do so, as it is a mixed question of law and fact, and as the District Judge has not, he contends, drawn the correct conclusions from the simple facts found.

It has also been argued before us that certain proceedings before the Mámlatdár taken by Potnis, the predecessor-in-title of the defendant in 1833, which were not followed up effectually, debar the defendant from defending this suit with success.

The application of the rule deducible from the above and other decisions of the Privy Council is not usually attended with much difficulty. From facts found it is often easy to rule with certainty that a certain legal inference ought or ought not to be drawn. When such a state of facts occurs, the Court in second appeal can and often does correct erroneous conclusions drawn by the lower Appellate Court. Where, however, the legal inference to be deduced from facts is doubtful, it is not open to this Court in second appeal to interfere with the findings of the lower Court. A test which often presents itself to an English lawyer is this: Would a Judge withdraw the case from a jury on the ground that there was no evidence of the question to be found upon, such as adverse possession or title, to go to them, or would he, on the other hand, on certain facts being established, direct them to find in a particular manner. In either of these cases it would be open to this Court in second appeal to come to a different conclusion from the lower Appellate Court. But where the question upon the facts and law is one which the Judge would lay before the jury to decide, there it is not open to this Court to consider the propriety of the finding of the lower Appellate Court.

In some cases doubtless it is difficult to draw the boundary line. In the present the lower Appellate Court has found that

(1) L. R., 19 Ind. Áp., 48. (2) L. R., 19 Ind. Ap., 228.

the plaintiff has not established title to the land. The proof of ownership put forward on behalf of the plaintiff was altogether oral and consisted of acts of user over the land on the part of licensees of the plaintiff or of his predecessors in title. From these acts, even if unquestioned, the District Judge felt himself unable to draw the inference that the land in dispute belonged to the plaintiff. The argument of Mr. Branson before us was mainly based upon the assumption that the original title of the plaintiff's ancestors, the Rájas of Sátára, to the land in suit was a fact upon which there could be no question, a fact admitted in the case. There is, however, we think, no admission to that effect on the part of the defendant. In cross-examination by the plaintiff he, after stating that the land was the ancestral property of his vendors, said: "It is said that it was acquired by their ancestors about 100 or 200 years ago from the Mahárája of Sátára. It was given, I hear, for building a house and living there, as similar sites were given to other people by the Mahárája for the same purpose." The defendant was here no doubt stating the popular tradition as to the original ownership of building land in Sátára; but we cannot regard that as an admission by him of the plaintiff's original title to the land in dispute. The District Judge deals with the point thus: "During the sovereignty of the late Rája he could doubtless dispose as he thought proper of all vacant ground not belonging to any private individual. But the plaintiff cannot claim rights of a similar nature." The District Judge considers that this does not prove the plaintiff's original title to the land. We do not think that he has fallen into an error of law in this respect.

The evidence of user adduced for the plaintiff is to the effect that the Parasnis family who owned a house on the opposite side of the road used the land in question by placing cow-dung and grain upon it and fodder and fuel and tethering cattle there. This, it is said, was done by the permission of the Mahárání. The District Judge says that it is unnecessary to question the accuracy of the evidence that Parasnis received permission from the plaintiff's mother to use the ground and did use it. We do not by that expression understand that he found the user and permission as a fact, but he considered that as the ground was

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uninclosed, such casual acts of ownership, if they occurred, would not prove title. The presumption which they might give rise to, he considers to be rebutted by the fact that Potnis used a privy on the same land which the defendant now uses, and by other acts of ownership which Potnis and his mortgagee exercised over it.

The issue of ownership arising from acts of possession was, therefore, a doubtful one. There was evidence both ways. The District Judge has found upon it after a careful review of the evidence in a sense unfavourable to the plaintiff. We consider that this finding (a mixed one of law and fact) is a finding with which upon the principles to which we have adverted we cannot interfere. The District Judge has not in his judgment directly alluded to the evidence of the old man, Exhibit 43. That witness proves what is not questioned, that the land to the east of the land in dispute, upon which stands the house of Bápu Sutár, belonged to the plaintiff's predecessor, but he also adds that he lived in a *wára* on that land and exercised a right of way over the land in dispute and therefore he says that it belonged to the same owner. This evidence is of the same class as that considered by the District Judge, and adds but little to it. Even if we assume that the District Judge has not taken it into consideration, we think that it is not of sufficient importance to have altered his views; but we do not feel justified in saying that it was not present to his mind though he has not set it out or directly alluded to it.

