

1879

ABDUL  
SAMAD  
v.  
RAJINDRO  
KISHOR  
SINGH.

The plaintiffs appealed to the High Court "from the order" of the Court of first instance. It was objected on behalf of the respondent that, as the suit had been dismissed, the appeal should have been preferred as an appeal from a decree.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad*, for the appellants.

Mr. Conlan and *Pandit Bishambhar Nath*, for the respondent.

The judgment of the High Court, so far as it related to the above contention, was as follows :

SPANKIE, J.—A preliminary objection was taken that the Subordinate Judge had dismissed the suit, and that there should have been an appeal as from a decree in an original suit, whereas the present appeal had been entered as a first appeal from an order. The Subordinate Judge has certainly made use of the words "dismiss," but it is clear from his direction that the plaint was to be given back, that he stopped and intended to stop from further hearing of the suit, when he discovered that he had no jurisdiction. He, therefore, when he returned the plaint to be presented in the proper Court, was acting under s. 57, cl. (c), Act X of 1877. It may be that the section contemplates a return of the plaint, should error be patent, when it is first presented, but there is nothing in the wording of the section which forbids the return of the plaint at a later stage in the case, and it has been so held in former cases. An order returning a plaint under s. 57 of the Act is appealable under s. 588 of the Code, and it does not come within the definition of the decree in the amended Act, which appears to have come into force on the 29th July last. We see no reason to doubt that the appeal has been properly instituted as a first appeal from an order.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

1879  
August 21.

KIRATH CHAND AND OTHERS (DEFENDANTS) v. GANESH PRASAD (PLAINTIFF). \*  
*Suit for "haqq-i chaharam" based on custom—Act XV of 1877 (Limitation Act), sch. ii, arts. 62, 120, 132.*

C, the proprietor of a certain "mohalla," sued K, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one-fourth of the purchase-money, founding his claim upon an ancient custom obtaining in the

\* Second Appeal, No. 195 of 1879, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 22nd November, 1878, affirming a decree of Maulvi Ahmad-ullah, Munsif of Gorakhpur, dated the 21st September, 1878.

mohalla, under which the proprietor thereof received one fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held* that the period of limitation applicable to such a suit was that prescribed by art. 120, sch. ii of Act XV of 1877, and not by art. 62 or by art. 132 of that schedule.

THE plaintiff in this suit, which was instituted on the 28th October, 1878, and was one of three suits of a similar nature, stated in his plaint that he was the proprietor of a certain "mohalla" in the city of Gorakhpur; that an ancient custom obtained in the said mohalla under which when a house situated therein was sold, whether privately or in the execution of a decree, the proprietor of the mohalla received one-fourth of the purchase-money; that on the 10th July, 1875, a certain house situated in the said mohalla was put up for sale in the execution of a decree held by the defendants, and was purchased by the defendants themselves for Rs. 150; that on the same day the defendants, as decree-holders, acknowledged the receipt in full of the purchase-money, thereby appropriating the one-fourth thereof to which the plaintiff was entitled as the proprietor of the said mohalla. The plaintiff claimed to recover from the defendants Rs. 37-8-0 being one-fourth of Rs. 150 together with interest, stating that his cause of action arose on the 10th July, 1875. The Court of first instance gave the plaintiff a decree. On appeal by the defendants the lower appellate Court held, with reference to the question of limitation raised by the defendants, that the suit was within time, being governed by art. 120, sch. ii of Act XV of 1877. The defendants appealed to the High Court.

The *Senior Government Pleader* (Lala Juala Prasad) and the *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the appellants.

Pandit *Bishambhar Nath*, Munshi *Sukh Ram*, and Maulvi *Mehdi Hasan*, for the respondent.

The judgments of the Court, so far as they related to the question of limitation, were as follows:

SPANKIE, J.—The Judge remarks that the cause of action in respect of two of the houses arose in 1873, and of one in 1875. But he holds, on the authority of a decision of this Court (1), that the period of limitation is governed by art. 120, sch. ii of Act XV of 1877. Art. 120 provides a limitation of six years in suits for which

(1) S. A., No. 1681 of 1874, decided the 23rd August, 1875, unreported.

