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SKINNER v. NAUNIHAL SINGH.

Solicitors for the respondents in appeal 101 of 1911:—*T. C. Summerhays & Son.*

Solicitor for the respondents in appeals 98 and 105:—*Edward Dalgado.*

J. V. W.

SONI RAM (PLAINTIFF) *v.* KANHAIYA LAL (DEFENDANT).

[On appeal from the High Court of Judicature at Allahabad.]

*P. C.** 1913. *February*, 6. *March*, 6.

Act No. XV of 1877 (Indian Limitation Act), section 19 and schedule II, article 148—Acknowledgement, effect of—Acknowledgement by widow in possession of husband's estate—Suspension of limitation—Act XV of 1877, section 9—Act XIV of 1859, section 1, clause 15—Res judicata—Contentions raised for the first time on appeal to His Majesty in Council—Practice of Privy Council.

In a suit brought by the appellant on the 4th of March, 1907, against the respondents for the redemption of a mortgage, dated the 2nd of January, 1842, made between the respective predecessors in title of the parties and in which no date for redemption was specified, acknowledgements of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellant contended, extended the period of limitation.

Held that the law of limitation applicable to the case was not Act XIV of 1859, the law in force at the date of the acknowledgements, but Act XV of 1877, which was in force at the time of the institution of the suit.

Under article 148 of schedule II to that Act the period of limitation prescribed for a suit to redeem a mortgage was 60 years from the time when the right to redeem accrued, and by section 19 an acknowlegement to be effective must be "signed by the party against whom such right is claimed or by some person through whom he claims title."

Held that the respondents derived title through the last male owner, and not through his widow and daughter, who were therefore not competent under section 19 to make an acknowledgement of the right of redemption so as to bind any interests except their own. To hold otherwise would be to extend the power of a Hindu female in possession of a limited interest to bind the estate to an extent which was not sanctioned by authority.

An acknowledgement of liability only extends the period of limitation within which the suit must be brought, and does not confer title, and, with reference to section 2 of Act XV of 1877, was not a "thing done" within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868.)

There was nothing in article 148 of schedule II of Act XV of 1877 to justify a holding that by reason of the fusion of the interests of the mortgagor and mortgagee (which, it was alleged, took place between the years 1883 and 1898) the

* *Present:*—Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

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period of limitation which began to run on the 3rd of January, 1842, was suspended; which would be deciding contrary to section 9 of the Act: this suit not being one to which the proviso to that section applied.

Burrell v. *Earl of Egremont* (1) distinguished.

The present suit was not barred as *res judicata* by a former suit in 1904.

With regard to contentions raised on this appeal which had not been raised before at any stage of the case, and consequently had not been considered by any of the courts below, nor were even suggested in the reasons in the case of the appellant to England, their Lordships adhered to the established practice of the Board not to allow new cases to be made for the first time on appeal to His Majesty in Council.

APPEAL from a judgement and decree (7th August 1909) of the High Court at Allahabad, which reversed a judgement and decree (24th March 1908) of the court of the District Judge of Aligarh, who had affirmed a decree (16th September 1907) of the Subordinate Judge of Aligarh.

The suit out of which this appeal arose was one for redemption of a mortgage, dated the 2nd of January, 1842, and the only question for determination on this appeal is whether the suit is barred by limitation. The District Judge held that it was not barred; but on appeal the High Court (BANERJI and TUDBALL, JJ.) reversed that decision and dismissed the suit.

The case before the High Court will be found reported in I. L. R., 32 All., 33, where the facts are sufficiently stated.

The facts of the case are also fully stated in the judgement of their Lordships of the Judicial Committee.

On this appeal, which was heard *ex parte*—*G. Cave, K. C.* and *J. M. Parikh* for the appellant contended that the suit was not barred by limitation. The Act of Limitation applicable to the suit was Act XIV of 1859, section 1, clause 15, under which the acknowledgements of 1866 and 1867 made by Musammat Jamna, and Musammat Janki respectively were valid and binding on the respondents and therefore effective to extend the period of limitation. Those acknowledgements, having been made while Act XIV of 1859 was in operation, were, within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868) "things done" before the Limitation Act, XV of 1877, came into force, and that Act being a repealing Act did not affect them. The appellant, it was therefore submitted, acquired a title under Act XIV of 1859, and Act IX of 1871, and, under section 2 of Act XV

(1) (1844) 7 Beav., 205.