As to the second point taken before us, no issue was raised with reference to it in the lower Appellate Court. If we thought that upon the facts found it would be conclusive in favour of the plaintiff we might, however, give effect to it in second appeal; but we do not think that it is so. In or about 1883 the defendant's predecessor Potnis sued Amrit Parasnis in the Mámlatdár's Court, alleging that the latter had disturbed his possession by piling sweepings upon the land in dispute and asked to be protected in his enjoyment of it. He did not appear on the day fixed for the hearing, and the suit was dismissed under section 13 of Act III of 1876 (Bombay). Potnis did not file a suit to set aside this order, and it is contended that after three years he by the combined operation of article 47 and section 28 of Act XV of

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1877 lost his title to the land which then became vested in Amrit Parasnis. The cases of *Rámchandra* v. *Bhikibái* (1) and *Chinto* v. *Vishnu* (2) followed in certain unreported cases (Second Appeal No. 889 of 1889 and Second Appeal No. 951 of 1889) are relied on in support of that contention. They show that an order made under section 13 of the Mámlatdárs' Act dismissing a suit on the non-appearance of the plaintiff operates as a decision refusing relief to the plaintiff, and that the plaintiff, if he does not sue within three years to set aside such an order, is absolutely bound by it and cannot subsequently obtain redress in respect of the wrong complained of by ordinary suit. There is no finding here as to what occurred after the order of the Mámlatdár dismissing the suit in 1883; but it would appear from the evidence of Potnis before the Bench of Magistrates contradicting his evidence in this suit and of the defendant given in this suit that Amrit Parasnis did not remove the heap of rubbish.

The defendant purchased the house of Potnis including the land in dispute in 1889. In 1890 he sued Amrit Parasnis and a servant of the plaintiff in the Mámlatdár's Court in respect of a further placing of rubbish on the land by Amrit Parasnis, and obtained an order, after which Amrit removed not only the further deposit of rubbish but also the original heap. Now, it may be that on the expiration of three years from the order of the Mámlatdár in 1883 Potnis could not have compelled Amrit to remove the heap. Probably he could not have done so. It may also be that he could not then lawfully by proceedings in the Mámlatdár's Court or in a Civil Court have prevented Amrit from placing further rubbish on the land. We give no opinion as to that. But we fail to see how this suit, which is not to have it declared that Amrit Parasnis or the plaintiff is entitled to deposit rubbish on the land, but is a suit on title by the plaintiff to eject the defendant, is affected by the decision of the Mámlatdár in 1883, except in so far as the proceedings and decree in his Court in 1883 can be relied on as proof of title in Amrit Parasnis and the plaintiff. For that purpose they were relied on by the Subordinate Judge and were before the District Judge,

(1) I. L. R., 6 Bom., 477. (2) P. J. for 1883, p. 131.

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who no doubt took them into consideration in coming to the decision he has arrived at.

This ground of appeal also fails. We must confirm the decree of the District Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

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PANDHARINA'TH AND ANOTHER, SONS OF PRALHA'D, DECEASED (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MAHA'BUBKHA'N AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Ejectment—Possession—Mahomedan family—Sons living with father—Decree and execution against father—Subsequent possession by sons—Adverse possession—Civil Procedure Code (Act X of 1877), Sec. 263—Limitation.

One A'jamkhán formerly owned the house and land in dispute. He sold it to Gopál, who sold it to the plaintiff. A'jamkhán, however, continued in occupation of the property. In 1879 the plaintiff sued A'jamkhán and Gopál for possession and obtained a decree. On 6th April, 1880, in execution of the decree he was put in formal possession by the Court under section 263 of the Civil Procedure Code (Act X of 1877) in the presence of A jamkhán, who made no objection. At the time of these proceedings, A'jamkhán's sons (the present defendants) were living with him in the house and they continued to do so subsequently. A'jamkhán died in 1885 and his sons continued in possession of the property and cultivated it. On the 4th April, 1892, the plaintiff brought this suit to eject them. They pleaded that the suit was barred by limitation, contending that the execution proceedings in 1880 did not bind them, as they were not parties to that suit.

Held, that as the present suit would not have been barred against A'jamkhán had he survived, it was not barred against the defendants, whose rights were derived from him. The defendants living with their father had no independent juridical possession of the premises. The father A'jamkhán was the only person in possession. The possession which the plaintiff Pralhád obtained through the Court from A'jamkhán in 1880 operated as well against the defendants (his sons) as against himself.

SECOND appeal from the decision of T. Hamilton, District Judge of Sholápur, reversing the decree of Khán Sáheb Ruttonji Muncherji, Subordinate Judge of Bársi.

Suit in ejectment. The original plaintiff Pralhád bought the house and land in question from one Gopál on the 16th October,

* Second Appeal, No. 318 of 1894.