APPELLATE CIVIL

Before Mr. Justice Bishambhar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

BANK OF UPPER INDIA THROUGH MR. H. HUNTER, LIQUIDATOR, (PLAINTIFF-APPELLANT) *v.* MUSAMMAT HIRA KUER AND OTHERS (DEFENDANTS-RESPONDENTS)* 1936 December, 19

Limitation Act (IX of 1908), sections 2(8) and 23 and Article 120—Defendants entered as under-proprietors under order of Settlement Court—Declaratory suit that defendants are not under-proprietors—Cause of action, when accrues—Limitation, starting point of—Settlement order, if constitutes a "continuing wrong" within the meaning of section 23, Limitation Act—Property sold after Settlement order—Purchaser, if has a different terminus a quo *for starting of limitation from what his predecessor had.*

A suit for declaration that the defendants had no under-proprietary rights in the lands in respect of which they got themselves entered as under-proprietors under an order of the Settlement Court, is governed by Article 120 of the Limitation Act and the right to sue accrues to the plaintiff when the defendants got themselves entered as under-proprietors under the order of the Settlement Court.

If the order of the Settlement Court about the defendants being recorded as under-proprietors is a wrong to the plaintiff, the wrong is complete when the order is passed and the entry made, and it cannot by any means be regarded as a case of a continuing wrong within the meaning of section 23 of the Limitation Act. *Francis Legge* v. *Ram Baran Singh* (1), referred to and relied on.

Where in a suit the cause of action is based on the wrong settlement entry and not on any subsequent injury arising out of it, the limitation which once began to run in respect of the said cause of action cannot be stopped by the property being afterwards sold, and the plaintiff cannot acquire any independent right in respect of the same cause of action by reason of his subsequent purchase. Therefore if the plaintiff institutes a suit on the cause of action arising from the settlement entry he cannot have a different *terminus a quo* for the starting of limitation from what his predecessor had, whether his pre-

*First Civil Appeal No. 77 of 1934, against the decree of Babu Gulab Chand Srimal, Civil Judge of Hardoi, dated the 7th of May, 1934.

(1) (1897) I.L.R., 20 All., 35.

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decessor chose to sue or not. *Sukhdasi Kuar* v. *Fateh Bahadur Singh* (1), *Aftab Ali Khan* v. *Akbar Ali Khan* (2), *Kali Prasad Misra* v. *Harbans Misra* (3), *Allah Jilai* v. *Umrao Husain* (4), *Sheopher Singh* v. *Deonarain Singh* (5), *Ahmad Hosain Bepari* v. *Digindra Narayan Singha Ray* (6) and *Govind Ojha* v. *Sitaram Ojha* (7), distinguished.

Messrs. *Ram Bharose Lal* and *Murli Manohar*, for the appellant.

Messrs. *Hyder Husain*, *D. K. Seth* and *H. H. Zaidi*, for the respondents.

SRIVASTAVA, C.J. and SMITH, J.:—These appeals arise out of seven suits instituted by the liquidator of the Bank of Upper India for a declaration that the defendants in the said suits did not possess any under-proprietary right in the lands in suit. The learned Civil Judge of Hardoi has dismissed all the suits on the ground of their being barred by limitation. As the question of limitation, which is the sole question which we are required to decide in these appeals, is common to all of them, we propose to dispose of all the appeals by this judgment.

The facts, which are not in dispute, may be briefly stated as follows: Raja Durga Prasad was the taluqdar of Sarwan Baragaon estate in the Hardoi district. Villages Khajuna and Nirmalpur were included in the said estate. He had executed several deeds of mortgage in favour of the Bank of Upper India. The Bank obtained decrees for sale on the basis of these mortgages and put them in execution. During the pendency of these execution proceedings Raja Durga Prasad died and was succeeded by his son Kuar Jang Bahadur. The two aforesaid villages, with which alone we are concerned in these litigations were purchased by the liquidator in 1927 at court sales held in the course of execution proceedings against Kuar Jang Bahadur. The principal defendants in suits Nos. 84 and 85 of 1933 of the Court of the Civil

(1) (1933) 10 O.W.N., 366.
(2) (1929) A.L.J., 794.
(3) (1919) I.L.R., 41 All., 509.
(4) (1914) I.L.R., 36 All., 492.
(5) (1912) 10 A.L.J., 413.
(6) (1935) I.L.R., 62 Cal., 969.
(7) (1936) Pat., 321.

Judge, Hardoi, which have given rise to first appeals Nos. 18 of 1935 and 77 of 1934 respectively, are members of the family of Raja Durga Prasad. Their predecessors-in-interest laid claims to a share in the taluqa before the British Indian Association. These claims resulted in their being given lands in village Khajuna by way of *guzara*. They were at first entered as occupancy tenants in respect of these lands, but at the last settlement the said plots were entered in the under-proprietary khewat.

The principal defendants in the five other suits, which have given rise to appeals Nos. 19 to 23 of 1935, are members of one family, but not connected with the taluqdar. Their predecessors-in-title claimed *"pukhtadari"* rights in village Nirmalpur at the first regular settlement against Dhanpat Rai, father of Raja Durga Prasad. Their claim for those rights was rejected, but they were granted cash *nankar*. Subsequently, in 1869, Raja Durga Prasad issued notices of ejectment against them in respect of the plots of land in village Nirmalpur in their possession. The notices were contested, and ultimately the defendants' predecessors-in-interest were granted occupancy rights in the said plots under section 5 of the Oudh Rent Act. In 1911 and 1914 Raja Durga Prasad took proceedings for enhancement of rent against the defendants and their predecessors-in-interest. In these proceedings also the claim for under-proprietary rights set up by the defendants was repelled, and the rent was enhanced, but in the course of the last settlement the Assistant Record Officer by his order, dated the 30th of May, 1925, directed that the defendants were to be recorded as under-proprietors. Kuar Jang Bahadur appealed against this order, but without success.

