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fault of his own, we think we have the power to afford him an alternative remedy in second appeal under clause (c), section 584. So that we shall call upon the Lower Appellate Court to take evidence and find whether the appellant was or was not duly served with notice of the appeal. The report with the notice and return in original and the evidence are to be submitted as early as possible.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

1896. July 16,30.

RANGAYYA APPA RAU (DEFENDANT No. 4), APPELLANT,

v.

NARASIMHA APPA RAU (PLAINTIFF), RESPONDENT.*

Boundary Marks Act (Madras)—Act XXVIII of 1860, *s.* 25—*Boundary Marks Act (Madras)—Act II of* 1884, *s.* 9—*Suit to set aside decision of the Survey officer—Plea of limitation abandoned.*

A suit filed on 21st April 1891 to set aside the decision of the Settlement officer under the Madras Boundary Acts passed on 15th September 1890 was dismissed by the Munsif as being time-barred not having been brought within six months as provided by s. 25 of Act XXVIII of 1860. This decision was reversed by the District Judge, who remanded the suit for disposal on the merits, holding that the production by the plaintiff of a copy of the judgment, dated 25th October 1890, raised a presumption that the suit was in time and shifted the burden of proof to the defendant to show that an earlier copy was granted to plaintiff, or that the decision was pronounced in the plaintiff's presence. Against this remand order there was no appeal. At the rehearing the question of limitation was not again raised, and the Munsif gave a decree on the merits. An appeal was preferred to the District Court, but no mention was made of the question of limitation. On appeal to the High Court:

Held that the question of limitation had been put aside by the consent of the parties who desired to have the case decided on the merits, and that the appellant could not be allowed to fall back on this plea which he had abandoned in the Lower Courts.

SECOND APPEAL against the decree of E. A. Elwin, Acting District Judge of Kistna, in appeal suit No. 935 of 1892, modifying the decree of C. Rama Rau, District Munsif of Bezwada, in original suit No. 181 of 1891.

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* Second Appeal No. 437 of 1895.

Plaintiff brought this suit alleging that the Survey department in their survey fixed the boundary stones improperly including 241 acres 92 cents of land belonging to him in Sunkollu village attached to the Sub-Registry of Nuzvid with Yanamadala village belonging to defendants, and praying for a decree establishing the red line on the marks A, B, C referred to in the plaint plan as the boundary limit and to fix boundary stones in the said site and to remove the stones improperly fixed at a cost of Rs. 10, establishing plaintiff's right to the lands marked from I to R and for possession of the same, and directing defendants to pay costs.

The District Munsif of Bezwada having dismissed this suit on the 19th March 1892 on the ground that it is barred by limitation, inasmuch as it was instituted after the expiration of six months from the date of the decision of the Survey officer, the plaintiff preferred an appeal. Thereupon the District Court, setting aside the judgment and decree of this Court, issued an order, dated 10th February 1893, remanding the suit for retrial.

On the hearing of the retrial the District Munsif passed a decree in favour of the plaintiff, which was confirmed with certain modifications not now material by the District Court on appeal.

The fourth defendant appealed to the High Court and took the objection that the original suit was barred by limitation under section 25 of Act XXVIII of 1860 (Madras Boundary Marks Act) as amended by section 9 of Act II of 1884 (Madras) not having been filed within six calendar months after the passing by the Settlement officer of his decision under the said Act.

Rama Subbayyar and *Subramania Ayyar* for appellant.

Sadagopa Chariar for respondent.

JUDGMENT.—Plaintiff sued to set aside a decision of the Survey officer passed under section 25 of (Madras) Act XXVIII of 1860 in regard to the boundary between two villages, and for a declaration that the boundary was as stated by him in the plaint, and for recovery of certain lands within that boundary alleged to have been taken possession of by defendants after the decision of the Survey officer.

The defendants pleaded that the suit was time-barred, and denied both the correctness of the boundary proposed by plaintiff and the alleged trespass.

The District Munsif dismissed the suit as time-barred on the ground that, under section 25 of Act XXVIII of 1860 (Madras) as

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amended by section 9 of Act II of 1884, a suit to set aside the decision of a Survey officer must be brought within six months of the passing of the decision, whereas the present suit was not brought until the 25th April 1891, though the decision was passed on the 15th September 1890.

At the appeal the plaintiff produced before the District Judge a copy of the Survey officer's decision, which copy was prepared in the Survey office on the 25th October 1890. The District Judge thought that this raised a presumption that the suit was in time, or at least threw on the other side the burden of showing that an earlier copy was granted to plaintiff, or that the Survey officer's decision was pronounced in the presence of plaintiff. He therefore remanded the suit for a fresh trial.

We observe that these proceedings of the District Judge were not warranted by law. The Act does not require that the Survey officer's decision should be pronounced in the presence of the parties, but merely that they should be informed of it after it has been duly recorded. Neither can the date on the copy raise any presumption at all that it was on that date that the holder was first made aware of the decision. Any number of earlier copies may have been made and given to the plaintiff, and it was not for the defendants to prove that plaintiff had the information earlier; but it was for the plaintiff, when the plea of limitation was raised, to show that his suit was in time. He took no steps to do this before the District Munsif, and the District Judge should not have admitted the copy before him as proof that plaintiff was first informed of the decision on the date it (the copy) was made. Further the District Judge, even on his own view of the effect of the copy, should not have remanded the suit for a fresh trial, but he should have first called for further evidence as to the date on which plaintiff was informed of the order, and he should then have himself decided the issue as to limitation.

Having noticed these irregularities, we follow the further progress of the case. When it was remanded the District Munsif's successor recorded that neither party pressed the question of limitation before him, and he proceeded to dispose of the suit on the merits.

Against that decree the plaintiff appealed to the District Judge, but, though nine grounds of appeal were stated by the appellant and two grounds of objection were notified by the respondents, no

reference was made by either side to the question of limitation, and the District Judge gave a decision on the merits. The fourth defendant now appeals, and the only ground urged before us is that the suit is time-barred for the reason stated by the District Munsif in the first trial. From what has been stated it is manifest that the question of limitation was put aside by the consent of the parties, and that they desired to have the case decided, not with reference to any such plea, but on the merits; and it was so decided in both the Courts below. This being so, it is impossible to allow the appellant now to fall back on the plea which he abandoned in both the Lower Courts, and, the more so, since it is a plea dependent on a variety of facts on which findings would have to be obtained before a decision could be given on it. It would be impossible to deal with the litigation of the country if such procedure were countenanced.

We confirm the decree of the Lower Court and dismiss this appeal with costs.

APPELLATE CIVIL

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

APPASAMI NAYAKAN (DEFENDANT No. 2), APPELLANT,

v.

VARADACHARI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1896. July 24.

Civil Procedure Code, s. 375—Power of Court to frame additional issues as to an alleged compromise effected subsequent to the institution of the suit.

The Civil Procedure Code, s. 375, was intended to meet cases where the parties having agreed to compromise subsequently fall out. The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.

SECOND APPEAL against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 206 of 1893, reversing the decree of M. Visvanatha Aiyar, District Munsif of Conjeeveram, in original suit No. 640 of 1892.

The facts of this case were as follows:—

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* Second Appeal No. 717 of 1895.