

decree for rent against the mortgagor attach and sell the mortgaged premises, but must bring a suit as provided by section 67 of Act No. IV of 1882. We may also refer to the case of *Gobind Hari Dev v. Parashram Mahadev Joshi* (1). The learned counsel on behalf of the respondent has admitted that he cannot contest this point, and we think rightly so, having regard to the explicit terms of section 99. We therefore allow the appeal, and, as it has been disposed of upon this preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure to the lower appellate Court with directions to re-admit it under its original number in the register of pending appeals and try it upon the merits. The costs in all Courts will follow the event.

Appeal decreed and cause remanded.

1903

BEOLA NATH
v.
MURHAMMAD
SADIQ.

1903

December 9.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Hurkitt.

JAMNA PRASAD (DEFENDANT) v. BALMUKAND (PLAINTIFF)*

Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 113—Partition—Question of title—Parties referred to Civil Court—Revenue Court not empowered to limit the time within which recourse must be had to the Civil Court.

When in the course of partition proceedings under the North-Western Provinces Land Revenue Act, 1873, objections raising a question of title are preferred, and the Revenue Court under section 113 of the Act refers the parties to the Civil Court, the Revenue Court has no power to fix a limit of time within which recourse must be had to the Civil Court.

THE facts of this case are as follows:—

On the 9th of August, 1901, one Balmukand applied under section 108 of Act No. XIX of 1873 for perfect partition of certain property. Jamna Prasad, one of the defendants, objected to the application on the ground that his share, which was described in the partition application as one-fourth only of the property, was in reality one-half. The Assistant Collector before whom Balmukand's applications was pending, on this objection being raised, passed an order allowing the parties two months' time to have the question of title decided by a competent Civil Court. This order was passed on the 30th of October,

* First Appeal No. 52 of 1902, from a decree of Babu Jwala Prasad, Assistant Collector of the first class, of Muttra, dated the 1st February, 1902.

(1) (1900) I. L. R., 25 Bom., 161.

1903

JAMNA
PRASAD
v.
BALMUKAND.

1901. On the 1st of February 1902, the Assistant Collector dismissed Jamna Prasad's objection and proceeded with the partition, no suit in the Civil Court having been filed. Against this order Jamna Prasad appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The respondents were not represented.

STANLEY, C. J., and BURKITT, J.—The order of the Assistant Collector of Muttra of the 1st of February, 1902, appears to us to have been entirely misconceived, and therefore the appeal against it must be allowed. The appeal arises out of proceedings taken for partition under the Revenue Act. On the 9th of August, 1901, the plaintiff, Balmukand, applied for partition of certain properties. The defendant, Jamna Prasad, objected to the partition on the ground that his share, which was described in the partition application as one-fourth only of the property, was in reality one-half. On this objection coming before the Assistant Collector two courses were open to him under section 113 of the Land Revenue Act. He might either decline to grant the application for partition until the question had been determined by a competent Court, or proceed to inquire into the merits of the objection as a Civil Court of first instance. It appears from his order of the 31st of October, 1901, that he elected to adopt the first-mentioned course, and allowed two months' time to the parties to have the question of title which had been raised determined by a competent Court. Having passed this order it was not open to him to inquire into the merits of the objection. Moreover, he was not justified in limiting the parties to a period of two months within which to have the question of title decided. The section only enables him to decline to grant the application for partition until the question in dispute has been determined by a competent Court. There is no time specified within which the question in dispute must be determined. Notwithstanding, however, that he refused to inquire into the merits of the objection and left the parties to have the matter decided by a competent Court, he, by the order appealed against, dismissed the objection and directed that the partition should be proceeded with. He was entirely in error in this. Accordingly, we allow the appeal with costs, set aside the

order of the 1st of February, 1902, and direct that the partition proceedings be stayed pending the decision of the question which has been raised by a competent Civil Court. The effect of our order will be to render abortive any proceedings which have been taken subsequent to the order of the 1st of February, 1902.

Appeal decreed.

1903

JAMNA
PRASAD
v.
BALMUKAND.

1903
December 10.

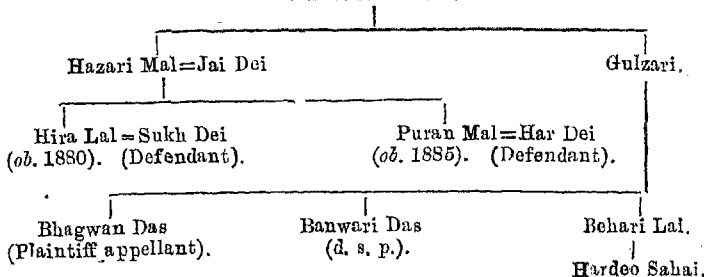
Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.
BHAGWAN DAS (PLAINTIFF) v. HAR DEI AND ANOTHER (DEFENDANTS).
Act No. IV of 1882 (Transfer of Property Act), section 95—Suit for contribution—Plaintiff not in possession of mortgaged property—Interpretation of Statute—Act No. XV of 1877 (Indian Limitation Act), schedule II, Article 132.

Held that section 95 of the Transfer of Property Act, 1882, cannot be interpreted absolutely according to the letter of the section, for it would then have reference to cases of usufructuary mortgage only, which could not have been the intention of the Legislature. To give effect to what was apparently the intention of the Legislature, it is necessary to read the section in some such way as the following:—"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, if the mortgagee be in possession, he has a charge, &c."

Where, therefore, a person who had a mortgagor's interest in a decree for sale on a mortgage satisfied the decree and then brought a suit for contribution against his co-mortgagors without having obtained possession of the mortgaged property, it was *held* that the suit was maintainable and was governed as to limitation by article 132 of the second schedule to the Indian Limitation Act, 1877. *Moidin v. Oothumanganni* (1) and *Ghulam Maula Khan v. Baano Khanam* (2) referred to.

THE suit out of which this appeal arose was one for contribution to which the plaintiff claimed to be entitled as a co-mortgagor who had paid up the mortgage debt. The parties were related in the manner shown in the following table:—

HARSUKH RAI.



* First Appeal No. 111 of 1901, from a decree of Babu Achal Bihari, Additional Subordinate Judge of Moradabad, dated the 14th February, 1901.
(1) (1888) I. L. R., 11 Mad., 416. (2) (1901) Oudh Cases, Vol. IV, p. 278.