

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

DAJI BABAJI SAWANT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
 v. SAKHARAM KRISHNA KULKARNI (ORIGINAL DEFENDANT No. 1),
 RESPONDENT.*

1914.

July 29.

*Civil Procedure Code (Act V of 1908), Order XLI, Rule 27—Appellate Court—
 Admission of fresh evidence—Practice regarding admission.*

Where an appellate Court desires to admit fresh papers in evidence, under Rule 27 of Order XLI of the Civil Procedure Code (Act V of 1908), it must record its reasons in writing for doing so and admit them formally in evidence.

SECOND appeal from the decision of V. G. Kaduskar, Additional First Class Subordinate Judge with Appellate Powers at Ratnagiri, reversing the decree passed by E. F. Rego, Subordinate Judge at Malvan.

Suit for declaration.

The plaintiffs sued for a declaration that certain lands belonged to them. The declaration was granted by the Subordinate Judge.

The defendant appealed. On appeal, the Court sent for, at the plaintiffs' instance, certain papers in a revenue inquiry concerning the lands. The papers were not formally exhibited in the case, nor were any reasons recorded for having sent for the papers. The Court proceeded to weigh this new evidence along with other evidence in the case and dismissed the suit.

The plaintiffs appealed to the High Court.

D. W. Pilgaokar for the appellants.

Nilkantha Atmaram for the respondent.

SHAH, J.:—The main point argued in this appeal relates to the question of the admissibility of certain evidence which the lower appellate Court considered

* Second Appeal No. 742 of 1913.

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for the first time in appeal. That evidence consists of certain papers relating to a revenue inquiry. During the course of the argument we were led to think that these papers were looked at and considered by the Court without the knowledge and consent of the present appellants. It turns out, however, that these papers were sent for expressly on the application of the plaintiffs, and the pleaders on both sides were heard after these papers were received and before the judgment was pronounced. No objection has been taken to this procedure in the memo of appeal to this Court. Under these circumstances it is quite clear that so far as the present appellants are concerned, they have no just grievance at all as regards the procedure adopted by the lower appellate Court with reference to these papers.

At the same time we think that it was necessary for the lower appellate Court to have complied with the provisions of Rule 27 of Order XLI before taking these papers into consideration; and if it thought, either with the consent of the parties or on the application of any one of the parties, that there was sufficient ground to admit these papers, the reasons for admitting them in evidence should have been stated, and they should have been formally admitted in evidence. The lower appellate Court no doubt acted improperly in considering the papers without formally admitting them in evidence. But having regard to the facts which we have already mentioned, it is quite clear that the appellants cannot be allowed to object to the procedure which they invited the Court to adopt.

On a consideration of the whole evidence in the case, including these papers, the lower appellate Court has come to definite conclusions on questions of fact, *viz.*, that the plaintiffs have not proved their title, and that the defendant has been in possession of the lands for

over twelve years prior to the date of the suit. These findings must be accepted. On these findings it is quite clear that the decree passed by the lower appellate Court is proper.

We, therefore, confirm the decree of the lower appellate Court with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

MESSRS. KING, KING & Co. (ORIGINAL PLAINTIFFS AND DECREE-HOLDERS),
RESPONDENTS, v. MAJOR F. D. DAVIDSON (ORIGINAL DEFENDANT AND
JUDGMENT-DEBTOR), APPLICANT.*

1914.

February 2.

Civil Procedure Code (Act V of 1908), section 60, clause 2 (b)—Army Act, 1881 (44 & 45 Vict., c. 58), sections 136 and 190, sub-section 8, as amended by Army (Annual) Act, 1895 (58 & 59 Vict., c. 7), section 4—Officer on the Indian Staff Corps—Money decree—Execution—Salary not liable to attachment.

Messrs. K. K. & Co. filed a suit and obtained a decree for a sum of money against Major D., an officer in the Indian Army. They subsequently attached a moiety of that officer's pay under Order XXI, Rule 48, of the Civil Procedure Code and in pursuance of such attachment the Deputy Controller of Military Accounts remitted such moiety to the Sheriff of Bombay who had paid out a portion of the moneys received by him under Messrs. K. K. & Co.'s attachment and had in his hands a further sum which in the ordinary course would have been paid out likewise, when Major D. took out a summons calling on the plaintiffs to show cause why their attachment should not be raised and the sums recovered thereunder refunded.

Held, that Major D. under section 190, sub-section 8, of the Army Act, 1881, was an Officer of His Majesty's Regular Forces and under section 136 of the Army Act, 1881, and section 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D. the sum received by him under the attachment and not yet paid away.

* Suit No. 303 of 1911.