

*Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.*

ABDUL KARIM KHAN (DEFENDANT) v. MUHAMMAD JAN (PLAINTIFF) AND  
AZIZ-UR-RAHMAN KHAN (DEFENDANT).\*

1922  
May, 10.

*Civil Procedure Code (1908), order II, rule 2—Annuity—Suit for arrears—  
Suit dismissed as premature and appeal subsequently withdrawn—Later  
suit for subsequent instalment decreed—Another suit thereafter for the origi-  
nal arrears.*

An annuitant sued for arrears of his annuity from 1914 to 1917. On the date fixed for hearing the parties were absent, and the suit was dismissed; but it was dismissed rather because the court found it to be premature than on account of the absence of the parties. The plaintiff applied to have the order of dismissal set aside, but his application was rejected. He appealed against this order of rejection, but subsequently withdrew the appeal. Meanwhile the plaintiff sued for a further instalment of the annuity, which had fallen due on the 1st of July, 1917, and obtained a decree. He then (after the appeal above-mentioned had been withdrawn) sued again to recover the arrears of the annuity which had formed the subject of his original suit :

*Held* that the suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure, 1908.

THE facts of this case are fully stated in the judgment of the Court.

*Babu Piari Lal Banerji*, for the appellant.

*Dr. S. M. Sulaiman* and *Maulvi Mukhtar Ahmad*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—We are concerned in this case with a claim which was brought by the first respondent Munshi Muhammad Jan for the recovery of arrears of an annuity of Rs. 660 per annum.

The annuity was payable in equal moieties on the 1st of January and the 1st of July of each year and the period covered by the present suit ran from the 1st of January, 1914, to the 1st of July, 1919.

The courts below have decreed the claim in full and the question raised before us is whether or not, in view of certain proceedings between the parties, the items from the 1st of January, 1914, up to and including that of the 1st of January, 1917, are claimable in this suit.

In order to explain the matter which arises for decision, it is necessary to refer to the following facts :—

On the 28th of June, 1917, the plaintiff, Munshi Muhammad Jan, brought a suit against these defendants to recover the instalments of the annuity which had fallen due from the 1st of January, 1914, up to the 1st of January, 1917. This suit was suit No. 166 of 1917, and on the 31st of July, 1917, the parties were absent. The Subordinate Judge wrote

\* Second appeal No. 1481 of 1920, from a decree of V. B. G. Hussey, District Judge of Moradabad, dated the 18th of May, 1920, confirming a decree of Lalta Prasad Johri, Subordinate Judge of Moradabad, dated the 13th of November, 1919.

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a judgment dismissing the suit. In his order of that date he mentions that the parties were absent. He also went on to say that because an appeal was pending with respect to a certain sale deed, the suit appeared to him to be premature, and he purported to dismiss the suit not on the ground of absence of the parties but on the ground that the suit had been brought before time.

The plaintiff, after this order of dismissal had been passed, made an application to the Subordinate Judge to have the order of dismissal set aside. Clearly that was an application made to the court in accordance with the provisions of order IX, rule 4.

That application for setting aside the order of dismissal was rejected on the 10th of November, 1917.

Against that order of rejection the plaintiff filed an appeal in the court of the District Judge, and on the 2nd of March, 1918, that appeal was withdrawn and dismissed on the application of the present plaintiff.

Meantime the instalment of the annuity which fell due on the 1st of July, 1917 had become payable and a suit to recover that particular instalment was brought in the court of the Munsif on the 22nd of December, 1917. That suit was tried out and the plaintiff got his decree on the 2nd of April, 1918.

The point which has been made here on behalf of the defendants and which was raised unsuccessfully by them in the courts below is that when the plaintiff brought this claim on the 22nd of December, 1917 in respect of the half-yearly instalment of the annuity which had become payable on the 1st of July, 1917 he was bound to include in his claim a claim for all other instalments which had become due up to that date and with respect to which a claim would have been within limitation.

Order II, rule 2, is consequently put up as a bar by the defendants.

The plaintiff seeks to avoid the operation of order II, rule 2, in this way. He says that at the time he filed his suit on the 22nd of December, 1917, an appeal was still pending in the court of the District Judge, an appeal relating to the suit in which the claim was for the arrears of the earlier years, that is to say, from the 1st of January, 1914, up to the 1st of January, 1917. It is argued that while that

appeal was pending when the second suit was filed, it was not open to the plaintiff to include the earlier claim in the second suit.

There are two answers to this contention. In the first place, it is obvious that after the plaintiff's application to have the order of dismissal in default set aside was rejected, he had no right of appeal at all. In the next place, even if he assumed mistakenly that he had a right of appeal, it is clear that that appeal was withdrawn from the court of the District Judge on the 2nd of March, 1918, that is to say, a full month before the decree was passed in the second suit which was brought on the 22nd of December, 1917. In other words, the appeal was withdrawn while the second suit was still pending. In these circumstances, we think, the plaintiff cannot be heard to say that he is in any way protected against the operation of order II, rule 2, by the fact that he had an appeal pending in the court of the District Judge at the time the second suit was filed. After the appeal was withdrawn any protection which might have accrued to the plaintiff by reason of the appeal having been filed was taken away and his proper course then was to apply to the court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1-1-'14 to 1-1-'17. We hold that the view taken by the court below on this point of law is erroneous and the appeal must, therefore, be allowed to this extent. The result is that allowing the appeal, we direct that the claim of the plaintiff regarding the items accruing due prior to the 1st of January, 1918, is dismissed. The rest of the claim is decreed with proportionate costs against the defendants. The defendant appellant is entitled to proportionate costs in all three courts.

*Decree modified.*

*Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.*

HANS RAJ AND OTHERS (DEFENDANTS) v. MUSAMMAT SOMNI (PLAINTIFF).  
Act No. IV of 1882 (Transfer of Property Act), section 51—Alienee from Hindu widow without legal necessity—Improvements made by alienee on land so obtained.

A Hindu widow mortgaged with possession certain property which had been of her deceased husband—as was subsequently found—without any

\* Second Appeal No. 79 of 1921, from a decree of R. L. Yorke, Additional Judge of Gorakhpur, dated the 23rd of November, 1920, reversing a decree of Puran Chandra Consul, City Munsif of Gorakhpur, dated the 15th of April, 1920.

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