

selected by him. For all practical purposes, therefore, there was a person duly qualified who could look after the trust property. We hold that the *waqf* is good.

The next question is whether the *waqf* is bad as being intended and calculated to defeat the just claims of the appellant. Although the point was specifically taken in the written statement, it does not appear that it was pressed in either of the courts below. \*\*\*\*In the grounds of appeal taken in this Court the point has not been specifically taken. \* \* \* \* In the circumstances, we do not feel justified in remanding the suit for deciding a fresh issue. The result of our remanding an issue like that would probably be that a mass of doubtful evidence would be put forward on behalf of the appellant—evidence which was never put forward in the earlier part of the case, although a specific plea had been taken.

The result is that the appeal fails and is hereby dismissed with costs.

*Appeal dismissed.*

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## REVISIONAL CIVIL.

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*Before Mr. Justice Weir.*

CHANDRIKA LAL AND OTHERS (DEFENDANTS) *v.* SAMI NATH AND ANOTHER (PLAINTIFFS.)\*

1928  
April, 20.

*Civil Procedure Code, order XXIII, rule 1—Withdrawal of suit with liberty to bring fresh suit—“Formal defect” —Revision.*

Where a court allowed a plaintiff to withdraw his suit with liberty to bring a fresh one upon the ground that he had not given formal proof of a document which was essential to his success, it was *held* that the court was within its jurisdiction, and that the High Court should not interfere.

1928

*Jhunku Lal v. Bisheshar Das* (1), followed. *Baijnath Pande v. Babban Pande* (2), distinguished.

GEANDRIKA

LAL.

v.

SAMI NATH.

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Debi Prasad Malaviya*, for the applicants.

Munshi *Ram Nama Prasad* and Munshi *Binod Bihari Lal*, for the opposite parties.

WEIR, J. :—This is an application to revise an order of the Additional Subordinate Judge of Gorakhpur by which he granted to the opposite party permission to withdraw a suit which they had brought against the applicants, and granted them liberty to bring a fresh suit. The ground on which permission was granted was that the opposite party had not put in evidence a mortgage decree under which they had purchased the land in suit. The learned Subordinate Judge ordered them to pay the costs of the applicants. In the course of the argument I have been referred to several decisions. In my opinion I am bound by (and I shall follow) the decision of a two Judges Bench of this Court, namely, *Jhunku Lal v. Bisheshar Das* (1). In that case the plaintiff was permitted to withdraw his suit and to bring a new suit, the ground being that he had failed to give formal proof of a document which was essential to his success. The only other case which I need notice is a decision of a Judge of this Court in *Baijnath Pande v. Babban Pande* (2). In that case an order of the Judge granting the plaintiff permission to withdraw from a suit and to institute a fresh suit was set aside. The grounds on which the order was made were that the plaintiff had not produced sufficient evidence and that he thought that, if he had more time, he would be able to produce evidence which would counteract the documentary evidence produced by the defendant. That

(1) (1918) I.L.R., 40 All., 612.

(2) (1927) I.L.R., 49 All., 459.

appears to me to be an entirely different case from the present. There is, in my opinion, a marked distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract evidence given by the defendant *i.e.*, where the plaintiff wants time to prepare what would be more or less a new case, and a case where, as here and in *Jhunku Lal v. Bisheshar Das* (1), a plaintiff merely wishes to give formal proof of a document. I, therefore, decline to interfere in revision, as I think that the Additional Subordinate Judge had jurisdiction to act as he did. The application is dismissed with costs.

1928

CHANDRIKA  
LAL  
v.  
SAMI NATH.

*Application dismissed.*

Before Mr. Justice Weir.

GOVIND PRASAD (PLAINTIFF) *v.* HAR KISHAN AND  
OTHERS (DEFENDANTS.)\*

1928

April, 20.

*Civil Procedure Code, order IX, rule 3—Suit dismissed and application to restore it dismissed—Competence of plaintiff to bring a fresh suit on the same cause of action.*

A suit in a Court of Small Causes was dismissed because, on the date fixed for hearing, neither party appeared. The plaintiff applied for restoration of the suit; but his application was dismissed.

*Held* that it was competent to the plaintiff to file a fresh suit on the same cause of action. *Daya Shankar v. Raj Kumar* (2), and *Bhudeo v. Baikunthi* (3), approved.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Shabd Saran*, for the applicant.

Pandit *M. N. Kaul*, for the opposite parties.

WEIR, J. :—This is an application by the plaintiff in a civil suit to revise an order of the Small Cause

\*Civil Revision No. 70 of 1928.

(1) (1918) I.L.R., 40 All., 612. (2) (1916) 20 Oudh Cases, 66.

(3) (1921) 63 Indian Cases, 239.