1864.
April 5.

Special Appeal No. 487 *of* 1863.

SUBHA'NJI bin BAHIRJI and another (original defendants) ..... *Appellants.*

BHAVA'NRA'V bin ANANDRA'V and others (original plaintiffs) ..... *Respondents.*

Decision on Issue of Fact not appealed from—Award of Rájá of Sátárá set aside.

The decision of an appellate court, on a preliminary issue of fact, which was not at the time appealed against, and which on a subsequent special appeal, was not altered or noticed by the special appellate court, is conclusive between the parties, and the issue determined cannot be re-opened on a second special appeal.

An award of the late Rájá of Sátárá, founded upon a deed of consent, set aside, on proof being given that the consent had been obtained by duress.

THIS was a Special Appeal from the decision of R. F. Mactier, District Judge of Sátárá.

The appeal was heard by COUCH and TUCKER, JJ.

Dhirajlál Mathurádás and *Vináyakráv Harichand* for the appellants.

Vishvanáth Náráyán Mandlik for the respondents.

The facts of the case appear from the following judgments:—

COUCH, J.:—This suit was brought in the year A.D. 1850, to eject the defendants from certain lands attached to the *pátílki watan* of the village of Karandi, of which they had obtained possession in Shake 1751 (A.D. 1829-30), under an order of the late Rájá of Sátárá. It was alleged that this order was founded on an admission obtained from two of the plaintiffs when under duress, and that one of the defendants, who was an officer of the court, had, by the exercise of improper influence, procured the order in their favour.

The defendants answered that they were entitled by inheritance to a share in the *pátílki watan*, and that in Shake 1751 the plaintiffs had agreed to surrender to them the land which belonged to their share, and that on this agreement a decree was passed in the defendants' favour by the late Rájá, and delivery of the land given to them.

The Amín, who first tried the case, considered that the deed of agreement (*sumjutapatra*), and order of the Rájá (*dumál-*

patra) founded upon it, gave the defendants a good title, and he, therefore, decreed in the defendants' favour with costs.

On appeal, the first Assistant Commissioner (Mr. Coxon) gave the following judgment :—

"The Court thinks that there is every reason to believe that the deed of division was forced from the appellants, and that the grant was not made with that due discrimination and sense of justice that is observable in most of his late Highness's proceedings. It is certain that the second respondent was a personal attendant on the Rájá ; that beyond the deed of division and grant respondents have no evidence whatever that their ancestors ever held an inch of the *watan* they cannot prove; that the appellants, who are actually *pátils* of Karandi, came into their rights and possessions surreptitiously or fraudulently they cannot show,—they are even unable to say when this happened. These are the reasons that led the Court to think that the grant of his late Highness cannot, in any court of justice in the world, be held binding, for the Rájá had no right to give away what did not belong to him ; and, therefore, the Court thinks it would be justified in at once awarding for the appellants, and putting them into possession. But as the case has been very ill and very negligently tried, and as no inquiry into the respondents' claim to be considered the hereditary *pátils* has taken place, the decree is reversed, and the case returned for retrial on its merits. The Amín is directed to throw out of consideration the deed of division, and the grant by his late Highness, and to inquire into the respondents' prior and independent claim. If there is no proof of these, and the respondents are unable to show the forcible possession they complain of on the appellants' part, the Court thinks that the award must be for the appellants. Costs to be awarded in the new decree."

On a new trial, the Principal Sadr Amín decreed for the plaintiffs, as he held that the defendants had not proved their right to eject the plaintiffs in Shake 1751, and that it was shown that prior to that ejectment the plaintiffs had had uninterrupted possession of the whole *pátílki* estate for more than sixty years. This decree was affirmed by another Assistant Commissioner (Mr. Newton) on appeal, who held himself restricted by his predecessor's decision from decreeing on the validity of the order of the Rájá, on which the defendants had obtained possession.

1864.
SUBHA'NJI BAHIRJI *et al.* *v.* BHAVA'NBA'Y ANANDBA'Y *et al.*

On a special appeal to the Collector of Sátárá, Mr. Rose, a further trial was ordered in order that certain points noticed in the decree might be inquired into.

On a third trial, the Principal Ṣadr Amín rejected the plaintiffs' claim, on the ground that it was improperly valued; but this decision was reversed on appeal, and the case remanded to be disposed of in accordance with the instructions of the special appellate court.

On a fourth occasion, the plaint was rejected, on the ground that the plaintiffs had not paid the fees required for the service of summonses; but this order was reversed on appeal.

Finally, the Principal Ṣadr Amín declared the plaintiffs' claim proved, and decreed accordingly, and the Judge of Sátárá, on appeal, has affirmed this decision.

It has been argued for the defendants (the special appellants) that the Rájá's order was in fact a judicial decree which had been executed more than nineteen years prior to the institution of the suit, and that it was not competent to the British courts to question its validity or set it aside.

