

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

April 1.

CHUDASAMA KHOLUBA SARTANSANG AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* CHUDASAMA TAKHATSANG NARSINGJI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 6 TO 8, 13, 16 AND 22 TO 29), RESPONDENTS*.

Indian Evidence Act (I of 1872), section 65—Secondary Evidence—Certified copy—Copy showing that the original produced in an old suit—Copy can be relied on to prove the terms of the original document.

In a suit for a declaration that certain survey numbers were kept joint at a partition between the parties' ancestors in 1809, the plaintiff relied upon a certified copy of a partition deed passed between the parties in that year. The copy which was produced showed that the original document was produced in Court in a suit of 1823.

Held, that the Court could rely on the certified copy as showing the terms of the partition, as there was no reason to doubt, owing to the lapse of time, that the certified copy retained on the file of the suit of 1823 was a correct copy of the original.

SECOND Appeal against the decision of C. N. Mehta, Joint Judge of Ahmedabad confirming the decree passed by P. C. Desai, Subordinate Judge at Dhandhuka.

Suit for a declaration.

The parties to the suit were Talukdars holding the village of Tagdi on Talukdari tenure. The plaintiff alleged that the village site and field lands of the village were first partitioned into two main shares of 50 Dokdas each in 1809; that the lands near the village site (Gam Padar) and the grainyard were, however, kept joint; that old Survey Nos. 177 and 40 part of Gam Padar were common numbers belonging to all the 100 Dokda sharers; that the survey numbers were used as common pasture and grainyard; that the defendants obstructed the plaintiff in using the land according to

*Second Appeal No. 73 of 1916.

usual practice. The plaintiff, therefore, sued for a declaration to the effect that Survey Nos. 177 and 40 belonged in common to all the 100 Dokda sharers of the village for use as common pasture and grainyard and for a perpetual injunction restraining the defendants from using the land of the said numbers, either by themselves or through others for purposes other than those specified.

The contending defendants pleaded that Survey No. 177 belonged exclusively to them, while the other number (Survey No. 40) was the common property of the plaintiffs and defendants but it was held in separate shares of 50 Dokdas by the two branches.

The Subordinate Judge relying upon a certified copy of a partition deed entered into between the ancestors of the parties in 1809 held the plaintiffs' claim proved. He, therefore, passed a decree in favour of the plaintiffs.

On appeal, the Joint Judge confirmed the decree.

The defendants appealed to the High Court.

G. N. Thakor, for the appellants.

G. S. Rao and *R. W. Desai*, for respondents Nos. 1 and 2.

B. D. Mehta for *N. K. Mehta*, for respondents Nos. 9 to 11.

MACLEOD, C.J.:—The plaintiffs filed this suit for a declaration to the effect that Survey Nos. 177 and 40 of the Tagdi village, bounded as described in the plaint, belonged in common to all the 100 Dokda sharers of the village for use as common pasture and grainyard, and for a perpetual injunction restraining the defendants from using the land of the said numbers, either by themselves, or through others, for other purposes, and

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from interfering with the plaintiffs either by themselves or through others in the use of the same for the said purposes. The plaintiffs' case is that the village of Tagdi was first partitioned into two main shares of 50 Dokdas each in 1809, when lands of the Padar and grainyard were kept joint. They rely upon the certified copy of the document passed between the parties' ancestors in that year. The original was not forthcoming, but the copy which was produced showed that the original was produced in Court in 1823. It has been ascertained from the original record that the certified copy which had been retained on the file of that suit corresponded with the copy produced, Exhibit 337. There can be no doubt that in that deed of compromise between the two branches the whole of the village Padar, including the *khalās* or threshing floor, was kept joint.

It has been contended that the Court could not rely on a certified copy as evidence of the compromise. But considering the time that has expired, there is no reason whatever to doubt that the certified copy retained on the file of that suit is a correct copy of the original. The Courts were perfectly correct in relying on it as showing the terms of the compromise.

The question is then raised whether the present Survey Nos. 177 and 40 were the village Padar in 1809. A very large number of documents have been referred to, from which it appears that the old Survey Numbers were 33 and 110. The Courts have referred to the village map and to the village Khardas, and came to the conclusion that the present Survey Nos. 177 and 40 are waste open lands. The position of those Survey Numbers on the map at p. 11 of the print shows conclusively that those Survey Numbers from their very position must have been open sites used for the

purposes of pasture and grainyards. Survey No. 177 is next to the village site, Survey No. 40 is adjoining the village tank. They have also been entered in the Government Registers as waste land. It is not suggested that they had ever been turned into arable land and had paid assessment. The fact that some of the defendants got their names entered in the Government Survey Records in regard to these two numbers does not in any way change the nature of these lands and make them the separate property of the defendants instead of being joint between the plaintiffs and the defendants.

The defendants sought to prove that they had ousted the plaintiffs from the common user of these Survey Numbers and that they had acquired a title to them by adverse possession. That is a plain question of fact and has been found against the defendants. The learned appellate Judge at p. 4 says: "I entirely agree with the lower Court that the plaintiffs' witnesses, who are more reliable than those of the appellants, prove that there has been continuous joint user of both the Survey Numbers in dispute by all the 100 Dokda sharers."

It has been urged before us that the Court in its judgment put on the record as Exhibits documents which had not been referred to in the course of the argument so that the defendants had not the opportunity of showing that they do not support the plaintiffs' case, or of exhibiting further documents in order to get rid of the effect of those Exhibits. The numbers of those Exhibits are 345, 346 and 347. The Court exhibited portions of certain Sim Khardas and of a Field Book, all of which are Government records. The point was raised in first appeal, but I cannot think that it was then seriously contended by the appellants that the trial Court had made a serious error in regard to these documents in the course of its judgment. Amongst the

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mass of documents which must have been produced for the purpose of the case, no doubt these Government records were produced, and the Judge, as he was entitled to do, referred to portions of them and marked the specific portions which he referred to as Exhibits. If the appellants had considered that the trial Judge had committed a serious error, and had urged this point as strongly before the lower appellate Judge, as has been urged before us, I think it is certain that he would have referred to such a contention in his judgment. The argument must really depend on certain facts as to what happened in the trial Court, and without those facts it is extremely difficult to consider in Second Appeal whether the appellants had any grievance at all—it is one of those points which are argued the more strenuously the further the appellant gets away from the trial Court, and I am not disposed to consider that the appellants have a real grievance when they have not even taken the trouble to set out the facts upon which their grievance must depend. Apart from these Exhibits, it is obvious that the Courts have relied upon other documents in order to come to the conclusion that the old numbers corresponded with the present numbers; and even striking out all these documents, as I have already pointed out, the very situation of these Survey Numbers points almost inevitably to the conclusion that they always have been waste lands. When we find that they were registered as waste land and never paid assessment, the conclusion becomes more certain. In my opinion, therefore, the judgments of both the lower Courts were perfectly correct. The appeal must be dismissed with costs.

SHAH, J:—I agree.

Decree confirmed.

J. G. R.