I have not based my decision on the argument that an application to file an award is not a suit as was held in the case of *Mohan* v. *Tukaram*[1], for there are difficulties in the way of following that decision in consequence of the observations of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan*[2]. Whether the difficulties are insuperable it does not seem to me to be necessary here to enquire.

Decree reversed.

R. R.

(1) (1895) 21 Bom. 63.

(2) (1901) 29 Cal. 167 : L. R. 29 I. A. 58.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1911 *March* 7.

LAKMIDAS KHUSHAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHAIJI KHUSHAL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Subordinate Judge—Personal view of disputed premises—Appreciation of evidence based on the personal view.

The plaintiff, in a suit to establish easement of passing his rain-water over the defendants' field, tried to make out his right by the evidence of his witnesses who deposed that the passage for the rain-water had all along existed and was still visible to the eye. The Subordinate Judge visited the spot in question, at the request of both parties, to test the veracity of the witnesses; but, finding that there was no passage at the spot, he disbelieved the witnesses and dismissed the suit. On appeal, it was contended that the Subordinate Judge had wrongly decided the case, because he had disposed of it, not by appreciating the evidence, but by the light of his own view of the passage:—

Held, that there was no error in the procedure adopted by the Subordinate Judge.

SECOND appeal from the decision of Vadilal Tarachand Parekh, First Class Subordinate Judge, A. P., at Broach, confirming the decree passed by P. C. Desai, Subordinate Judge at Wagra.

Suit to establish the right to an easement.

The plaintiff filed this suit alleging that he had the right of passing the rain-water on his land, over the adjoining field

* Second Appeal No. 935 of 1909.

1911.

LAKMIDAS KHUSHAL v. BHAIJI KHUSHAL.

belonging to the defendants, to the main water-course on the other side of the defendants' field. He alleged that the defendants had put up an embankment on their land which prevented the rain-water from passing and, therefore, prayed for an order directing the defendants to remove the embankment, and for a permanent injunction restraining the defendants from obstructing the passage of the water.

The defendants denied the plaintiff's right to pass the rain-water and contended that it never passed through his field.

In support of his case, the plaintiff examined four witnesses who all deposed that the passage of water had existed all along and was still visible to the eye.

To test the veracity of the witnesses, the Subordinate Judge visited the spot in question at the request of both parties. Finding on personal inspection of the land that there were no traces of the passage deposed to by the witnesses, the Subordinate Judge disbelieved them and dismissed the plaintiff's suit.

On appeal, this decree was confirmed by the lower appellate Court.

The plaintiff appealed to the High Court.

L. A. Shah, for the appellant, relied on the cases of *Joy Coomar* v. *Bundhoo Lall*[1]; *Dwarka Nath Sardar* v. *Prosunno Kumar Hajra*[2]; *Moran* v. *Bhagbat Lal Saha*[3]; *London General Omnibus Company, Limited* v. *Lavell*[4]; and *Kessowji Issur* v. *G. I. P. Railway Company*[5].

G. N. Thakore, for the respondent, replied on the cases.

CHANDAVARKAR, J. :—The point of law urged in this second appeal, in my opinion, fails. The parties are the owners respectively of two fields, which are opposite to each other. Plaintiff, the present appellant, is owner of Survey No. 88, and defendants own Survey No. 87. The two properties are separated by a narrow passage. The plaintiff alleged that water from his

(1) (1882) 9 Cal. 363.
(2) 1897) 1 C. W. N. 682.
(3) (1905) 33 Cal. 133.
(4) [1901] 1 Ch. 135.
(5) (1907) 31 Bom. 381.

1911.

LAKMIDAS KHUSHAL *v.* BHAIJI KHUSHAL.

field passed on from its south-west corner to the narrow passage; that thence it flowed on to the defendants' field and that there it ran along a well-defined passage. The plaintiff complained that the defendants had obstructed this latter passage by raising an embankment so as to prevent the water entering his field. The defendants denied the existence of any such passage for water in the field. So the question at issue was whether there was or had been any such passage as alleged by the plaintiff. Witnesses examined on behalf of the plaintiff deposed that the passage in dispute had existed all along and was still visible to the eye.

Both parties thereupon requested the Subordinate Judge to visit the spot and see for himself whether the passage was still visible to the eye. Accordingly the Subordinate Judge visited the spot and in the presence of the pleaders of the parties satisfied himself that the passage in question was not visible; and, therefore, he disbelieved the plaintiff's witnesses and disallowed the claim without examining any of the defendants' witnesses.

The plaintiff appealed to the District Court and contended that the Subordinate Judge had wrongly decided the case, because he had disposed of it, not by appreciating the evidence, but by the light of his own view of the passage. The appellate Court disallowed the contention, holding that the Subordinate Judge was "at liberty to see the disputed property," that it was necessary for him to see it, and that, having seen it in the presence of the pleaders of the parties, he was warranted in forming his own opinion on the case.

In second appeal the same contention is repeated before us; and reliance is placed by the appellant's pleader on some decided cases, particularly on the judgment of the Judicial Committee of the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Company*[1]. The other cases cited are *Joy Coomar* v. *Bundhoo Lall*[2], *Dwarka Nath Sardar* v. *Prosunno Kumar Hajra*[3], and *Moran* v. *Bhagbat Lal Saha*[4]. It is urged on the strength of these authorities that the trial Judge has erred

(1) (1907) 31 Bom. 381.
(2) (1882) 9 Cal. 363.
(3) (1897) 1 C. W. N. 682.
(4) (1905) 33 Cal. 133.

