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[75] APPELLATE CIVIL.

Before Mr. Justcie Birdwood and Mr. Justice Parsons.

BHAGOJI AND ANOTHER (*Original Defendants*), *Appellants v.* BAPUJI (*Original Plaintiff*), *Respondent.** [6th March, 1888.]

Entry in Collector's books—Title—Practice—Appellate Court's duty to determine facts.

The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. The Collector's book is kept for purposes of revenue, not for purposes of title.

Fatma v. *Darya Saheb* (1) followed.

Where a decree is in favour of the respondent, the appellate Court is not entitled to accept the facts found by the Court of first instance as incontestably proved, merely because the respondent has not filed any cross-objections to the decree under s. 561 of the Code of Civil Procedure (Act XIV of 1882).

[F., 5 Bom. L.R. 957 ; 6 Bom. L. R. 983 (987) ; R., 35 B. 487=13 Bom. L.R. 879= 12 Ind. Cas. 356 ; 24 Ind. Cas. 68.]

SECOND appeal from the decree of G. Jacob, Acting Assistant Judge of Poona, reversing the decree of Rav Saheb G. V. Tullu, Joint Subordinate Judge of Poona, in suit No. 240 of 1883.

The plaintiff sued, as heir of his daughter-in-law Jaya, to recover possession of certain land, alleging that it had been given to her as a marriage gift by her father Bhagoji, deceased, and that he had received the produce from Bhagoji till 1882.

Defendant No. 1, who was Bhagoji's son, denied that the land in dispute had been given as a marriage gift to Jaya, or that his father had ever been in possession on her behalf. He added that his father had sold the land to defendant No. 2 in 1878.

Defendant No. 2 filed a similar written statement.

The Subordinate Judge found the following facts proved:—(1) That at the celebration of Jaya's marriage, her father promised to give her son lands as a marriage gift, (2) that he afterwards caused the lands in dispute to be entered in her name in the Collector's books, and (3) that he annually gave some quantity of rice to the plaintiff up to the year 1878, in which year the lands were sold to defendant No. 2.

The Subordinate Judge held that these facts were not sufficient to constitute a valid and complete gift of the lands in dispute, [76] as the alleged gift was not accompanied by a transfer of possession from the donor to the donee. He, therefore, rejected the plaintiff's claim.

On appeal the Assistant Judge held that on the facts as found by the Subordinate Judge the gift to Jaya was proved. He, therefore, reversed the decree of the lower Court and awarded the plaintiff's claim. His reasons are thus stated :—

"The Subordinate Judge has found that at Jaya's marriage her father Bhagoji gave her, by word of mouth, some indefinite pieces of land ; that in pursuance of this intention (whatever that may mean) he transferred the land in dispute to the name of his daughter ; and that up to the year 1878 he gave some quantity of rice to the plaintiff. The respondents are

* Second Appeal, No. 834 of 1885.

(1) 10 B.H.C.R. 187.

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bound by these findings, as they have taken no objection to the decree of the lower Court. I am of opinion that the facts established as above are sufficient proof of the gift to Jaya. The transfer of the land to Jaya's name in the Collector's book was a sufficient identification of the land given symbolically at the time of the marriage; and the subsequent payment of rice till 1878 is sufficient evidence of transfer of possession to the donee. Actual physical possession is not necessary. In my opinion, the rice must, under the circumstances, be presumed to have been the produce of the land in dispute in the absence of any evidence on the part of the defendant to the contrary.

* * * * *

"The second defendant is not entitled to plead his purchase for valuable consideration, as the fact of the land being entered in Jaya's name was sufficient to put him on inquiry as to her title."

Against this decision the defendants appealed to the High Court.

Mahadev C. Apte, for the appellants.—The second defendant is a purchaser for value without notice. The mere entry in the Collector's book is no notice. Nor is it any evidence of title—*Fatma* v. *Darya Saheb* (1). Under the Hindu law a gift is not complete unless it is accompanied by transfer of possession. [77] Here the Subordinate Judge has found that the donor did not part with possession.

J. R. Kirloskar, for the respondent.—This Court is bound in second appeal to accept the lower Court's finding of fact as conclusive. The lower Court has found that the gift was accompanied by an actual transfer of possession. The gift is, therefore, valid.

