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30 C. 291= 30 I. A. 44= 7 C.W N. 193 =5 Bom. L. R. 1= 8 Sar. 412.

or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793 the enquiry is at once enlarged ; and it would not be right in point of law to direct the Judge of First Instance that he ought in all cases to act on the last thak or survey map and to treat it as decisive in the absence of evidence to the contrary. In *Sarat Sundari Dabi* v. *Secretary of State for India* (1) it is not clear whether the re-formed lands were or were not assessed, when the Permanent Settlement was fixed ; but if they were, the case went too far and is not consistent with the case of *Secretary of State for India* v. *Fahamidannissa Begum* (2). Indeed it was distinctly disapproved in India in the case of *Fahamidannissa Begum* v. *Secretary of State for India* (3) (see p. 92 of that report) and afterwards affirmed in *Secretary of State for India* v. *Fahamidannissa Begum* (2). In the case of *Satcowri Ghosh Mondal* v. *Secretary of State for India* (4) the question was sent back for further inquiry ; and in the case before their Lordships the same course might have been taken. But no error in point of law was committed in deciding on the evidence as it stood ; and on that evidence the decision of the District Judge was right. It certainly cannot be assumed that the lands in question were dry land in 1793 or that the land forming the bed of a public navigable river was included in the assessment then permanently fixed.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitor for the respondent : *The Solicitor, India Office.*

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30 C. 303 (=30 I. A. 41=7 C. W. N. 225=5 Bom. L. R. 6=8 Sar. 409.)

[303] PRIVY COUNCIL.

RAM ANUGRA NARAIN SINGH *v.* CHOWDHRY HANUMAN SAHAI.*

[13th, 14th November and 13th December, 1902.]

[*On appeal from the High Court at Fort William in Bengal.*]

Privy Council, practice of—Concurrent decisions on facts—Courts basing decision on different grounds—One Court relying on oral, and the other on documentary, evidence.

The rule of the Judicial Committee not to disturb a concurrent finding of fact by two Courts, unless it is clearly shown to be erroneous, is none the less applicable, although the Courts have not taken precisely the same view of the weight to be attached to each particular item of evidence.

A case where one Court has relied on the oral, and the other on the documentary, evidence is within the rule.

[Ref. 37 Mad. 199.]

APPEAL from a decree (4th August 1899) of a Divisional Bench of the High Court, reversing a decree (24th September 1897) of the Subordinate Judge of Gya, which had dismissed the respondent's suit with costs.

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* *Present* :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

(1) (1885) I. L. R. 11 Cal. 784.
(2) (1889) I. L. R. 17 Cal. 590.
(3) (1886) I. L. R. 14 Cal. 87, 92.
(4) (1894) I. L. R. 22 Cal. 252.

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30 C. 303=30 I. A. 41=7 C.W.N. 225= 5 Bom. L. R. 6=8 Sar. 409.

Appeal by the defendant, Ram Anugra Narain Singh, to His Majesty in Council.

The suit was brought to recover property which the defendant was holding under a decree of the Privy Council passed on 27th June 1873 (1). The plaintiff claimed under a deed of transfer dated 30th April 1895 by two persons, Sheo Sahai and Balgobind, who asserted that they were the next heirs of one Sheo Churn, and as such heirs were entitled to succeed to certain property held by Sheo Churn's mother as his heir until her death.

The property in suit was a portion of the property belonging to one Ram Dyal Singh, who died on 3rd May 1845. Shortly before his death he made a verbal disposition of his property. He gave it in the first instance to his wife, Brij Koer, for her [304] life, and subject to her life-interest he gave an absolute estate in about two-thirds of the property to Ajudhya Pershad, the only son of his eldest daughter, Sham Soonder Koer, and the remainder of the property he gave to Sheo Churn Lal, the only son of his younger daughter, Mahan Soonder Koer. The present suit relates to a moiety of the property so given to Sheo Churn Lal.

After the death of Ram Dyal a *fautinama* (2) attested by witnesses before whom he had made his verbal will and containing its provisions was registered and attested by the Kazi. That document was dated 7th May 1845.

Brij Koer remained in possession of the property, until her death on 12th October 1851. Sheo Churn had predeceased Brij Koer, and on her death Ajudhya took possession of the share left to him, and Mahan Soonder Koer as heiress of Sheo Churn took possession of his share and retained possession of it, until her death on 15th June 1894. On her death the persons entitled to that portion were the reversionary heirs of Sheo Churn Lal. Mahan Soonder Koer had, besides Sheo Churn, two daughters, Bhawani Koer and Gir Koer. Bhawani Koer, who died a few days before Mahan Soonder, was the wife of Tooka Nath, the father of the plaintiff. Gir Koer had died long before in 1852. She was the wife of the defendant, Ram Anugra Narain Singh. On the death of Mahan Soonder Koer, the defendant, claiming under a deed of gift dated 28th August 1860, which he alleged had been executed by Mahan Soondar Koer, and that she had thereby given a half of her property to each of her daughters, claimed possession of the moiety left to the younger daughter, Gir Koer, his wife, and obtained registration of it in his name on 10th December 1894. Hence this suit, which was instituted on 11th September 1896.

