1916
February, 25.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

HIMMAT BAHADUR AND ANOTHER (PLAINTIFFS) *v.* DHANPAT RAI (DEFENDANT).*

Family settlement—Claim to property to which the claimant must have known he had no title—Relinquishment to save litigation—Such relinquishment not binding on reversioners.

One D. R., upon the death of his wife, laid claim to certain property which had been the property of the wife's father and had been given to the wife by her mother. The mother and the surviving sister of the wife, in order to avoid litigation, relinquished a substantial portion of the property to D R.

Held on a suit by the reversioners entitled to succeed to the property upon the death of the survivor of the two ladies, that the relinquishment made by them could not properly be called a family settlement and was not valid as against the reversioners, who were minors at the time when the so-called family settlement was made. *Bihari Lal* v. *Daud Husain* (1) and *Hiran Bibi* v. *Sohan Bibi* (2) referred to.

THE facts of this case were as follows:—

One Duli Chand died leaving two sons Munshi Nitya Nand and Munshi Bechai Lal. Munshi Nitya Nand died in the year 1878, leaving him surviving a widow Musammat Mullo and two daughters Musammat Saraswati and Musammat Naraini. Musammat Naraini was married to the defendant Dhanpat Rai. She died in the year 1889, in the life-time of her mother. Musammat Saraswati died on the 25th of November, 1902, leaving her surviving two sons who are the plaintiffs in the present suit. Musammat Mullo, after the death of her husband, executed a deed on the 15th of December, 1880, by which she gave a $2\frac{1}{2}$ biswas zamindari share in this mauza to her two daughters in equal shares. It is said that she gave in a similar way other property to each of her daughters worth about two lakhs, by other deeds. On the death of Musammat Naraini in the year 1889, Musammat Mullo and her daughter attempted to get back the property which had been given to Musammat Naraini. They were opposed by the denfendant Dhanpat Rai who made claim to all the property which had been in the possession of his wife. The result was that a submission to arbitration was entered into, a pleader of the name of Munshi Baldeo Prasad was called in.

*First Appeal No. 346 of 1914, from a decree of Kshirod Gopal Banerji, Subordinate Judge of Budaun, dated the 6th of August, 1914.

(1) (1913) I. L. R., 35 All., 240. (2) (1914) 18 C. W. N., 929.

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He gave certain advice, and the end was that Dhanpat Rai executed a relinquishment of all claim to the major portion of the property, whilst Musammat Mullo and her surviving daughter admitted his claim to the property now in dispute. Subsequently the property was formed into a new mahal under the name of mahal Dhanpat Rai.

The present suit was brought by the reversioners, the sons of Musammat Saraswati, to recover possession of the property of their grandfather. The defendant pleaded, *inter alia*, that the settlement arrived at after the death of Naraini was a *bonâ fide* family settlement and binding upon the reversioners. The court of first instance accepted this defence and dismissed the suit. The plaintiffs thereupon appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and Mr. *G. W. Dillon*, for the appellants.

Mr. *B. E. O'Conor* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit for possession of landed property consisting of a 20 biswas zamindari share in mauza Barsua, mahal Dhanpat Rai, One Duli Chand left two sons, Munshi Nitya Nand and Munshi Bechai Lal. We are not concerned with the branch of Munshi Bechai Lal, Munshi Nitya Nand died in the year 1878, leaving him surviving a widow Musammat Mullo and two daughters Musammat Saraswati and Musammat Naraini. Musammat Naraini was married to the defendant Dhanpat Rai. She died in the year 1889, in the life-time of her mother. Musammat Saraswati died on the 25th of November, 1902, leaving her surviving two sons who are the plaintiffs in the present suit. Musammat Mullo, after the death of her husband, executed a deed on the 13th of December, 1880, by which she gave a 2½ biswas zamindari share in this mauza to her two daughters in equal shares. It is said (and probably correctly said) that she gave in a similar way other property to each of her daughters worth about two lakhs by other deeds. On the death of Musammat Naraini in the year 1889, Musammat Mullo and her daughter attempted to get back the property which had been given to Musammat Naraini. They were opposed by the defendant Dhanpat Rai who claimed

