

in suit, and, if so, it seems that Mr. Mayne's third exception should be enlarged so as to cover such a case.

We think that the Court below was right, and dismiss this appeal with costs.

*Appeal dismissed.*

1901

LACHMI  
NARAIN  
v.  
JANKI DAS.

*Before Mr. Justice Knox and Mr. Justice Burkitt.*

GULKANDI LAL AND OTHERS (DEFENDANTS) v. MANNI LAL (PLAINTIFF)\*

*Civil Procedure Code, section 373—Suit for partition—Withdrawal of suit—Joint petition by parties praying that the suit might be struck off—Subsequent suit for partition barred.*

The plaintiff and the defendants in a suit for partition having arrived at a compromise, presented to the Court a joint petition asking that the suit might be struck off (*bharij kardiya jawe*). The Court passed orders accordingly in the terms of the petition, striking off the suit. The terms of the compromise were not however inserted in the decree, and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property.

*Held*, that it was incumbent on the plaintiff to see that the Court did its duty and recorded a proper order in the suit with reference to section 373 of the Code of Civil Procedure, and that, as he had not done so, he must be taken to have withdrawn his suit without permission to sue again, and his second suit was barred by section 373 of the Code.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellants.

Mr. *W. K. Porter* and *Munshi Gobind Prasad*, for the respondent.

KNOX and BURKITT, JJ.—On the 27th July, 1889, the plaintiff-respondent to this second appeal sued the present appellants and others, and prayed for the same relief in respect of what was virtually the same subject-matter as he now sues for in this suit: the only difference as regards the subject-matter is that in the present suit a certain portion of the property, for the partition of which he originally sued, has been omitted from the plaint. In other respects the suit of 1889 and the present suit are precisely the same. Before the suit of 1889 was determined, the parties

1901  
February 21.

\* Second Appeal No. 840 of 1898 from a decree of Rai Pandit Indar Narain, Subordinate Judge of Farrukhabad, dated the 28th July, 1898, confirming a decree of Babu Prithi Nath, Munsif of Kaimganj, dated the 16th March, 1898.

1901

GULSHANDI  
LAL  
v.  
MANNI LAL.

came to Court and represented that the matter in dispute between them had been adjusted. The Court set forth in its order that both the parties before it expressed a wish that the suit should be struck off (*kharij*), and proceeded to strike off the case in accordance with this wish. The Court in passing such an order acted wrongly. It should have acted in accordance with section 375 of the Code of Civil Procedure. It did not do so, and it is probably due to this mistake that the present litigation has taken place. Still it was the duty of the present plaintiff to have got a proper order recorded. Instead of seeing to this he remained satisfied with action which practically amounted to withdrawal of his suit without permission asked to sue again. We can easily understand that under the circumstances the parties never contemplated that such permission would be needed. After some ineffectual efforts made to enforce the compromise, the plaintiff has brought the present suit, the nature of which has been explained above. We are compelled reluctantly to hold the suit is barred by the second clause of section 373 of the Code of Civil Procedure.

The result is that this appeal must be and is decreed. The judgment and decree of the lower appellate Court is set aside, and the plaintiff's suit is dismissed with costs in all Courts.

*Appeal decreed.*

### PRIVY COUNCIL.

RADHA KISHAN, PLAINTIFF, APPELLANT v. THE COLLECTOR  
OF JAUNPUR, DEFENDANT, RESPONDENT.

On appeal from the High Court for the North-Western Provinces.

*Ex parte decrees against an absent defendant—Civil Procedure Code, section 108—Remand under section 562—Such order not appealable—Civil Procedure Code, section 595(a).*

A defendant, not present in person at the hearing on evidence, had appointed a pleader who had acted in the suit until that occasion, when he stated to the Court that he was not instructed for the defence. The Court proceeded without him to a decree for the plaintiff.

An application by the defendant under section 108, Civil Procedure Code, for an order setting that decree aside, was disallowed without the Court's being

*Present:—LORDS HOBHOUSE, DAVEY and ROBERTSON, and SIR RICHARD COUCH.*

P. C.  
J. C.  
1900

November  
14  
December  
8.