1875.

NILAVA'KOM RACHAPPA' v. RUDRAYA' BIN RACHAPPA'.

missible in evidence, although not registered. We come to the conclusion with the less hesitation as we feel satisfied of the justice of the plaintiff's claim. We, therefore, reverse the Assistant Judge's decree, and restore that of the Subordinate Judge with costs on the respondents.

[APPELLATE CIVIL JURISDICTION.]

April 8.

Special Appeal No. 81 *of* 1874.

TRIMBAK RA'NU .....*Plaintiff and Appellant* .....

NA'NA' BHAVA'NI and another. } *Defendants and Respondents.*

Regulation XVII. of 1827, *Section* 7, *Clauses* 1 *and* 2—*Bombay Act I. of* 1865—*Right of occupation—Miras land—Burden of proof.*

On the 28th August 1857, the plaintiff passed a *kabuláyat* to Government, and took possession of certain *Mirás* land, abandoned by the *Mirásdár* for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In an action brought by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them. Both the lower courts rejected the claim. The Lower Appellate Court based its decision on the ground that as the plaintiff failed to prove the fact of his alleged partnership with the defendants he could not succeed, notwithstanding that court found in the plaintiff's favour the other facts stated above:

Held in special appeal that as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Regulation XVII. of 1827, Section 7, clauses 1 and 2, and Bombay Act I. of 1865, have called upon the defendants to prove their claim to hold possession as against the plaintiff's right of occupation.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmednagar, affirming the decree of Purushotam Shidheshwar Binivále, First Class Subordinate Judge at the same place.

Trimbak brought this suit to recover possession of a field (survey No. 59), and alleged that the field belonged to him; that about five years before the date of the suit he took the defendants into partnership with him and cultivated the field; that afterwards, when he proceeded to cultivate it alone, the defendants obstructed him in doing so, and dispossessed him of the land. The defence chiefly was that the field in dispute was the *mirás* land of one Khandu Go-

vindá, from whom the defendant Náná Bhaváni took it for cultivation for a term of nine years, on payment of the Government assessment. The defendants denied the partnership alleged by the plaintiff. The first court rejected the claim on the ground that the defendants did not get the field from the plaintiff. In appeal, the Judge affirmed that decision, on the ground that the plaintiff's evidence failed to prove his case, because he did not prove the alleged partnership. The following extract from his judgment will show his reasons :—

"The evidence shows that this land was the *mirás* of Khandu valad Govindá. Khandu (No. 47) admits that the land was waste five or seven years, and that the plaintiff then took it from Government. The plaintiff took it from the Government by a *kabuláyat* (No. 28), dated the 28th August 1857. The plaintiff's receipt book (No. 29) shows that he paid the assessment on the field from 1864 till 1872. The plaintiff's witnesses say that they saw the plaintiff alone cultivating the field for ten or fifteen years, and that afterwards the plaintiff and the defendant Náná cultivated it together; but their evidence does not clearly show whether the plaintiff and the defendant Náná jointly cultivated the whole field, or whether they each cultivated half. It is remarkable that the plaintiff says in his plaint that he took the defendants into partnership four or five years ago. The plaint ought to have been returned to him to specify the exact time. There is no direct evidence to prove the alleged partnership, and I cannot infer it from the circumstances above mentioned. * * * * * * * The plaintiff's evidence fails to prove his case. It is, therefore, needless to review the evidence for the defence."

The objections urged in special appeal on behalf of the plaintiff were these:—(I.) The lower court was wrong in holding that the appellant had not shown a better title, although he proved abandonment of the field by the *Mirásdár* and his occupation under Government. (II.) The suit was brought on the ground that the appellant was illegally

1875.

TRIMBAK RA'NU v. NA'NA' BHAVA'NI.

dispossessed, and not on the ground of partnership. The lower court, therefore, ought not to have gone into the question of partnership, but ought to have determined the appellant's title.

The appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA'S, JJ.

Bhairavnáth Mangesh, for the appellant, referred to Regulation XVII. of 1827, Section 7, Clauses 1 and 2, and Bombay Act I. of 1865, and contended that the facts found by the District Court sufficiently proved the plaintiff's right to occupation, and that the burden lay on the defendants to show their title to possession as against that right.

Shámráv Vithal for the respondents.

KEMBALL, J. :—It appears to us that the District Judge has proceeded on a wrong ground in rejecting the plaintiff's claim by reason of his having failed to prove that he had taken the defendants into partnership. The Judge has found in distinct terms that the land was the *mirás* land of one Khandu, that this Khandu had neglected to cultivate it for six or seven years prior to the 28th August 1857, when the plaintiff passed a *kabuláyat* to Government and took possession of the land, and that the plaintiff had, at least from 1864 to 1872, paid assessment to Government (Khandu himself saying that the plaintiff had been in occupation from 1857 up to the present time), but he went on to hold that, because the plaintiff had alleged he let the defendants in as partners four or five years ago, and failed to prove that fact, therefore he could not succeed, remarking : "The plaintiff's evidence fails to prove his case. It is, therefore, needless to review the evidence for the defence." But as this was a suit to establish title and recover possession, the Judge should, on the facts found (having regard to Regulation XVII. of 1827, Section 7, Clauses 1 and 2, and Bombay Act I. of 1865), have called upon the defendants to establish their right to hold possession as against the plaintiff's right of occupation. It may be that the defendants can show a countervailing right, but this is a point which the Judge has

1875.

TRIMBAK RA'NU v. NA'NA' BHAVA'NI.

failed to inquire into and determine. We are unable to find facts, and we must, therefore, in reversing the Judge's decree, return the case for a fresh decision on the real merits. Costs to follow final judgment.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* GULA'M ABA'S.

April 15.

The Code of Criminal Procedure, Sections 273 *and* 453—*Appeal—Aggregate sentence.*

For purposes of appeal the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence.

Semble, that where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed.

But if a separate sentence be passed on each head, *Held* that an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial, within the jurisdiction of the Appellate Court.

THIS was a reference, under Section 296 of the Code of Criminal Procedure, by H. M. Birdwood, Session Judge of Surat. The accused Gulám Abás was charged under Section 381 of the Indian Penal Code with having committed theft in his master's house on two occasions, and being convicted by S. P. Pandit, Magistrate F.C., he was sentenced for the first offence to suffer two years' rigorous imprisonment and to pay a fine of Rs. 50, or in default to suffer three months further rigorous imprisonment; and for the second offence was sentenced to receive sixty lashes with a cat-o'-nine tails. On appeal, the Session Judge, on a review of the evidence, reversed the sentence for the first offence, but was of opinion that he had no jurisdiction to deal with the sentence passed for the second. He, therefore, reported the proceedings for the orders of the High Court.

The reference was heard by WEST and PINHEY, JJ.

No one appeared either on behalf of the accused person or the Crown.

PER CURIAM:—The prisoner Gulám Abás was tried at the same time for two instances of the same offence. For such a trial provision is made by Section 453 of the Code of Cri-