all the property which had been in the possession of his wife. The result was that a submission to arbitration was entered into, a pleader of the name of Munshi Baldeo Prasad was called in. He gave certain advice, and the end was that Dhanpat Rai executed a relinquishment of all claim to the major portion of the property, whilst Musammat Mullo and her surviving daughter admitted his claim to the property now in dispute. Subsequently the property was formed into a new mahal under the name of mahal Dhanpat Rai. The plaintiffs have now instituted the present suit in which they allege that they became entitled to the property upon the death of their mother on the 25th of March, 1902, and that neither she nor their grandmother Musammat Mullo had any power to alienate the property. These allegations are met with the allegation, first, that Nitya Nand had made an oral will in favour of his wife Musammat Mullo which authorized her to dispose of the property as she pleased, secondly, that the suit was barred by limitation, and thirdly, that the arrangement on the death of Musammat Naraini was a family settlement which ought to be given effect to. As to the first point about the will; the court below has entirely disbelieved the allegation. There cannot be the least doubt that the court was right. This will was alleged for the first time in the present litigation. As to the question of limitation, false evidence was given as to the date of the death of Musammat Saraswati. We entirely agree with the finding of the court below that the lady died on the 25th of March, 1902. There only remains for consideration the question of the alleged family settlement. The learned Subordinate Judge thought that the transaction should be treated as a family settlement, and dismissed the plaintiffs' suit. No doubt their Lordships of the Privy Council and this Court have always been ready to give effect to what is in reality a "family settlement." The case of *Bihari Lal* v. *Daud Husain* (1) has been quoted, also the decision of their Lordships of the Privy Council in the case of *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (2). A careful perusal of both these cases will show that there was in each case a *bonâ fide* family dispute. We have to look into the facts of this case to see whether there was anything of the kind.

(1) (1913) I.L.R., 35 All., 240. (2) (1914) 18 C. W. N., 929.

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Reading the deed of gift of the 15th of December, 1880, which is a specimen of the manner in which Musammat Mullo gave over the property to her daughters we think that the document, read as a whole, clearly shows that what the mother did was to accelerate the succession of her two daughters. There is, however, nothing in the document which would lead us to think that she had any intention of doing anything more. On the death of Naraini, Dhanpat Rai made claim to everything that his wife had been in possession of. It seems to us almost impossible to believe that Dhanpat Rai really considered that he had any title to this property. In his evidence in the present case he makes a feeble attempt to suggest that he thought that his wife was possessed of two classes of property, namely, some that she had got from her mother as *stridhan* and some which she had got as part of her father's estate and that this was the dispute. We have only the bare word of Dhanpat Rai for the suggestion that his wife had two classes of property, unsupported by any kind of documentary evidence. The defendant was not even born at the time of Nitya Nand's death and could know nothing personally of the property he left. Not one of the witnesses who speak of the dispute alleges that this was the dispute. It seems to us that the very highest at which the defendant's case can be put is that he in the year 1889, put forward a baseless claim, and the ladies in order to avoid being forced to litigation, consented to give him the property in suit. It is said that this settlement was carried out at the suggestion of a respectable pleader. No doubt it may have been very wise to advise the ladies to yield up property of small value sooner than have to incur the expenses and suffer the horrors of litigation, but it does not follow from that that there was a *bonâ fide* dispute, *bonâ fide* settled by the members of the family. There is a great difference between a settlement of family disputes or even the screening of family scandals and yielding up property on a threat of litigation. It is reasonable that the former should bind the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it. The defendant has enjoyed the property ever since the year 1889. He has certainly got full consideration for all that he gave up on the death of his wife. There has no

doubt been some delay on the part of the plaintiffs in instituting the present suit. But it appears from certain matters on the record that they have been engaged in other litigation since the death of their mother. We think that the decision of the court below was wrong, and that it would be very dangerous to hold that the parties could evade the law by a pretended dispute and family settlement. We allow the appeal, set aside the decree of the court below, and decree the plaintiff's claim with costs in all courts.

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Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

ABDUL KARIM (PETITIONER) *v.* ISLAMUN-NISSA BIBI AND OTHERS (OPPOSITE PARTIES)*.

1916 *February*, 28.

Act No. IX of 1908 *(Indian Limitation Act), Schedule I, articles* 165 *and* 181—*Civil Procedure Code* (1908), *section* 47—*Execution of decree—Limitation—Application by judgement-debtor to be restored to possession of immovable property taken by the decree-holder in excess of that decreed.*

Held that the application of a judgement-debtor for restoration of immovable property seized by the decree-holder in excess of what has been decreed, is one under section 47 of the Code of Civil Procedure, and is governed by Article 181 of schedule I to the Indian Limitation Act. *Ratnam Ayyar* v. *Krishnadoss Vital Doss* (1), *Har Dan Singh* v. *Lachman Singh* (2), dissented from.

THE facts of this case were as follows :—

A decree, based upon an arbitration award, was passed on the 31st of March, 1911, for possession of a certain share out of several properties. In execution thereof the decree-holders obtained possession of a certain amount of property on the 19th of November, 1911. On the 18th of December, 1911, the judgement-debtor made an application in the execution court, complaining that the decree-holders had obtained possession over a larger share of the property than was awarded to them by the decree, and invoking the aid of the court under sections 151, 152 and 153 of the Code of Civil Procedure for restoration of the excess share. The court was of opinion that these sections were

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* Second Appeal No. 1047 of 1915, from a decree of G. C. Badhwar, Additional Judge of Saharanpur, dated the 29th of April, 1915, reversing a decree of Saiyad Abdul Hasan, Subordinate Judge of Saharanpur, dated the 1st of May, 1914.

(1) (1898) I.L.R., 21 Mad., 494. (2) (1900) I.L.R., 25 All., 348.