1879

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 KIRAT  
 CHAND  
 v  
 GANESI  
 PRASAD

1899

KIRATH  
CHAND  
V.  
FAHESH  
HASAD.

no period of limitation is to be found in sch. ii of the Act. It is contended by Babu Dwarka Nath Banarji, the Junior Government Pleader, on behalf of appellants, that art. 62, sch. ii of the Act, applies. He urges that the claim must be viewed as one for money payable by the defendant to the plaintiff for money received by defendant for the plaintiff's use. On the other hand Pandit Bishambhar Nath, for the respondent, contends that art. 132 is strictly in point, and that the plaintiff has a charge on the property for the amount claimed; and he refers to the explanation below that article that the allowance and fees respectively called "*malikana*" and "*haqqs*" shall, for the purpose of the clause, be deemed to be money charged upon immoveable property, in support of his contention. If the appellants' pleader be right, the limitation would be three years from the date of the receipt of the money by defendants, whereas if the pleader for the respondent has applied the proper article, the limitation would be twelve years from the date when the money sued for became due.

I am not prepared to accept as correct the contention of either of the learned pleaders. If we apply art. 62, then this claim would take the English form of an action for breach of contract, and if this be so, as between the proprietor of the mohalla and the vendor and the vendee, the component parts of a contract appear to be wanting both as regards consideration and promise to pay money to the proprietor of the mohalla, express or implied. If this were a suit for money had and received, the sum claimed being under Rs. 500, the claim was one for a Small Cause Court. But this Court in Full Bench has decided (1) that suits of this nature are not cognizable by a Court of Small Causes. The Court observed that such a claim as one for "*haqq-i-chaharam*" "is for a zamindari due customarily payable, it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages," and the Court adds that they must not be understood to impugn the ruling that where "*chaharam*" is payable in virtue of a contract, the claim would be triable by a Court of Small Causes. The claim in the present instance is one expressly founded on ancient custom, and it cannot be maintained that the record of this ancient custom in the administration-paper is a contract, express or implied, as between the owner of the mohalla

(1) I. L. R., 1 All. 414.

1879

BRAT  
CHANI  
v.  
GANES:  
PRASAI

and the mohalladar. The record of the custom is some evidence of its existence, and doubtless it was entered in the administration papers of 1833 and 1867, because the settlement officer was bound to prepare a complete record of the mahal, and to include in it all village-customs, and extra cesses and collections. As the claims in these suits are based upon ancient usage and not upon contract, the Full Bench ruling clearly applies, and this being so, one cannot say that art. 62, sch. ii of the Limitation Act governs them, still less does art. 132 apply to these cases. The "*haqq*s" referred to in the explanation and described as fees are fixed charges upon immoveable property, of which payment could be enforced by the sale of the property so charged. It is not contended here that a zamindar could recover his one-fourth share of the sale-proceeds of a house when sold by a suit to bring the house to sale by enforcement of any lien upon it. I need not, however, dwell at length upon the question of limitation, inasmuch as I am quite ready to accept the ruling of a Division Bench of this Court on the point in *Sheo Dehal v. Thakur Mathura Prasad* (1). The learned Judges in that case applied art. 118, sch. ii of Act IX of 1871, to a case of this nature, holding that there was no limitation expressly provided for such suits. I would therefore say that art. 120, sch. ii of Act XV of 1877, which represents art. 118 of the former Act, governs the limitation in these suits, and if so, all these are within time, as the limitation is six years from the time when the right to sue accrues.

STRAIGHT, J.—I concur in Mr. Justice Spankie's judgment. I was in some doubt at one time upon the question of limitation, and was disposed to think the case within art. 62, though I never had any doubt that art. 132 was inapplicable. But, upon further consideration of the matter and the decision of this Court already referred to, I think art. 120 properly applies.

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

DURGA PRASAD (DEFENDANT) v. ASA RAM (PLAINTIFF). \*

*Constructive Trust—Limitation.*

*B* and *D*, father and son, were jointly entitled to the moiety of certain property, *B*'s brother, *E*, and *K*, *E*'s son, being jointly entitled to the other moiety.

1879  
August

\* Second Appeal, No. 425 of 1879, from a decree of Babu Aubinash Chandar Banarji, Officiating Subordinate Judge of Farukhabad, dated the 14th February 1879, modifying a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 30th November, 1878.

(1) S. A. No. 1681 of 1874, decided the 23rd August, 1875, unreported.