The defendant's written statement alleged that Mahan Soonder held her share of the property not as heir of Sheo Churn, but in absolute ownership under a verbal gift from her father and mother; that Mahan Soonder made a gift of the property in dispute in 1860 to his wife, Gir Koer; that she died in 1864, leaving as her heir an infant son, who died in a few days and to [305] whom the defendant became heir, and that his title was affirmed by the Judicial Committee in 1873, subject to Mahan Soonder's right to enjoy the income during her life. The defendant also pleaded that the suit was barred by limitation; denied that Sheo Sahai and Balgobind were the heirs of Sheo Churn or had any title to the property, and said

(1) 12 B. L. R. 483.

(2) A document stating the death of an incumbent and the names of his heirs. *Wilson's Glossary.*

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that the deed of transfer itself was a champertous transaction executed without consideration, and that it conferred no title on the plaintiff.

On these pleadings the material issues were (2) Whether the property in dispute vested in Sheo Churn under Ram Dyal Singh's will, if any, after the death of Ram Dyal Singh? (3) Whether Sheo Sahai and Balgobind *alias* Bhundu, the alleged vendors of the plaintiff, are the nearest *sapindas* and heirs of the said Sheo Churn? (4) Whether the deed of sale dated 30th April 1895 relied on by the plaintiff is a genuine and valid document? (5) Whether the property in dispute was the *stridhan* of Mahan Soonder Koer, mother of Sheo Churn? (6) Whether the Privy Council decree relied on by the defendant in any way affects the plaintiff's claim?

The Subordinate Judge found on the 2nd and 5th issues that the property in suit did vest in Sheo Churn. On the 5th issue he also found that the property was not the *stridhan* of Mahan Soonder. On the 3rd issue he found that Sheo Sahai and Balgobind were shown to be the heirs of Sheo Churn. He held this to be proved chiefly by the oral evidence, upholding that of the plaintiff's witnesses as more trustworthy than that given on behalf of the defendant. On the 4th issue the Subordinate Judge came to the conclusion that the plaintiff's title-deed, the deed of transfer of 30th April 1895, was not a *bona fide* transaction, and that it was champertous and invalid, because there was a partial failure of the alleged consideration. On the 6th issue he held that the Privy Council decree relied on was not *inter partes*, and therefore not relevant. In the result he dismissed the suit with costs.

On appeal the High Court (MACPHERSON and WILKINS, JJ.) concurred with the Subordinate Judge on the 2nd, 3rd and 5th issues, holding that Sheo Churn took a vested interest under the oral will of his grandfather, Ram Dyal Singh; that the defendant's **[306]** story of the oral gift to the daughter, Mahan Soonder, was an inconsistent one and not true; and that Sheo Sahai and Balgobind, the plaintiff's vendors, were the nearest collateral heirs of Sheo Churn. On the 4th issue the High Court differed from the Subordinate Judge as to the transfer of 30th April 1895 to the plaintiff, which they held was valid and effectual.

The High Court reversed the Subordinate Judge's decision and gave the plaintiff a decree.

Haldane K. C. and *Mayne* for the appellant contended that both the Courts below were wrong in holding that Sheo Churn took a vested interest in the property in dispute. The evidence did not establish such an interest in him, and all that took place showed that no one in the family ever treated Sheo Churn as being in any different position from that of a daughter's son, whose right depended on his surviving his mother. That Ram Dyal intended to pass over his daughter Mahan Soonder was improbable; but if any interest in the property was given to Sheo Churn it was subject to Brij Koer's life-estate, and contingent on his surviving her, whereas he died before her life-tenancy came to an end. The legal evidence as to the will was insufficient to prove that it was ever made, or what its terms were. The *foutinama* of 7th May 1845 was inadmissible for that purpose, nor, if admissible, was it sufficient proof. On the admissibility of that and other documentary evidence the Evidence Act (I of 1872) s. 32, cl. 5, and s. 35 was referred to. In the absence of a will Mahan Soonder was entitled to succeed as heiress of her father, and in that case title must be made through him

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and not through Sheo Churn. But Mahan Soonder, it was submitted, was shown to have asserted from the death of Brij Koer in 1851 an absolute and independent title in reference to her share, and had by her dealings with it shown that she claimed to hold it adversely to the reversionary heirs, and so had, as against the heirs of Sheo Churn, obtained a prescriptive title by adverse possession. *Lachhan Kunwar* v. *Manorath Ram* (1) and *Mahabir Pershad* v. *Adhikari Koer* (2) were referred to.

