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denied plaintiff's right without stating on what grounds she did so, and here again raised a question on which evidence might seem necessary. By these two latter parts of her statement she thus gave plaintiff reason and occasion to bring a suit at once, and I think the case is one in which a declaration might be properly asked for. The fact that defendant now does not attempt to defend her statement is not a ground for not granting the declaration sought, nor, indeed, is it pleaded by defendant that it is."

On appeal by the defendants to the High Court, it was again contended that the statements contained in the deposition of Jamna Kuar gave the plaintiff no cause of action.

Mr. A. Carapiet and Babu *Bārōda Prasad*, for the appellants.

Babu *Ram Das Chakarbatī*, for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

OLDFIELD, J.—The statement made before and recorded by the Revenue Court was intended to operate, and would have operated, as a will in respect of the property, and it gave a valid cause of action to the plaintiff for bringing this suit.

We affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DURGA (DEFENDANT) v. HAIDAR ALI (PLAINTIFF).*

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Pre-emption—Rival pre-emptor impleaded as defendant—Act XV of 1877 (Limitation Act), sch. ii, Nos. 10 120—Remand—Civil Procedure Code, ss. 562, 564.

Two suits to enforce the right of pre-emption in respect of a particular sale having been instituted, the plaintiff in the one first instituted was added as a defendant to the other. *Held* that, as regards him, the second suit constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property, which was a claim essentially declaratory in its nature; and there being no specific provision for such a claim in the Limitation Act, it was governed by art. 120 of that Act, and the right to sue accrued when the first suit was instituted.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of the sale of a share in a village. The suit

* First Appeal No. 47 of 1884, from an order of W. Barry, Esq., District Judge of Banda, dated the 14th April, 1884.

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was based on the *wajib-ul-arz* of the village. It appeared that on the 14th December, 1882, Nabi Bakhsh, defendant, executed and registered a deed of sale, whereby he conveyed his share in a village to Gayadin and Bhura, defendants. Durga, a co-sharer in the village, instituted a suit on the 4th December, 1883, to enforce the right of pre-emption in respect of that sale. During the pendency of that suit, Haidar Ali instituted the present suit on the 7th December, 1883, to enforce the right of pre-emption in respect of the same sale, and on the 21st December, 1883, he applied to add Durga as a defendant to his suit, on the ground of his having previously instituted a rival suit for pre-emption. Durga was accordingly impleaded, and a summons was served on him on the 30th of December, 1883.

Various pleas were set up in defence of Haidar Ali's suit, but it is not necessary for the purposes of this report to notice any of them, except the plea of limitation set up by the defendant Durga.

The Court of first instance tried the two suits together. It decreed the claim of Durga, but applying the provisions of the penultimate paragraph of s. 32 of the Civil Procedure Code and those of s. 22 of the Limitation Act and sch. ii, No. 10 of the same enactment, dismissed Haidar Ali's suit, both against Durga and the other defendants, as barred by limitation.

On appeal by Haidar Ali, the lower appellate Court held that his suit, so far as it claimed pre-emption against the vendor and the vendees, had an aspect different to his claim against Durga, the rival pre-emptor; that in its former aspect it was governed by one year's limitation under sch. ii, No. 10, of the Limitation Act; that in its other aspect it fell under No. 120 of the same enactment, being a claim for which no special period of limitation is provided in the Act; and that the entire suit was therefore within time.

On these findings the lower appellate Court set aside the decree of the Court of first instance in the suit of Haidar Ali, and remanded the case for disposal on the merits.

From that order the present appeal was preferred by Durga, and in his memorandum of appeal he contended that the suit, as against him, was barred by limitation; that even if it were not so barred, the lower appellate Court should, instead of remanding the case,

have disposed of it finally, there being on the record the entire evidence produced by the parties; and that the order as to costs was erroneous.

Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

MAHMOOD, J.—We are of opinion that the appeal, so far as it relates to the question of limitation, has no force. Haidar Ali's suit, so far as it claimed pre-emption in respect of the sale of 14th December, 1882, was properly instituted within a year after the sale, and the vendor and the vendees, necessary parties to such a suit, were duly impleaded.

The suit was governed by art. 10 of the Limitation Act, and was obviously within time. So far as the position of Durga, appellant, is concerned, it is true that he was impleaded as defendant to the suit after the lapse of one year from the date of the sale. But the claim against him is not of the nature contemplated by art. 10 of the Limitation Act. He was impleaded, not because he was a party to the sale in respect of which pre-emption was sought to be enforced, but because he had, by instituting a rival suit for pre-emption, rendered it necessary for the plaintiff Haidar Ali to pray in his suit for the declaration that he had a right of pre-emption preferential to that of the defendant Durga. Such a claim cannot be regarded as a claim for pre-emption, but a claim to establish a right to pre-empt the property in preference to a rival pre-emptor. In other words, the suit, so far as it relates to Durga, constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property. The claim was essentially declaratory in its nature, and there being no specific provision for such a claim in the Limitation Act, it was rightly held by the lower appellate Court to be governed by art. 120 of the Limitation Act,—the right to sue against Durga having accrued when the latter instituted his pre-emptive suit on the 4th of December, 1883.

But we are of opinion that the third ground of appeal has force. The learned pleaders for the parties admit that the record of the

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case is complete, and that, although Haidar Ali respondent's suit was disposed of by the Court of first instance on a preliminary point, yet that Court did not exclude any evidence offered by the parties. Such being the case, we are of opinion that s. 562 of the Civil Procedure Code was not applicable, and the order of the lower appellate Court remanding the case for a second decision was opposed to the express provisions of s. 564 of the Code. We must therefore, whilst upholding the view of the lower appellate Court on the question of limitation, set aside the order of that Court, and direct it to dispose of the case itself on the merits, with reference to the issues raised by the pleadings of the parties. This view renders it unnecessary for us to dispose of the last ground of appeal, which relates to costs.

We decree this appeal, and, setting aside the order of the lower appellate Court so far as it relates to the suit of Haidar Ali, plaintiff-respondent, remand the case to that Court for disposal according to law. Costs to follow the result.

Appeal allowed.

FULL BENCH.

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November 19.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

RAM GHULAM (PLAINTIFF) v. DWARKA RAI AND OTHERS (DEFENDANTS)*.

Civil Procedure Code, s. 244—Mesne profits—Decree for possession of immoveable property—Reversal of decree on appeal—Appellate decree silent as to mesne profits—Suit for recovery of mesne profits.

The plaintiff in a suit for possession of immoveable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant. The decree of the appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits.

Held, per PETHERAM, C. J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the suit was not barred by s. 244 of the Civil Procedure Code, the question raised by such suit, although it might have arisen out of the decree of the appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section, (because, at that time, no such question had

* Second Appeal No. 1213 of 1883, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 25th May, 1883, affirming a decree of Babu Nilmadhub Roy, Munsif of Ghazipur, dated the 12th December, 1882.