Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

BIR CHANDRA ROY MAHAPATTAR (PLAINTIFF) *v.* BANSI DHAR ROY MAHAPATTAR AND OTHERS (DEFENDANTS)*

1869 June 26.

Admissibility of Evidence—Objection—Jurisdiction of Appellate Court—Substitution of name on the Record.

Where no objection had been taken as to the admissibility of documentary evidence, *viz.* a decree, and other proceedings in regard to that decree had been made use of by the opposite party, an Appellate Court has no jurisdiction to exclude it.

Where a defendant allows without objection a purchaser of a plaintiff's interest in the suit to substitute his name on the record under an order of Court, he cannot afterwards contend that the suit is thereby abated.

Baboo *Hem Chandra Banerjee* for appellant.

Baboos *Mahendra Lal Shome* and *Mahendra Lal Mitter* for respondents.

JACKSON, J.—This was a suit originally brought by Jageswar Roy Mahasattar against Damudar Das, and also against Bansi Dhar Roy and others, his allegation being that he, the plaintiff, and Bansi Dhar being jointly entitled to certain immoveable property, that property had been attached in execution of a decree against Bansi Dhar alone, and purchased by the defndant Damudar, who after his purchase had dispossessed the plaintiff, the plaintiff up to that time having been in joint possession and enjoyment with Bansi Dhar.

The defendant denied thatJageswar had any interest in the property, and alleged that it belonged to Bansi Dhar solely.

During the progress of the suit, Jageswar sold his rights to Bir Chandra Roy; and upon their joint application, Jageswar was taken off the record, and Bir Chandra substituted for him as plaintiff.

The Moonsiff found in favor of the plaintiff, and decreed him possession of the disputed property inclusive of buildings, tanks,

* Special Appeal, No. 3275 of 1868, from a decree of the Subordinate Judge of Cuttack, dated the 14th December 1868, reversing a decree of the Moonsiff of that district, dated the 31st January 1868.

trees, etc., and decreed also, that the auction-sale made by the brother of Jageswar be reversed, and the plaintiff do get his costs.

Against this decision the defendant Damudar appealed. On his appeal, the Subordinate Judge set aside the judgment of the Moonsiff. He decreed the appeal, and dismissed the plaintiff's suit with costs.

The plaintiff now appeals specially, and contends that the judgment of the lower Appellate Court is defective, inasmuch as that Court summarily rejects, as inadmissible between these parties, evidence which was not merely admissible but also conclusive; and because that Court has entirely omitted to advert to other evidence and circumstances, which taken together with the evidence which was rejected, would entitle the plaintiff to a decree.

The evidence which the Subordinate Judge declared to be inadmissible, was a judgment of the Principal Sudder Ameen, dated 24th August 1865, in a suit between Bansi Dhar as plaintiff and his eldest brother Harihar as defendant, the other brothers, as I understand, having also been made defendants, but as I suppose, *pro formâ* defendants merely. The object of that suit was to establish on behalf of Bansi Dhar his right as member of a joint undivided Hindu family to one-fourth of the whole estate left by their father.

To Bansi Dhar's plaint the eldest brother answered, that the property of their father was not regulated as to its descent by the common Hindu law, but by a kulachar or family custom whereby the eldest brother took the entire property, and the younger brothers were entitled only to maintenance; and he further alleged that in conformity with that custom, the father had in his life-time executed a will, whereby the bulk of the family property being given to the eldest brother, certain property including the property now in dispute was assigned to Bansi Dhar and his uterine brother Jageswar.

In that suit the will to which the defendant referred was not produced. He alleged that he could not produce it, because it was in the custody of the plaintiff Bansi Dhar himself, who

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with a view to support his own pretensions in that suit, concealed the will and kept it out of the way.

The Principal Sudder Ameen appears to have found in that case that the facts were as alleged by the defendant. He found the family custom; and he also found that the father had executed the will as stated.

Now, in the suit before us the plaintiff put in the judgment of the Principal Sudder Ameen in that case, and the defendant put in the decree and the evidence which Bansi Dhar himself had given in that suit; and it is the judgment which the Subordinate Judge has now held to be inadmissible in evidence, and not binding in any shape on the defendant.