[307] It was also contended that the plaintiff had by his conduct shown that he considered himself bound by the Privy Council decree of 1873 under which the defendant held the property in dispute, and that the transfer to the plaintiff of 30th April 1895 was invalid as being made by persons who never had any title or whose title, if any, had been extinguished. Both Courts below no doubt held that the evidence proved that the transferors, Sheo Shai and Balgobind Sahai, were the heirs of Sheo Churn, but their judgments were, it was submitted, not concurrent decisions on the facts within the rule laid down by the Judicial Committee as they were not based on the same grounds, the first Court relying on the oral, and the High Court on the documentary evidence.

Rattigan K. C. and *C. W. Arathoon* for the respondents were not heard.

The judgment of their Lordships was delivered by

SIR JOHN BONSER. This is an appeal from a decree of the High Court of Calcutta which reversed a decree of the Second Subordinate Judge of Gaya.

The plaintiff (the present respondent) sued to recover certain villages which were in the possession of the defendant (the present appellant). He claimed under a conveyance made in his favour by the heirs of one Sheo Churn, who was entitled (as he alleged) to the property under the will of one Ram Dyal, subject to the life-interest of Ram Dyal's widow Brij Koer.

The principal questions argued before their Lordships and the Courts below were (1) whether Sheo Churn was entitled to the property as alleged by the plaintiff and (2) whether the plaintiff's vendors were Sheo Churn's heirs.

As regards the first question both Courts found that Ram Dyal did make on his death-bed an oral disposition of this property under which his grandson Sheo Churn, then an infant of tender years, took a vested estate subject to the life-interest of Brij Koer. It was urged by the appellant's Counsel that the evidence was insufficient to establish such a gift, and they insisted on the [308] improbability of the testator passing over his own daughter in favour of her infant son, and contended that, even if the testator intended to benefit Sheo Churn, the gift was contingent on his surviving the tenant for life, which he did not do; but their Lordships are of opinion that the finding of the Lower Courts is fully justified by the evidence and ought to be affirmed.

On the second question both Courts agreed in finding that the plaintiff's vendors were proved to be the heirs of Sheo Churn; and according to the well-known rule of this Board such a finding will not be disturbed, unless it can be shown to be clearly erroneous. The appellant's Counsel, however, contended that this finding was not within the

(1) (1894) I L. R. 22 Cal. 445.
(2) (1896) I. L. R. 23 Cal. 942, 946, 948, 949.

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rule, because the Courts were not quite agreed on the grounds of their decision—the Subordinate Judge relying on the oral testimony, whilst the High Court based its finding on the documentary evidence. But the rule is none the less applicable, because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence.

A further point which does not appear to have been expressly raised in the Courts below was pressed on their Lordships. It was contended that Mahan Soonder Koer, Sheo Churn's mother, under whom the defendant claims and who entered into possession of the property upon her son's death and enjoyed it, until her own death, which happened shortly before the institution of this suit, acquired an absolute title by adverse possession against the heirs of Sheo Churn. Their Lordships are of opinion that the possession of Mahan Soonder Koer must be referred to her title as heiress of her son, in which capacity she would take a life interest and that no case of adverse possession has been established.

For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellant will pay the respondent's costs.

Appeal dismissed.

Solicitors for the appellant: *Watkins & Lempriere.*

Solicitors for the respondent: *Dallimore & Son.*

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30 C. 309 (=30 I. A. 20=8 Sar. 431).

[309] PRIVY COUNCIL.

RAM NARAIN JOSHI *v.* PARMESWAR NARAIN MAHTA AND OTHERS.*

[20th November and 13th December, 1902.]

[*On appeal from the High Court at Fort William in Bengal.*]

Privy Council, Practice of—Appeal—Delay —Mistake—Court—Orders—"Sufficient cause"—Limitation Act (XV of 1877) s. 5—Analogous appeal.

The appellant preferred two appeals from a decision of a Subordinate Judge, one of which, instead of presenting to the High Court, he had filed in the District Court, which on a true valuation of the appeal had no jurisdiction to hear it. While the other, which was an analogous case raising the same question, he had correctly filed in the High Court.

It appeared:—

(*a*) that when the mistake was brought to the appellant's notice, great delay occurred in the taking of any steps by him to rectify it;

(*b*) that the High Court had refused to admit the appeal out of time on the ground of such delay, and because the appellant had not satisfied them that he had made a *bona fide* mistake, nor that he had sufficient cause under s. 5 of the Limitation Act (XV of 1877) for not presenting the appeal in time;

(*c*) that the High Court had transferred to their own files the appeal from the District Court, but no objection taken that they had no power to transfer a case that was not properly before the District Judge, they had dismissed the appeal; and

(*d*) that the analogous appeal had been decided by the High Court in the appellant's favour.

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* *Present*:—Lords Macnaghten and Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.