

*Before Mr. Justice Phear and Mr. Justice E. Jackson.*

SUKRAM AND OTHERS (PLAINTIFFS) v. KALA KAHAR AND OTHERS  
(DEFENDANTS.)\*

1869  
May 12.

*Death of Judge before Judgment—Possession.*

When a Judge dies after hearing and deciding a case, the only record of his decision being an entry in the Court Order Book, it is not competent to any co-ordinate Court to take up and re-hear the case, but the High Court will, on the ground of want of record of reasons for the decision, reverse the order and remand the case for re-hearing.

A suit based upon an allegation of possession must be at once dismissed, if plaintiff be shown to be out of possession.

IN this case the plaintiffs sued "to have about two bigas of land excluded from the defendants' potta," and declared to belong to the plaintiffs, and to have a survey award of December 1865 demarcating the land as belonging to the defendants set aside. It appeared that in 1855 the Collector had ordered the Chowdhry of the Pergunna to make over to the plaintiffs and defendants respectively the lands for which they had settled with Government. The Chowdhry reported that he had made over to the plaintiffs a part of the land covered by a pre-existing potta of the defendants. The first Court found that the plaintiffs had never actually been in possession of this land, and dismissed the suit on the 6th September 1867. The case was appealed to the Principal Sudder Ameen who heard it, but died before giving a written judgment. In the Court Order Book or Memorandum Book, was found an entry signed by the Principal Sudder Ameen giving the plaintiffs a decree. The Deputy Commissioner however again took up the case, and decided it against the plaintiffs on the ground that it was barred by limitation, the defendants' potta being more than 20 years old, and the land having remained in the defendants' possession all along. The case was then appealed to the High Court.

\* Special Appeal, No. 1859 of 1868, from a decree of the Deputy Commissioner of Kamroop, dated the 13th April 1868, affirming a decree of the Sudder Moonsiff of that district, dated the 6th September 1867.

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Baboo *Abhya Charan Bose* for appellants.

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Baboo *Chandra Madhab Ghose* for respondents.

PHILIP, J.—I think this case must be remanded to the lower Appellate Court for re-trial on the merits.

Some of the features presented by the suit are undoubtedly peculiar. If it were necessary for me to say, whether an adjudication of the case was come to by the Principal Sudder Ameen before his death, I should have some little hesitation in forming a judgment. But assuming for the moment that the entry in the Bahi Yaddasht or Memorandum Book is sufficient to indicate that the Principal Sudder Ameen had finally disposed of the case, and judicially reversed the decision of the Court of first instance, though this would have the effect of voiding the judgment of the Deputy Commissioner for want of jurisdiction, I think that this judgment of the Principal Sudder Ameen is so defective from not being accompanied by any reasons, or any explanation of the grounds on which the decision of the first Court was reversed, that the case ought, if matters stood there only, to be remanded in order that these should be supplied. In other words, as the Principal Sudder Ameen is dead, it would have to be remanded for re-trial. On the other hand, if the Principal Sudder Ameen did not in fact before his death finally adjudicate the case before him, there is no doubt that the second hearing before the Deputy Commissioner was had with jurisdiction.

The Deputy Commissioner has dismissed the plaintiffs' suit upon the issue of limitation. In so doing, it appears to me that he has erred in law. The plaint has been read to us, and it is certainly, to my understanding, somewhat ambiguous. It may be that the plaintiffs therein allege that they are in possession of the land, and that their possession has been threatened by the action taken on the part of the defendants before the Survey Authorities; and on that ground the plaintiffs ask for a declaration of title. Or it may be again that the plaintiffs seek to recover possession of the land from the defendants and ask to have the order of the Court accompanied by a declaration of

title. These two causes of action are, in my opinion, very **different.**

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I cannot gather from the judgment of the Deputy Commissioner, which of these be supposed to constitute the foundation of the plaintiffs' claim. If it was the first then according to the plaint, the cause of action accrued when the Survey Authorities in December 1865 demarcated the land in question as being in the possession of the defendants; and clearly on that cause of action, the suit would not be barred by lapse of time. If, on the other hand, the plaintiffs were suing to recover possession of the land, then no doubt the cause of action accrued when being out of possession they first became entitled to that possession; and it would be necessary, for the purpose of ascertaining whether the suit in that case was barred or not, to enquire how far back it was that the plaintiffs were last in possession.

The Deputy Commissioner seems, as I infer from his language, to have directed some attention to this latter point, and seems to come to the conclusion that the plaintiffs have not, in fact, been in possession for a considerable period. But the reasoning on which he places this conclusion, does not refer to any evidence of acts of possession, and therefore it seems to me, that in either alternative the judgment of the Deputy Commissioner upon the question whether or not the plaintiffs' suit is barred, is insufficient and ought to be set aside. With these views I think that the case ought to be remanded for re-trial upon the evidence on the record: first, on the preliminary issue; and then, in the event of that being decided in favor of the plaintiffs, on the general merits of the case.

I would add that if the Deputy Commissioner is of opinion that substantially the plaintiffs' cause of action is this, namely, that they are in possession of the land, and that their possession is menaced by the defendants, and by the action of the Survey Authorities, he ought to dismiss the suit not on the preliminary issue but on the merits, if he finds from the evidence as a matter of fact that the plaintiffs are not in possession.

**JACKSON, J.**—I concur. The case must be remanded for re-trial