of 1877, nothing contained in that Act affected his title. The ladies, who claimed through the original mortgagee, were full owners of the mortgagee rights, and therefore bound the succeeding heirs in the way stated in *Katama Natchiar* v. *Rajah of Shivagunga* (1). They represented the estate, and their acknowledgements were valid, so as to bind their successors in title the respondents. *Bhagwanta* v. *Sukhi* (2), and Mayne's Hindu Law (7th ed.), page 705, paragraph 519, page 818, paragraph 605, page 840, paragraph 624, and page 852, paragraph 634, were referred to. Moreover, between the years 1883 and 1898 there was a union of the rights of the mortgagor and those of the mortgagee in the appellant and his father, the effect of which, it was submitted, was that the operation of the Limitation Act was suspended during that period, and consequently, even if Act XV of 1877 applied, the suit would not be barred by lapse of time. There must under article 148 of Act XV of 1877 be one person liable to pay interest under the mortgage and with a right to redeem and another person entitled to receive interest, and liable to a suit for redemption; and where there is a union of those rights in one person, as there was here between 1883 and 1898, there was no operation of the Act. Reference was made to *Burrell* v. *Earl of Egremont* (3), the principle on which Lord Langdale M. R. acted in that case in construing section 40 of 3 and 4 Will. IV, C. 27, being, it was contended, applicable to the present case; and *Seagram* v. *Knight* (4): and sections 9 and 20 of Act XV of 1877 were also referred to. As long as the right of the mortgagee, and the right of redemption remained in one person, the equity of redemption could not be enforced. The cause of action for redemption arose again at earliest when, on the death of Musammat Janki in 1898, there was separation of those rights—under article 148 limitation begins to run when the right to recover possession accrues, and until 1898 there was no right to recover possession. It was also contended that in 1904 the respondent being full owner of the property sued only for the mortgagee's right, and did not assert his right to that of the mortgagor; his conduct led the appellant to believe that he (the appellant) could redeem the

(1) (1863) 9 Moo. I. A., 539 (603). (3) (1844) 7 Beav., 205 (234).
(2) (1899) I. L. R., 22 All., 33. (4) (1867) L. R., 2 Ch. App., 632.

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mortgage, and operated as an estoppel against him.

The present suit was not barred by the suit brought by the respondent in 1904, the right to redeem was not in that suit decided against the appellant.

1913, *March 6th*:—The judgement of their Lordships was delivered by Sir JOHN EDGE:—

The suit in which this appeal has arisen was brought on the 4th of March, 1907, by Lala Soni Ram the appellant here for the redemption of a mortgage which had been made on the 2nd of January, 1842, by the then owners of mauza Kheria Buzurg in favour of Khushwakt Rai, who was on the making of the mortgage put in possession by the mortgagors. The mortgage was usufructuary, the profits, except Rs. 80 per annum, were to be taken by the mortgagee in lieu of interest and the mortgagee was to pay to the mortgagors annually the Rs. 80 as malikana.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified, and consequently the mortgage became liable to be redeemed immediately after it was made. The whole 20 biswas of Kheria Buzurg were included in the mortgage, but the original mortgagors, or some of them, redeemed the mortgage so far as it affected 6 biswas, 17½ biswansis of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 biswas 2½ biswansis of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the court of first instance, or on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram, the plaintiff appellant, as representing the original mortgagors and to the title of the defendants respondents as representing the original mortgagee Khushwakt Rai, and to refer to a suit which was brought on the 18th of May, 1904, by the present defendant respondent Babu Charan Behari Lal, and his brother Lala Shib Shankar Lal against the present plaintiff appellant Lala Soni Ram. Lala Shib Shankar Lal

was a defendant to this suit and is represented here by the respondents to this appeal.

Between the years 1880 and 1883 Mannu Lal, since deceased, who was the father of the plaintiff appellant, acquired the rights and interests of the original mortgagors in 13 biswas, 2½ biswansis of Kheria Buzurg to which this suit relates. These rights and interests, so far as they can be enforced, are now vested in the plaintiff appellant, Lala Soni Ram.

Khushwakt Rai, the original mortgagee, died shortly before 1855, leaving surviving him his widow, Musammat Jamna, who died on the 10th of May, 1866, and a daughter Musammat Janki, who died on the 30th of May, 1898. Babu Charan Behari Lal and Lala Shib Shankar Lal, who were the plaintiffs in the suit of 1904, were the sons of Musammat Janki.

On the 31st of March, 1866, Musammat Jamna, who had succeeded to a Hindu widow's estate on the death of her husband Khushwakt Rai, executed a sale deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Prasad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On the 29th of April, 1867, Musammat Janki executed a sale deed in favour of Debi Prasad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by Musammat Jamna in 1866. The mortgagee's interest in Kheria Buzurg, which, by the sale deeds of 1866 and 1867, had vested for the lives of Musammat Jamna and Musammat Janki in Debi Prasad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 1883 until Musammat Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the plaintiff appellant, who succeeded him, enjoyed the rights of the mortgagors and the mortgagee in the 13 biswas 2½ biswansis.

