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With respect to the only other point in the memorandum of special appeal which has been argued, we are clearly of opinion that the question of the age of the eldest son at the time of the sale was substantially raised by the issue laid down in the lower appellate court at the second trial; and that, therefore, it was not only competent to the District Judge, but was indeed obligatory upon him, to determine this question of fact.

On the above grounds, we affirm the decree of the District Judge, and direct that the special appellant bear all the costs of this special appeal.

Decree affirmed.

Special Appeal No. 645 *of* 1864.

Jan. 25.

DEVÁJI GOYÁJI and others . . . . . *Appellants.*

GODADBHÁI GODEBHÁI and another. . . . . *Respondents.*

Possession—Proof of Deed—Conduct of Suit—Special Appeal.

A sued B, in 1841, to recover possession of certain villages in Gujarát, B produced a deed, purporting to be a conveyance by way of mortgage by A's ancestors of their 6/16th share in the villages to B's ancestors. A at first denied the genuineness of the deed; but the suit of 1841 having been withdrawn by consent, with a view to arbitration—took no steps to have the question decided, until the deed was again produced (from the records of the court where it remained meanwhile) in the present suit, brought, in 1859, by A against B to recover the same villages.

Held, in the absence of evidence to show that the defendants, by their conduct during the interval, had admitted that the deed was not genuine, or that they did not intend to rely upon it, so as to mislead the plaintiffs, that the time which elapsed must be taken into account, and that they ought not to be required to prove the deed in the same way as they might have been when it was first produced and relied upon by them.

Held, also, that the High Court, sitting in special appeal, will not examine the evidence, with a view to determine whether such a document be genuine or not; nor will it consider the question, whether there is any evidence to connect the plaintiffs with the parties to the deed, when the suit appears to have been conducted in the courts below as if this was admitted.

THIS was a special appeal from the decision of C. H Cameron, District Judge of Ahmedábád, in Appeal Suit No. 174 of 1860, affirming the decree of the Munsif of Gogo in Original Suit No. 363 of 1859.

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The special appellants, plaintiffs in the original suit sought to recover possession of two villages in Gujarát, as to half of which they alleged that they had been wrongfully dispossessed by the defendants; the other half having been mortgaged by their ancestors, and the mortgage satisfied before the expiration of a period of nineteen years, during which the defendants were allowed to remain in possession for the purpose of having the debt paid off. That possession of the defendants was alleged to be the result of a refernce to a panchâyat in A.D. 1812; and it was stated that the plaintiffs laid their claim to possession before the Collector in 1836. In 1841 a suit was filed in the Court of the Principal Sadr Amin of Ahmedábád, but was withdrawn by consent, with a view to arbitration. In that suit a document was produced by the defendants, purporting to be a conveyance by way of mortgage, in 1792, by the ancestors of the plaintiffs, of their 6/10th share in the villages, to the ancestors of the defendants, to become a sale at the expiration of ten years in the event of the debt not being paid off.

The present original suit was decided against the plaintiffs by the Munsif of Gogo in 1860, and that decision was affirmed, in appeal, by the Acting Judge of the District of Ahmedábád. But, on special appeal (No. 296 of 1862), the High Court reversed his decree, and remanded the case for re-trial and a new decision on the merits, awarding costs.

The appeal came on for hearing, on the re-trial, in the District Court, on the 4th of April 1864, before C. H. Cameron, who laid down the issue to be: "whether plaintiff's claim is proved." His decision was as follows:—

"My finding on this issue is that the plaiutiff's claim is not proved.

"There appears to be no good reason for doubting the authenticity of the document No. 178. Its age makes it unnecessary to prove it. But it so happened that the writer was alive during one of the previous stages of the investigation, and his deposition was taken; and a copy of it is now handed to the Court, and recorded No. 11. Against this

bond the plaintiffs' vakil only pleads that it is a fabrication. They urge that the very late period in the investigation at which it was introduced is *prima facie* proof that it must have been fabricated, and they also urge that several times the defendants, Godadbhái and Sadabhái, have acknowledged that it was on account of debt only that they claimed possession of the village.

"The Court considers that at first certainly both the parties were equally ignorant of the whereabouts of this bond. Before the Collector, up to the time indeed of the investigation made by the Principal Sadr Amin of Ahmedábád, it, was understood by both parties that the possession was the result of debt; and various modes of arrangement were resorted to. From the investigation consequent on these arrangements it, however, became apparent that the defendants had very long possession in their power, and also that, had that possession been merely on account of debts, it is more than probable that some of the plaintiffs' family would have made some attempt to recover possession before this present claim under investigation.

"It is, therefore, perfectly consistent with ordinary life that the document relating to the mortgage, or any other document relating to the estate, should have been sought for, and when found produced. It is, however, highly improbable that, when the defendants allowed their possession to have resulted from certain debts, they should foolishly introduce suddenly a fabricated document showing that the property was in effect sold. It is difficult to believe that the defendants would have had the effrontery to produce the document No. 178, if it were a fabrication. It would have been so much easier to have fabricated a document better answering the circumstances of the case; but it is easy to understand the triumph with which this document would be produced by the defendants, when they found not only a mortgage deed, showing their story to have been true from the first, but, besides that, that the property had become their own private property by virtue of a clause in the said document.

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"When to this is added the fact of long undisturbed possession, and that [the deposition of] a witness to the document still exists to certify its truth, the Court feels satisfied that the Munsif has come to the right conclusion, and that the bond No. 178 is a true deed, which proves that the plaintiffs have now no claim whatever on the villages.

"No further issue was sought by either party.

"On the fact above proved, the Court, considering the plaintiffs' claim is not proved, affirms the decree of the Munsif of Gogo, and saddles the plaintiffs with all costs of both Original and Appeal Courts."