The plaintiffs (the special respondents), on the other hand, contend—

1*st*—That the order was not a judicial decree.

2*nd*—That if it were a decree, it was passed on consent, and could be set aside, if it were shown that the consent had been obtained by force or fraud. That at the second trial, the Principal Ṣadr Amín had held that there was satisfactory evidence that the plaintiffs, who signed the deed, were in the custody of the Mámlatdár at the time the consent was given.

3*rd*—That no special appeal having been made against Mr. Coxon's decree declaring the Rájá's order to be not conclusive, the point cannot be raised at the present time.

I am of opinion that the decree of the Judge must be confirmed. The decree of Mr. Coxon, that the *dumálapatra*, or as he calls it the "deed of division," and elsewhere "the grant," was not binding, was a judgment between the same parties, or those through whom they claim, of a court of competent jurisdiction to entertain the question, and that decree never

1864: SUBHA'NJI BAHIRJI *et al.* v. BHAVA'NRA'V ANANDRA'V.

been reversed or set aside. The Collector of Sátára did not indeed in terms uphold it, but I think he did so in effect: for, although in the grounds of appeal to him it was objected that it was not competent for the courts to set aside the *sanads* (meaning the acts of the Rájá) he directed the case to be heard upon the other evidence of title, which was plainly inconsistent with the opinion that the *dumálapatra* was binding, and ought not to have been set aside. If the decree setting it aside was wrong, and ought to be reversed, no further inquiry was necessary, and the decree of the Amín, who first tried the case, was right, and ought to have been allowed to stand as the final decree. The subsequent conduct of the suit by the parties appears also to have been in accordance with the supposition that the decree of Mr. Coxon remained in force. The present case is even stronger than if this decree had been made in another suit between the same parties, in which case it would, according to well-established principles, have been conclusive: for it is here part of the proceedings in the suit itself, and until reversed must regulate the subsequent proceedings.

With regard to the other grounds of appeal it does not appear to me that any *onus probandi* has been wrongly placed on the appellants. The respondents had made a case which it was necessary for the appellants to meet, and which, the *dumálapatra* having been set aside, they have failed to do.

Some further evidence appears to have been given by the respondents in accordance with the opinion expressed by the Collector, whose decree, as the Judge says, is anything but clear on the points on which, in his opinion, extra proof was necessary; and it is not for us, on the present appeal, to decide upon the weight to be attached to that evidence.

TUCKER, J.:—I am of opinion that the decree should be affirmed, but I have arrived at this conclusion on different grounds from those which have been stated by my learned brother. I consider that as the Rájá's award was founded on the alleged consent of the parties, it might have been set aside on proof that that consent had been obtained by force or fraud. I am also of opinion that the lower appellate court, in its decree, dated 28th March 1850, substantially decided that the "*samjutapatra,*" on which the Rájá's order was passed, had been obtained by duress, and that its decision on

1864.
SUBHA'NJI BAHIRJI *et al.* v. BHAVA'NRA'V ANANDRA'V *et al.*

this issue of fact was final. Under this view, it is not necessary that I should determine whether the Collector practically affirmed the Assistant Commissioner's award on this point, as I hold that the question was not properly within the cognisance of a court of special appeal.

Decree confirmed.

Special Appeal No. 46 of 1864.

April 14.

SHEK ABDULLA' valad SHEK HASS DIVEKAR..... *Appellant.*

SHEK MUHAMMAD valad MUHAMMAD JA'FAR GOTYE ..... *Respondent.*

Mortgage—Destruction of Deed of Mortgage by Mortgagees—Secondary Evidence.

In a suit to redeem a mortgage, it was proved that the mortgagees and their assignee had fraudulently destroyed the deed by which the property was mortgaged.

Held—That the mortgagees could not be permitted to prove the contents of the deed or the amount of mortgage debt by secondary evidence, and that the representative of the mortgagor should be allowed to recover the lands without any payment.

THIS was a Special Appeal against the decree of the Senior Assistant Judge of Ratnágirí, in Appeal Suit No. 219 of 1860.

Shek Abdullá Divekar preferred a plaint in the Court of the Munsif of Chiplun against (1) Azizá, wife of Shek Abbás valad Abdul Kádar, (2) Shek Usmán *alias* Dádá valad Tátyá, Desái, and (3) Shek Muhammad valad Muhammad Jáfar Gotye, to redeem and recover possession of a *dhára* consisting of *thikáns*, *wakani*, and *umarpati*, and alleged that the same was entered in the names of his ancestors in the survey of A.D. 1783-84, and belonged to him by a proprietory title; but that for the last fifty years it had been in the enjoyment of the Desais, in whose name it had been subsequently entered in the Government *Goshavára* register. He had heard from his father that it was mortgaged to the Desáis, but neither they nor their manager, Gotye, would show how much was due to them. He claimed to recover the aforesaid *thikáns* on the payment of such sums as might be found due.