In the deed of the 31st of March, 1866, Musammat Jamna had described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of the 29th of April, 1867, Musammat Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the

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inference which their Lordships draw from the proceedings and the judgements in the Courts below.

After the death of Musammat Janki her sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on the 18th of May, 1904, against Lala Soni Ram, the present plaintiff appellant to obtain possession as mortgagees of the 13 biswas 2½ biswansis of Kheria Buzurg on the ground that the transfers which were made in the life-time of Musammat Jamna and Musammat Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on the 12th of October, 1904, obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal did not in the suit of 1904 allege or admit that the mortgagors' interest had vested in Mannu, or was vested in Lala Soni Ram, the present plaintiff appellant; their case apparently simply was that the title to the mortgagees' interest which had been transferred by Musammat Jamna and Musammat Janki had determined, so far as Lala Soni Ram was concerned, on the death of Musammat Janki, and that they became entitled as representing Khushwakt Rai, the mortgagee, on her death to possession as mortgagees. Their case was, that after the death of Musammat Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit, was vested in anyone, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in anyone. Their title to possession on the death of Musammat Janki, which was the title they claim, related back to and was based on the mortgage of 1842, whether the right to enforce by suit redemption of that mortgage had or had not been extinguished before the 18th of May, 1904, by limitation. The mortgage had not been redeemed and nothing had happened between the death of Musammat Janki and the 18th of May, 1904, to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired, on the death of

Musammat Janki, in 1898, to redeem, he could have brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January, 1902, but apparently he hoped, by holding on to the possession of the 13 biswas 2½ biswansis to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of 60 years, computed from the 2nd of January, 1842, had expired.

In this appeal, which is *ex parte*, the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the judgement of the 12th of October, 1904, and from the judgement of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother Musammat Janki on the 30th of May, 1898.

Lala Soni Ram, the present plaintiff appellant, on the 4th of March, 1907, brought in the Court of the Subordinate Judge of Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of the 2nd January, 1842, so far as it affected the 13 biswas 2½ biswansis of Kheria Buzurg. Other defendants were subsequently added. In their written statement Lala Shib Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of the 2nd of January, 1842, was made, and so far as is now material pleaded that the suit was not brought within 60 years of the date of the mortgage, that no admission of the right of the mortgagor was made within 60 years from the date of the mortgage, and consequently that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession, and they relied upon section 13 of the Code of Civil Procedure. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by Musammat Jamna and Musammat Janki were not binding upon them, the answering defendants, after the deaths of those ladies.

The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of section

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13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed, and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. Lala Soni Ram's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying section 15 of Act XIV of 1859 to the case, held that the acknowledgements of the existence of the mortgage by Musammat Jamna and Musammat Janki in their respective deeds brought this suit within time, and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh, on appeal from the decree of the Subordinate Judge, affirmed the judgement of the Subordinate Judge, and by his decree of the 24th of March, 1908, dismissed the appeal. From the decree of the District Judge the defendants appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding, is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV of 1877, and not Act XIV of 1859, was the Limitation Act which was applicable to the suit. By section 19 of Act XV of 1877, it is, so far as is material for present purposes, enacted as follows:—

"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he claims title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgement was so signed."

This is a suit to redeem and the period prescribed by article 148 of the second schedule to Act XV of 1877 within which a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged is 60 years from the time when the right to redeem or to recover possession accrues.

The learned Judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by Musammat Jamna and Musammat Janki in their respective deeds,

but they also held that the defendants derived title through their grandfather Khushwakt Rai, who was mortgagee and the last full owner of the rights of the mortagagee, and did not derive title through Musammat Jamna or Musammat Janki, who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor, and that in making such acknowledgements they had no power to bind any interests except their own. To have held otherwise would, in their Lordships' opinion, have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

It was also contended in the High Court on behalf of the plaintiff that there had been a fusion of the interests of the mortgagee and the mortgagor in the same person between the years 1883 and 1898; and that no mortgage was in existence during that period; and that article 120 of the second schedule of Act XV of 1877, and not article 148 applied; and that the suit was within time. The learned Judges of the High Court pointed out one obvious answer to that contention. It was that, if article 120 applied, the suit was not within time, as Musammat Janki had died more than six years before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and consequently there had been no merger. The High Court, by its decree of the 7th of August, 1909, allowed the appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff Lala Soni Ram has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV of 1859, and consequently the acknowledgements of the existence of the mortgage of 1842 which were contained in the deeds which were executed by Musammat Jamna and Musammat Janki brought this suit within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV of 1859 does not apply to this suit and that the Limitation Act which does apply is Act XV of 1877, and further that the acknowledgements which were

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made by Musammat Jamna and Musammat Janki were not acknowledgements within the meaning of section 19 of Act XV of 1877 made by a person or persons through whom the defendants derived title or liability. Their Lordships consequently consider that these acknowledgements were ineffectual to give a new period of limitation. The contention in this appeal which is based upon section 6 of the General Clauses Act and section 2 of Act XV of 1877 was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgement of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of section 6 of the General Clauses Act.

