

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Sir Pramada Charan Banerji.

1918  
June, 5.

**BANDHIR SINGH (PLAINTIFF) v. BHAGWAN DAS (DEFENDANT);\***  
*Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 111.—*  
*Plaintiff referred to Civil Court—Suit filed within time but subsequently with-*  
*drawn—Second suit filed after prescribed period.*

Where a Revenue Court, acting under section 111 of the United Provinces Land Revenue Act, 1901, required a party to the case before it to institute a suit in the Civil Court within three months, and the plaintiff did so, but for some technical reason had to withdraw it with permission to bring a fresh suit, which was in fact filed without delay, but after the three months had expired: held that the second suit must be considered to be a continuation of the first suit, and it could not, therefore, be held that the plaintiff had not complied with the order of the Revenue Court.

THE facts of this case, so far as they are material for the purposes of this report, were as follows:—

The plaintiff brought a suit in the Civil Court for a declaration of his title to certain immovable property in pursuance of an order of a Revenue Court under section 111 of Act No. III of 1901. The suit was instituted within the three months allowed, but was withdrawn on account of a technical defect, with liberty to bring a fresh suit. The present suit, which has given rise to this appeal, was accordingly filed, but beyond the three months allowed by the Revenue Court. The court below decreed the suit in part. Both parties appealed, the plaintiff contending that the whole suit should have been decreed, and the defendant that the entire suit should have been dismissed.

Munshi *Gulzari Lal*, for defendant respondent, contended that the suit, not having been filed within three months, was barred by time. He relied on *Banwari Lal v. Gopi* (1). The mere fact that originally the suit was instituted within three months did not help the plaintiff, inasmuch as the present suit was not filed within three months. The permission granted by the court to file a fresh suit was subject to the time limitation for the filing of the suit.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the plaintiff appellant, urged that the present suit should be

\* Second Appeal No. 668 of 1912 from a decree of E. E. P. Ross, Additional Judge of Gorakhpur, dated the 22nd of February, 1912, modifying a decree of Kesri Narain Chand, Munsif of Basti, dated the 20th of September, 1911.

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deemed to be a suit in continuation of the first suit, which was filed within three months, and the present suit was filed on the very next day after the first suit was withdrawn.

Munshi *Gulzari Lal* was heard in reply on other points arising in the cross appeal filed by the defendants appellants.

RICHARDS, C. J. and BANERJI, J.—This and the connected appeal No. 765 of 1912 arise out of the same suit. The suit was brought by the plaintiff for a declaration of his title in respect of a three anna two pie odd share in mauza Manjaba Hardaspur. It appears that on the 10th of June, 1901, Bhagwan Das, the respondent in this appeal and the appellant in the connected appeal, and five other persons, who were defendants to the suit, sold a six anna eight pie share in the village in question to the predecessor in title of the plaintiff. At that time, however, mutation could only be obtained in respect of a three anna five pie odd share. In the year 1908, Bhagwan Das applied for partition, alleging himself to be entitled to certain shares in the village. The plaintiff contested the share claimed by Bhagwan Das. Thereupon the Revenue Court directed the plaintiff in the present suit to institute proceedings in the Civil Court, within three months, to establish his title. A suit was instituted within the prescribed period, but for some technical reason the suit had to be withdrawn with leave to bring a fresh suit. The court of first instance decreed the plaintiff's claim to the extent of a two anna six pie odd share against Bhagwan Das and his co-defendant of the first party. The defendant, Bhagwan Das, appealed to the lower appellate court. The lower appellate court has given a judgement which we feel great difficulty in understanding. In the first place, the learned Judge seems to think that he was entitled to apportion the liability of Bhagwan Das and his co-vendors. We think that this was quite incorrect. All the vendors were jointly liable to make good the property which they purported to sell out of any property which they had at the time of the sale or which they subsequently acquired. If we were to accept the finding of the learned Additional Judge that Bhagwan Das acquired an eight pie share after the date of the purchase, it might possibly be a reason for giving the plaintiff a decree to the full extent claimed. However, the plaintiff did not

appeal to the court below and does not appeal to this Court on this point.

A technical objection has been raised by Bhagwan Das in this appeal. He contends that, although a suit was instituted within the three months prescribed by the order of the Revenue Court under section 111 of the Land Revenue Act, that suit was withdrawn and the present suit was not instituted within the three months prescribed. We think that there is no force in this objection. In the first place, according to the record as it stood while the case was in the court below, it did not appear that the proceedings in the Revenue Court were in existence. As a matter of fact, at one time at least they had been struck off. It is alleged that these proceedings have been restored. Assuming this to be so, the present suit was practically a continuance of the suit which was instituted within time. In any event, the plaintiff did comply with the order of the court and the terms of the section, because he did institute a suit within the three months. We think this technical ground fails. We allow this appeal, set aside the decree of the court below and restore the decree of the court of first instance with costs.

*Appeal allowed.*

*Before Mr. Justice Ryves and Mr. Justice Piggott.*

SUNDAR LAL AND OTHERS (DEFENDANTS) v. BRIJ LAL (PLAINTIFF) AND BHAIRON PRASAD, AND OTHERS (DEFENDANTS).\*

*Joint Hindu family—Mortgage—Mortgage by two brothers of undivided shares, each assenting to the other's mortgage—Partition—Entire mortgaged property falling to the share of one brother—Effect of partition on rights of mortgagee.*

Two brothers constituting a joint Hindu family jointly mortgaged in 1879 a ten biswa share in village Chauwar. In 1881, in substitution for this mortgage, each brother mortgaged to the same mortgagee a five biswa undivided share in Chauwar, and each brother also signed the mortgage executed by the other. In 1888 the family property was partitioned and the whole ten-biswas of Chauwar fell to the share of one brother.

*Held* on suit by the son of the mortgagee for sale that the plaintiff was entitled to bring to sale a five biswa share in Chauwar under the mortgage executed by the brother who had lost possession of the village, and not merely

\* Second Appeal No. 1340 of 1912 from a decree of H. Nelson Wright, District Judge of Bareilly, dated the 31st of July, 1912, confirming a decree of Baijnath Das, officiating Subordinate Judge of Bareilly, dated the 8th of May, 1911.

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