Against this decision the present special appeal was brought, which came on for hearing on the 18th of January 1865, before COUCH, NEWTON, and WARDEN, JJ.

Anstey, White, Dhirajla'l Mathura'da's, and *Na'na'bha Harida's* for the appellants.

Reid, Vishvana'th Na'ra'ya'n Mandlik, and *Kiva'muddin Miyanji* for the respondents.

Cur. adv. vult.

COUCH, J.:—Upon the hearing of this appeal, it was at first contended by the counsel for the appellants that the exhibit No. 178 was a fabrication; and he wished us to examine into the evidence recorded in the suit, with the view of determining that question. But we were of opinion that this was a matter which it was not competent for us, sitting as a court of special appeal, to try; and that the appellants must show that there had been some substantial error or defect in law in the procedure or investigation of the case in the court below.

The appellants' counsel then relied upon the objection taken in the second ground of appeal, "that the District Judge was wrong in holding exhibit No. 178 to be good only because it is old." Now, the Judge says: "There appears to be no good reason for doubting the authenticity of the document No. 178; its age maks it unnecessary to prove it;" but he does not stop there; and we think it cannot be inferred from his judgment that he held the

document to be good only because it was old. The statement at the end of his judgment, that "the Court feels satisfied that the Munsif has come to the right conclusion, and that the bond No. 178 is a true deed," must, in our opinion, be considered as a finding upon all the evidence in the case, and not a conclusion founded merely upon the age of the document; nor do we consider ourselves justified in inferring, from his not having in his judgment remarked upon every portion of the evidence, that he has excluded it from his consideration,

The document was produced in 1841, and was then relied upon by the respondents, in answer to a suit to recover possession of the villages now in dispute. After being recorded in that suit, it appears, and is now admitted, to have remained amongst the records of the court at Ahmedábád until it was produced in the present suit. The appellants, although they at first disputed its genuineness, have allowed it to remain amongst the records of that court, without taking any step to bring the question of its genuineness to a decision.

We think the time which has elapsed since it was first produced and recorded must be taken into account; and that the respondents ought not now to be required to prove the document, in the same way that they might have been required to do when it was first produced and relied upon by them. The lapse of time may have rendered it impossible for them now to produce evidence which they then had it in their power to produce. If the respondents had, by their conduct during the interval, admitted that the deed was not a genuine one, or had shown that they did not intend to rely upon it, so as to mislead the appellants and induce them not to take any further proceedings, the case might have been different; but we are of opinion that this has not been shown, and that there has not been any error in law on the part of the Judge.

It was objected that there was no evidence to connect the plaintiffs with the parties to the deed. This objection was not taken in the grounds of appeal to the Judge, and ap-

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decision to be: "Has plaintiff, Harjivándas, proved his ownership of the house;" and found as follows—

"My finding on this issue is that the plaintiff, Harjivandás, has satisfactorily proved his ownership. The deed No. 11 is proved by witnesses Nos. 43—45, and is acknowledged by Amthaá Rasik, No. 23. This is the principal deed which was passed by Amthá to the plaintiff Harjivandás. It appears that after this, and within the three years' limit, at which time, by deed No. 11, the property mortgaged was to be considered as sold, the son, Pránjivandás, obtained another deed (No. 2), which Amthá Rasik also acknowledges. The execution of this deed No. 2, is the main point on which the allegation of collusion and deceit rests; but the explanation given by Harjivandás is quite consistent with probability. The son, not being certain about deed No. 11, got deed No. 2 executed. His having done so does not affect the validity of No. 11, but rather increases its force. The evidence of Dáyábhái (No. 32) and Haribhái (No. 34) shows that they are in possession of the property as tenants of Harjivandás; and against this the defendants offer no proof. Had plaintiff's claim rested solely on deed No. 2, there might have been some ground for suspecting collusion; but as No. 2 is merely in continuation of No. 11, however unnecessary its execution may have been, it does away with the reason for suspicion, and adds to the weight of the proof adduced in favour of No. 11. The plaintiff cannot be said to have perjured himself in this case. It seems his son, Pránjivandás, does manage all business affairs for him now; and his acknowledgment respecting this, and that he, Pránjivandás, got the deed No. 2 executed, cannot be looked on in the light of false evidence wilfully and maliciously given."

"No further issue was called for by either parties.

"On the above facts, I reverse the decree of the Munsif of Balsád, and allow the plaintiff Harjivandás's claim, adding all costs of both original and appeal courts on defendants."

The case was heard before COUCH, NEWTON, and WARDEN, JJ.

Reid and *Dhirajla'l Mathura'da's* for the appellants:—The

Munsif correctly laid down two issues: but having found for the defendants on the first, it was unnecessary to decide the second. The Judge framed a single issue, which was far too broad, and appears to have entirely excluded from his consideration the second point, left undecided by the Munsif. This was "a substantial error or defect in law in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits:" Act VIII. of 1859, Sec. 372. Moreover, the reasons given by the Judge for the conclusion he comes to on the question of collusion will not bear examination; and he has not found whether there was in point of fact any consideration, either for the mortgage or for the sale. The case should be remanded, and the attention of the Judge called to the questions he has left undecided.

Na'na'bha'i Harida's, for the respondent, was not called upon by the Court.

COUCH, J.:—We cannot see any grounds for remanding this case, except it may be that the Judge came to a wrong conclusion on a question of fact; and, sitting here in a special appeal, we have no power to remand on that ground. The defendant did no ask for any other issue in the lower appellate court.

Decree affirmed.

NOTE.—Compare with this case the decision in *Ra'mda's Sa'kharla'l v. Ganga'dhar R. Dongre*, post, p. 186.—ED.