It was in the first instance argued before us, that this evidence was not merely admissible, but conclusive. Conclusive it manifestly was not; for this simple reason that the issue regarding the will was not really a material issue in the first suit. The material issue in that case was, whether the property of Bunsi Dhar's father devolved upon his sons according to the Hindu law prevalent in that district, or was governed by a peculiar family custom. The circumstance of a will made by the father and acquiesced in by the sons in furtherance of that custom, making provision by way of maintenance for the younger sons, was no doubt a circumstance in favour of the existence of the custom; but it was not a separate material issue, the dertermination of which would dispose at all of that suit as a whole

It was contended by the respondent before us that the special appellant had no *locus standi*, and that in fact the suit ought to abate by reason of the original plaintiff having withdarwn from the suit, the Court having no power to substitute another plaintiff in his room; and in support of this argument he referred to the case of *Saheb Roy* v. *Chuni Sing* (1). It is sufficient to say on that point, that although what the Court did in respect of substituting the plaintiff was probably irregular, it was an irregularity which was capable of being cured by the consent of the defendant, and that the defendant in this case did consent in the most emphatic manner. He not merely offered no opposi-

(1) 9 W. R., 187.

tion to what took place in the first Court, but he actually appealed against the judgment on the merits, making the substituted plaintiff one of the respondents.

The question then remains whether this was almissible. On this point, it is sufficient I think, to say that the question does not really arise here as a question of law. No doubt, if this judgment alone had been tendered on behalf of the plaintiff, and had been then objected to by the defendant as inadmissible, and if no other proceedings in the case had been produced, it would be a question for the lower Appellate Court and for us to determine, whether or not it was admissible; and the question arising in that way, I think we should have been bound, in accordance with the previous decisions of this Court, to hold that it was not admissible.

But the question does not come before us in that way, because is was not objected to, and so far from its being objected to, other parts of the proceedings in the very same suit were put in by the defendant himself. That being so, the plaintiff and the defendant having respectively put in different portions of the proceedings in that suit, and having referred to and having built up arguments upon those different portions, I think the Subordinate Judge was bound to look at them all as evidence, and to make use of them for whatever light they could throw upon the facts of the case. That being so, it is clear that there was also other evidence. There was the evidence on which the Moonsiff had found in favour of the plaintiff that up to the period when the defendant Damudar made his purchase the plaintiff had been in joint possession of this land with his brother Bansi Dhar: and if that were so found, I think that that would be not only a circumstance of itself in the plaintiff's favour, but it would also assist the Court materially in coming to the conclusion that this property had descended by will; because otherwise it seems to me it would be impossible to account for a join possession over that property by only two out of four brothers, members of a joint Hindu family. That being the case, I think we must say that the Principal Sudder Ameen has not fully adverted to all the evidence in this case, and that consequently the case must be remanded to him for further consideration.

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MARKBY, J.—I am entirely of the same opinion. I base my judgment as to the remand to the Subordinate Judge to consider this evidence, entirely on the same grounds as Mr. Justice Jackson. I fully agree that according to the decisions of this Court, which sitting here we are bound to follow, we should have been bound to hold that this document was not admissible. If this judgment or any part of those proceedings had been objected to in the first instance by the parties, they must have been rejected; but the parties, each having put in portions of those proceedings and each having founded arguments in their own favour on those different portions of the proceedings, they made those proceedings evidence in this case. I think that the parties had by their own conduct made these proceedings evidence, and that the Judge was therefore wrong in not so considering them. I think, therefore, that we ought to remand this case in order that those proceedings may be considered with the other evidence in the case.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

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RADHANATH DHUBI AND MAHES CHANDRA DHUBI (DEFENDANTS) *v.* RAMGOBIND PAL (PLAINTIFF.)*

Act VIII. of 1859, s. 355—Evidence—Witnesses called by lower Appellate Court—Averment of Title—Deposition of Plaintiff

In a suit for possession of certain lands under a howla tenure, khas possession of which for some generations was alleged, no special documentary title was set up in the plaint; but one of the plaintiff's in his deposition referred the title to a particular patta which he said had existed and had been lost in the time of his grandfather.

Two of the defendants were the zemindars of the talook in which the howla tenure was said to exist, and had transferred their proprietary right to the other two defendants. The zemindars did not defend the suit, and were not examined in the Court of first instance.

The lower Appellate Court "considered it necessary, for the proper decision of the case," to examine the zemindars, and relying mainly on their evidence, reversed the decision of the Moonsiff, and gave a decree in favor of the plaintiff. *Held*, in appeal, that the lower Appellate Court had sufficiently re-

* Special Appeal, No. 668 of 1869, from the decision of the Subordinate Judge of Dacca, dated the 15th August 1868, reversing a decision of the Moonsiff of that district, dated 30th November 1867.