APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

GOVIND VALAD LAKSHMAN LOHA'R (ORIGINAL PLAINTIFF), APPELLANT, *v.* VITHAL VALAD DA'DA' SUTA'R AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1895. *August* 26.

Second appeal—Finding of fact—Finding of lower Court based on misconception of evidence—Practice—Procedure—Suit for possession—Issues to be raised.

The finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it.

In a suit to recover possession based on a deed of sale,

Held, that the Court should have raised issues as to ownership and possession, as even if the sale-deed were not proved, the plaintiff might have been able to substantiate a title independently of it.

SECOND appeal from the decision of A. H. Unwin, District Judge of Násik.

The plaintiff sued to recover possession of a piece of ground alleging that it was his ancestral property, having been purchased by his father from one Malhári Náráyan Kulkarni under a deed of sale in the year 1856, and that the defendants took wrongful possession thereof in August, 1891.

The defendants denied that the land was the plaintiff's, and pleaded that in the year 1891 the plaintiff had sued the first defendant for possession in the Court of the Mámlatdár of Málegaon, and that the Mámlatdár had dismissed the suit and allowed the first defendant to remain in possession.

One of the reasons assigned by the Mámlatdár for dismissing the plaintiff's claim was that the deed of sale to his father being unstamped was inadmissible in evidence.

At the hearing of the present suit the Subordinate Judge sent for the proceedings before the Mámlatdár and found that the deed of sale (Exhibit 34) set up by the plaintiff did not need to be stamped; that it was satisfactorily proved by witnesses; and that the plaintiff's exclusive title to the land was established. He, therefore, allowed the plaintiff's claim.

On appeal by the defendants the Judge reversed the decree. The following is an extract from his judgment:—

*Second Appeal, No. 83 of 1894.

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"Has the document (Exhibit 34) been rightly held proved?

"I find in the negative.

"The plaint was filed on the 12th February, 1892, but is wholly silent about this or any other muniment of title. The document was not produced in Court till the 1st June following, and never before does it appear to have seen the light of day in any Court, or to have been inspected by any public functionary. After some personal experience of ancient records, I do not hesitate to say that this document is a clumsy, impudent forgery."

The plaintiff preferred a second appeal.

Shámráo Vithal, for the appellant (plaintiff):—The finding of the lower Court on the issue raised cannot be accepted. The Judge has fallen into an error in supposing that the sale-deed was first produced by us in June, 1892. It was produced by us in the possessory suit before the Mámlatdár, who refused to allow it in evidence, because it was not stamped. In his judgment the Judge has remarked that the deed had never seen the light. This is wrong. Witness No. 22 has attested the deed. The vendor's nephew was examined and he proved the vendor's signature. The Judge has misconceived the evidence in the case, and a finding based on a misconception of evidence cannot be accepted as a legal finding.

Dáji A. Khare, for the respondents (defendants):—The Judge has found the deed to be a clumsy forgery. This is a finding of fact. It does not appear from the sale-deed that it was produced before the Mámlatdár. We are in possession, and before the plaintiff can eject us, he must prove his title, which according to the finding of the Judge he has failed to do.

FARRAN, C. J.:—The Judge raised only one issue and decided the appeal upon it. His finding on the issue is objected to on the ground that he is wrong in saying that the deed of sale relied on by the plaintiff had never seen the light of day in any Court before the 1st of June, 1892, and that no living being speaks for it. The objection seems well-founded, because the Subordinate Judge says that the deed was produced before the Mámlatdár in 1891, and we find that a witness (Exhibit 22) swears to execution of the deed by Malhár and to his having attested it. This misconception of the evidence prevents our accepting the Judge's finding as a legal finding on the issue raised.

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We think also that the Judge should have raised issues as to the ownership and possession both of the plaintiff's vendor and the plaintiff, since even if the deed were not proved, the plaintiff might be able to substantiate a title independently of it, and, on the other hand, if the deed were proved, it would not necessarily establish the title either of his vendor or of himself.

We reverse the decree and remand the appeal for a fresh decision on the merits. Costs to be costs in the cause.

Decree reversed and case sent back.

APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

SINDHA SHRI GANPATSINGJI HIMATSINGJI (ORIGINAL DEFENDANT), APPELLANT, *v.* ABRAHAM *ALIAS* VAJIR MAHOMED AKUJI (ORIGINAL PLAINTIFF), RESPONDENT.*

1895. *September* 2.

Contract Act (IX of 1872), Secs. 2 (d), 25—Services rendered during the defendant's minority at his desire and continued at his request after his majority—Agreement to compensate for services—Consideration—Annuity.

Services rendered at the desire of the minor expressed during his minority and continued at the same request after his majority form a good consideration for a subsequent express promise by him in favour of the person who rendered the services. By section 2 (*d*) of the Contract Act, services already rendered at the desire of the promisor are placed on the same footing with such services to be rendered, and constitute a good consideration for a definite agreement.

Cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service and the promisor undertakes to compensate him for it, are covered by section 25 of the Contract Act (IX of 1872); in them the promise does not need a consideration to support it.

SECOND appeal from the decision of R. S. Tipnis, Assistant Judge, F. P., of Surat at Broach, confirming the decree of Ráo Sáheb Karpurrám M., Subordinate Judge of Jambusar.

The plaintiff sued to recover Rs. 625, being the amount of five years' (1882 to 1886) arrears due on a deed, dated the 5th June, 1875, by which the defendant agreed to pay him Rs. 125 per annum in consideration of the services rendered by him to the defendant in connection with a suit which the defendant had

* Second Appeal, No. 143 of 1894.