JUDGMENT.

BIRDWOOD, J.—It appears to us that the lower appellate Court, in arriving at its finding in favour of the gift of land relied on by the plaintiff, has adopted an improper method of dealing with the evidence. The Subordinate Judge had found against the alleged gift, but held that, at the marriage of the plaintiff's daughter-in-law Jaya, through whom the plaintiff claims, her father Bhagoji, who is defendant No. 2's vendor, made her a gift of land orally, and had the land in dispute transferred to her name in the Collector's books, and up to 1878 (when Jaya died) made payments of rice annually to the plaintiff. The Assistant Judge is of opinion that the defendants are bound by these findings, as they took no objection in his Court to the Subordinate Judge's decree. But that decree was in their favour. The facts found by the Subordinate Judge did not appear to him to warrant the inference which the Assistant Judge afterwards in appeal drew from them; and the Assistant Judge should not have accepted the facts on which he based his decision as incontestably proved, merely because no objection to the decree was filed under s. 561 of the Code of Civil Procedure. He should himself have dealt with the evidence in the case, and found on it whether the alleged gift was proved or not. The decree must now be reversed, in order that the appeal may be reheard. At the rehearing the lower appellate Court should have its attention directed to the ruling in *Fatma* v. *Darya Saheb* (1), in which it was held that the Collector's book is kept for purposes of revenue, not for purposes of title. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title to defeat the title of any other person.

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[78] We reverse the decree of the lower appellate Court and remand the appeal for re-trial. Costs to abide the result.

PARSONS, J.:—In deciding this appeal it was incumbent on the Assistant Judge to have determined the facts for himself from the evidence. He ought not have held the appellants bound by the facts found by the Subordinate Judge, merely because they took no objection to the decree. That decree was entirely in their favour; the facts found were in the opinion of the Subordinate Judge also in their favour. Moreover, the presumptions drawn by the Assistant Judge are so opposed to those drawn by the Subordinate Judge from the same facts that they cannot be accepted without some grounds being shown to justify them. None such appears in his judgment. For instance, unless there is some evidence that the rice paid bore some proportion to the produce of the land in suit, the presumption that the rice was the produce of the land in dispute appears hardly sustainable, while the facts that the rice was only paid during Jaya's life-time and that Bhagoji always paid the assessment have not been considered at all. Again the Assistant Judge says that the second defendant is not entitled to plead his purchase for valuable consideration, as the fact of the lands being entered in Jaya's name was sufficient to put him on enquiry as to her title. This statement is not correct, since "the fact of the entry of a person's name in the Collector's books does not of itself establish that person's title or defeat the title of another"—*Fatma* v. *Darya Saheb* (1). It has never yet been held that an entry in the Collector's books is of the same effect as registration. I concur, therefore, in reversing the decree and remanding the appeal for a rehearing.

Decree reversed and case remanded.

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[79] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

GORDHAN DALPATRAM (*Original Plaintiff*), *Appellant v.* CHOTALAL HARGOVAN, A MINOR BY HIS GUARDIAN BAI PARSAN (*Original Defendant*), *Respondent.** [27th March, 1888.]

Easement—Adjoining buildings—Side wall.

A built a house in the rear of B.'s house. There was a passage between the houses. Over the passage A. built a room connecting the two houses. This room corresponded with B.'s first floor, and had an open terrace on the top of it. The structure by which A. connected the two houses was quite independent of B.'s house. It was supported throughout by wooden pillars adjoining B.'s wall, which the cross-beams did not penetrate or touch. But the structure was built so close to B.'s wall, that the latter served as a side wall to the room. This state of things had existed for upwards of twenty years.

Held, that A. did not acquire any easement over B.'s wall by merely building on his own ground close to B.'s house, even though A. had built no side wall to his own house, but trusted to B.'s keeping up his wall to shelter his (A's) house on that side.

SECOND appeal from the decision of A. Shewan, Assistant Judge of Ahmedabad, in appeal No. 208 of 1883.

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* Second Appeal, No. 58 of 1886.

(1) 10 B. H. C. R. 187.