In this appeal it was also contended that the operation of Act XV of 1877 was suspended during the whole period 1883—1898 when Mannu or his son Lala Soni Ram, the plaintiff, were in the position of mortgagors and mortgagees, the contention being that that period should be excluded from the computation of the 60 years provided by article 148 of the second schedule to Act XV of 1877, as between 1883 and 1898 no suit for redemption could have been brought by Mannu or after his death by the plaintiff Lala Soni Ram. Their Lordships are by no means certain that this particular contention was raised in the High Court. The contention there apparently was—not that the operation of article 148 was suspended during the period 1883—1898—but that by reason of the fusion of interests of mortgagor and mortgagee article 148 did not apply to this case and that the article which did apply was article 120. In support of the contention in this appeal this Board was urged to apply in this suit the principle which Lord Langdale, Master of the Rolls, applied when construing section 40 of 3 & 4 Will., IV, C. 27, in *Burrell* v. *The Earl of Egremont* (1). Their Lordships are unable to accede to that contention, as article 148 of Act XV of 1877 is essentially different in its language and intention from section 40 of 3 & 4 Will., IV, C. 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit. Under section 40 of 3 & 4 Will., IV, C. 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to

(1) (1844) 7 Beav., 205.

receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The 60 years' period of limitation allowed by article 148 of Act XV of 1877 begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrell* v. *The Earl of Egremont* (1) there was a charge upon an estate which no assignable person was liable to pay and in respect of which no person was capable of making an acknowledgement that it was due. In this case the right to redeem the mortgage of the 2nd of January, 1842, accrued to the mortgagors the moment the mortgage was executed and the 60 years' period of limitation must be computed as having begun on the 3rd of January, 1842. There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would—this not being a suit to which the proviso to section 9 of Act XV of 1887 applies—be deciding contrary to the express enactment of that section that "when once time has begun to run no subsequent disability or inability to sue stops it."

At the hearing of this appeal two other contentions, each of which involved the consideration of facts and of law as applied to these facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by anyone at any stage of this suit either in the Court of first instance or on either of the appeals, and consequently had not been considered either by the Subordinate Judge or the District Judge or the learned Judges of the High Court. Further, neither of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the High Court for leave to appeal to His Majesty in Council, nor is either of them suggested in the reasons contained in the case for the appellant here, and it must be remembered that this appeal has been heard *ex parte*, neither the respondents nor any counsel on their behalf having appeared. Their

(1) (1844) 7 Beav., 205.

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Lordships are not disposed to depart from the established practice of this Board not to allow on appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court should be affirmed.

Appeal dismissed.

Solicitor for the appellant:—*Edward Dalgado.*

J. V. W.

APPELLATE CIVIL.

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January, 10

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

BACHCHAN LAL AND OTHERS (PLAINTIFFS) *v.* BANARSI DAS (DEFENDANT).*

Civil Procedure Code (1908), *order VIII, rule* 6—*Set-off—Claim barred according to* lex fori, *but not according to* lex loci contractus.

In a suit filed against him in the United Provinces the defendant claimed to set off a debt, which, though it would have been barred by limitation in the United Provinces, was not barred according to the local law (that of the Punjab) applicable thereto. *Held* that the set-off claimed was admissible.

THE facts of this case, so far as they are material to the purposes of this report, are as follows. The plaintiffs sued to recover Rs. 3,200 from the defendant, who was a resident of Umbala in the Punjab, the money being alleged to be due as the result of dealings in flour between the parties. Amongst other defences, the defendant claimed to set off the amount due on a certain rukka for Rs. 200. This set-off was disallowed by the court of first instance upon the ground that the claim on the rukka was barred by limitation. On appeal by the defendant, however, the lower appellate Court reversed the finding of the court below on this point, holding that the local law of the Punjab applied to the rukka in question, according to which the debt was not time-barred. The plaintiffs appealed in respect of this and other matters to the High Court.

The Hon'ble Dr. *Sundar Lal* and Mr. *A. P. Dube*, for the appellants.

Babu *Satya Chandra Mukerji*, for the respondent.

KNOX and MUHAMMAD RAFIQ, JJ.:—The appellants before us in this second appeal were plaintiffs in the court of first instance.

* Second Appeal No. 1264 of 1911 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 21st of August, 1911, modifying a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 6th of July, 1910.