1911.

LAKMIDAS KHUSHAL v. BHAIJI KHUSHAL.

in two respects, first, that he put his view in the place of the evidence, which the law did not warrant; and, secondly, that he decided the case without putting on record the result of his view, so as to give the plaintiff an opportunity of meeting the impressions formed by the Judge by his inspection None of the cases which have been cited has any cogent relevancy to the question which we have to decide here. All that was held in those cases is that a Judge ought not to substitute his view for the evidence in the case tried by him; that when he visits a spot and makes observations for himself, the result of those observations must be used by him only for the purpose of understanding the evidence; that in fact he should not ignore the evidence as if he had not heard it and dispose of the case merely by the light of what he saw on personal inspection. That law applies where the case is obscure and the evidence can be best understood by a personal view. As was said in *London General Omnibus Company, Limited* v. *Lavell*(1) in such cases "a view...is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." But there are cases of a different kind, cases where, as remarked by Farwell, J., in *Bourne* v. *Swan & Edgar, Limited*(2) "it is the eye-sight of the Judge that is the ultimate test." In the present case, the witnesses examined for the plaintiff deposed that the passage, as to which there was a dispute, was still visible to the eye and that it could be seen at any moment, by anyone visiting the spot; and, therefore, the parties asked the Subordinate Judge to apply the most satisfactory test available, *viz.*, to go to the field and see for himself whether the witnesses for the plaintiff were speaking the truth or not. Accordingly the Judge visited the spot. In other words, the Judge was asked by the parties to act upon the legal maxim, *res ipsa loquitur* (the thing speaks for itself). As is pointed out by the commentators of Best on Evidence, a jury is competent to take into consideration the *locus in quo* or to view the premises. The Privy Council decision in *Kessowji Issur* v. *G. I. P. Railway Company*(3) turns upon a different

(1) [1901] 1 Ch. 135 at p. 139.
(2) [1903] 1 Ch. 211 at p. 225.
(3) (1907) 31 Bom. 381.

set of facts altogether. There what their Lordships decided was that the High Court had acted illegally in deciding the question as to an event which had taken place one evening by the light of what the Judges had seen on another evening amidst possibly different surroundings. That cannot be said to have been the case here. Here the Subordinate Judge was told that there was a passage which existed, and which had *always* existed, and which could be seen *at any moment* by the eye. The eye was the Judge and the case is governed by the principle of law enunciated by Farwell, J., in the case above mentioned on the authority of some cases decided by the House of Lords. Therefore, in my opinion, there was no error in the procedure adopted by the Subordinate Judge and there is no law which bound him to record his view and explain it to the parties before deciding the case. The decree must be confirmed with costs.

HEATON, J. :—I agree that the decree must be confirmed with costs. It does, however, seem to me that the first Court, the Subordinate Judge, has written a judgment, which is open to a good deal of criticism. Because from the way in which he has expressed himself he has given ground for the argument that he substituted his own impressions derived from the local inspection of the place, for the evidence in the case. But the result of the argument has been to convince me that in effect he has not done this; but has only used the circumstances which were perceived at the local investigation for the purpose of understanding and appreciating the evidence. As the result of discussion the objection taken on behalf of the appellant ultimately resolved itself into this: that the Judge had not recorded in writing the circumstances observed at the inspection, and the parties consequently had not had an opportunity of discussing those circumstances and dealing with them in so far as they affected the case. I think there is this in the objection that it would be much better that the Judge should record the circumstances which are observed at a local inspection. In so saying I must emphatically add that I think he should record only facts and not impressions or inferences from facts.

1911.

LAKMIDAS KHUSHAL v. BHAIJI KHUSHAL.

But when a local inspection takes place we know that in the ordinary course of events the salient circumstances are pointed out on the spot and are discussed on the spot; and there is nothing in the case to suggest that the ordinary course of events was not followed here. I assume that it was followed, and as a consequence I find that the defect in not recording the circumstances in writing is a purely formal defect, which could not have misled the parties or caused injustice in the case. For these reasons I think the appeal must be dismissed and the decree confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1911. *March 9.*

BHIWA BIN JOTIBA (ORIGINAL PLAINTIFF), APPELLANT, v. DEVCHAND BECHAR (ORIGINAL DEFENDANT No. 1), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 462—Minor—Compromise—Sanction of Court not obtained—Compromise not binding on minor.

When a suit, to which a minor is a party, is compromised and no leave of the Court is obtained under section 462 of the Civil Procedure Code (Act XIV of 1882) the compromise does not bind the minor and is voidable. The fact that it is for the benefit of the minor, or that he has derived benefit from it, makes no difference.

SECOND appeal from the decision of R. D. Nagarkar, Joint First Class Subordinate Judge, A. P, at Poona, reversing the decree passed by E. Reuben, Subordinate Judge at Haveli.

Suit for redemption.

The plaintiff sued to redeem a mortgage that was executed by his father Jotiba Kamte in favour of Devchand Bechar (defendant No. 1) for Rs. 199-15-0 on the 23rd May 1893.

In 1904, Maruti (another son of Jotiba) on behalf of himself and as next-friend of his minor brother (the plaintiff) sued the defendant to redeem the mortgage. The suit was compromised,

* Second Appeal No 834 of 1908.