

1869 whether the defendant Tukaram had been put into possession by the Collector upon non-payment of the assessment by Malhari Raghoji the plaintiff, Malhari, or upon a *razinama*. If this question v. be not found in the affirmative, the lower Court should pass a decree in favour of the plaintiff Malhari.
TukaramDarkoji

GIBBS, J.—I quite concur.

Decree reversed and case remanded.

Special Appeal No. 65 of 1869.

April 14.

Appa valad Kashinath.	..	<i>Appellant.</i>
Vithoba valad Tukaram.	...	<i>Respondent.</i>

Insufficiency of evidence taken by lower Court—Course to be pursued on appeal—Civ. Proc. Code, sec. 355.

Where a Munsif, without framing issues or examining the plaintiff passed a decree in his favour upon an admission made by the defendant and upon inspection of a document that was upon the record of a former suit; but the judge, on appeal, reversed the decree of the Munsif on account of the insufficiency of evidence, the document, in his opinion, not being admissible.

It was held that the judge ought not to have reversed the Munsif's decree without first exercising his power of taking fresh evidence under sec. 355 of the Code of Civil Procedure.

This was a Special Appeal from the decision of S. N. Tagore, Acting Assistant Judge at Ahmednagar in Appeal Suit No. 356 of 1868, reversing the decree of the Munsif of Kadā.

The plaintiff Appa sued the defendant Vithoba to recover possession of certain premises alleged to have been let to him.

The defendant denied that the premises had been let to him by the plaintiff, and pleaded occupation for ten or twelve years.

The Munsif, Narayan Govind Apte, after adjourning the case several times for the settlement of issues, sent for the papers in another suit (No. 2239 of 1864 from the Judge's

Court, and on receipt of them decided the case in the plaintiff's favour without recording any issues, as he considered that the defendant's admission and the rent note in the other suit were sufficient and rendered further enquiry unnecessary.

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In appeal, the Assistant Judge reversed the decree on the ground that the former suit in which the admission was alleged to have been made was not between the same parties, that the rent note relied upon was not stamped, and that there was no other evidence, oral or written, to prove the plaintiff's title.

The case was heard this day before COUCH, C.J., and NEWTON, J.

Dhirajal Mathuradas for the Appellant;—Under the circumstances of the case, the Assistant Judge was wrong in reversing the Munsif's decree without giving the plaintiff an opportunity of producing all his evidence.

Shantaram Narayan for the Respondent.

COUCH, C. J.—The course which the Munsif took in this case in deciding in the plaintiff's favour without fixing the issues prevented the plaintiff from giving evidence, and, had the plaintiff asked that his evidence might be taken, the Munsif would have refused the application. In appeal, the Assistant Judge found that the evidence upon which the Munsif decided was not sufficient to justify the decision.

He should, there, have given the plaintiff an opportunity to produce his evidence; because, until the Assistant Judge pronounced his opinion, the plaintiff could not know that other evidence was required and would not tender it. This was not a disposal of the case by the Munsif on a preliminary point, excluding any evidence of fact, and, therefore, section 351 of the Code of Civil Procedure does not apply to it. It would not be right for the Appellate Court in such a case to remand the suit for retrial, since section 352 of the Code limits the power of remand to cases falling under section 351 only. The course which the Assistant Judge ought to have adopted was to exercise the power given by section

1869 355 of the Code. This section applies not merely to a case where the lower Court has refused to take evidence, but also where there is a substantial cause for taking further evidence, and here there was a substantial cause, not only to justify but to require the admission of additional evidence by the Assistant Judge. We, therefore, reverse the decree of the Appellate Court and remand the case to be dealt with in accordance with this judgment.

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NEWTON, J.—Concurred.

Case Remanded.

Special Appeal No. 82 of 1869.

April 19.

Vithal Mahadev *et al.*... .. Appellants.

Daud valad Muhammad Husen *et al.*... .. Respondents.

Ancient Documents—Proof—Thirty years' rule.

With regard to the proof of ancient documents the proper rule is, that if they are more than thirty years old they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use and are free from suspicion of dishonesty.

Application of this rule considered.

Hari Dhangar v. Biru Dasru (5 Bom. H. C. Rep. A. C. J. 135) commented upon, and error in note thereto pointed out.

The rule, that if the owner of different estates mortgage them to one person separately for distinct debts or successively to secure the same debt the mortgagee may insist that one security shall not be redeemed alone, applied to a Muhammadan mortgage.

In mortgage transactions in which the mortgage contracts have been entered into before Act XXVIII. of 1855 came into operation and to which Reg. V. of 1827 secs. 11 and 12 applies, and in which an account of principal and interest on the one side and of rents and profits on the other side is not directed, the arrears of interest must be limited to six years.

This was a Special Appeal from the decision of R. F. Mactier, Judge of the District of Sattara, in Appeal Suit No. 428 of 1867, amending the decree of the Principal Sadr Amin of Sattara.