The plaintiff Bank came into court on the allegation that the defendants did not possess any under-proprietary rights in the plots of land in villages Khajuna

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and Nirmalpur in their possession, and that they had got their names entered as under-proprietors in the settlement papers in collusion with Kuar Jang Bahadur. It was further alleged that the plaintiff Bank acquired knowledge of the said entries in or about January, 1928, which was the date when the cause of action accrued to the plaintiff for bringing the suits.

The defendants asserted in reply that they were in possession as under-proprietors. They denied the allegations of fraud and collusion between them and Kuar Jang Bahadur, and pleaded that the suits were barred by time.

The learned Civil Judge held that the defendants in all the suits did not possess any under-proprietary rights in the lands in dispute. He also held that there was absolutely no evidence of the alleged fraud and collusion. On the question of limitation he held that the suits were governed by Article 120 of the Limitation Act, and that the right to sue accrued to the plaintiff's predecessor when the defendants got themselves entered as under-proprietors under the order of the Settlement Court. As the suits were admittedly brought beyond six years from the making of the said entries, he held them to be time-barred. As a result of this finding he dismissed all the suits.

The learned counsel for the plaintiff-appellant did not dispute the application of Article 120 to the case. He has, however, argued that as fresh entries are made every year in the annual register in accordance with the settlement entries, therefore the entries made at the settlement must be treated as a continuing wrong within the meaning of section 23 of the Indian Limitation Act. and it must accordingly be held that a fresh period of limitation begins to run at every moment of the time during which the wrong continues. Section 23 speaks of a continuing "breach of contract" and of a "continuing wrong independent of contract." The

phraseology used in the section seems to lend some support to the contention of the learned counsel for the respondents that the continuing wrong independent of contract contemplated by the section is one in the nature of a tort. Whether this is so or not, we are clearly of opinion that if the order of the Settlement Court about the defendants being recorded as under-proprietors was a wrong to the plaintiff, the wrong was complete when the order was passed and the entry made, and it cannot by any means be regarded as a case of a continuing wrong. In *Francis Legge* v. *Ram Baran Singh* (1), in answer to a similar argument it was remarked that "the act of the Settlement Officer, if it was a wrong to the plaintiffs, was a wrong committed once for all; and was very properly described as being the cause of action upon which the plaintiffs came into Court." It may also be noted that in the present cases also the plaintiff based his cause of action on the entry in the Settlement Court, and not on any subsequent entries in the annual registers made in pursuance of the settlement entry. The argument based on section 23 must therefore fail.

Next it was contended that though Kuar Jang Bahadur had a cause of action arising out of the settlement entry, yet he was not bound to sue. The argument proceeded that as the plaintiff came on the scene only when he purchased the villages in 1927, therefore his right to sue accrued only when he became aware of the settlement entry, and the present suits, brought within six years of his knowledge of the entry, should be held to be within time. We are of opinion that this argument also is without substance. It is conceded by the learned counsel for the respondents that if the possession of the defendants after the making of the settlement entry remained precisely on the same footings as before, Kuar Jang Bahadur was not obliged to bring a suit for declaration in the Civil Court, and could afford to ignore

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the entry. But this does not mean that if the plaintiff institutes a suit on the cause of action arising from the settlement proceeding he can have a different *terminus a quo* for the starting of limitation from what his predecessor Kuar Jang Bahadur had. In the definition contained in section 2, clause (8) of the Indian Limitation Act, the term "plaintiff" includes any person from or through whom a plaintiff derives his right to sue. The plaintiff in the present cases derives his right to sue from Kuar Jang Bahadur. The cause of action based on the settlement proceeding arose on the date of the order of the Settlement Court. Whether Kuar Jang Bahadur chose to sue or not, the limitation which once began to run in respect of the said cause of action could not be stopped by the property being afterwards sold, and the plaintiff could not acquire any independent right in respect of the same cause of action by reason of his subsequent purchase. The learned counsel for the appellant has relied on—*Sukhdasi Kuar* v. *Fateh Bahadur Singh* (1), *Aftab Ali Khan v. Akbar Ali Khan* (2), *Kali Prasad Misra* v. *Harbans Misra* (3), *Allah Jilai* v. *Umrao Husain* (4), *Sheopher Singh* v. *Deonarain Singh* (5), *Ahmad Hosain Bepari* v. *Digindra Narayan Singha Ray* (6) and *Govind Ojha* v. *Sitaram Ojha* (7), in support of his argument. In *Sukhdasi Kuar* v. *Fateh Bahadur Singh* (1), mutation entries in the names of three Hindu widows, who were the defendants, were, according to the plaintiff, made with his consent, and the plaintiff had no grievance against the entries until the defendants asserted title on their basis. It was held that in the circumstances the cause of action for the declaration sought being the wrong assertion, limitation began to run not from the date of the mutation entries, but from the time when the defendants asserted their title on their basis. This case is quite distinguishable

(1) (1933) 10 O.W.N., 366.
(2) (1929) A.L.J., 794.
(3) (1919) I.L.R., 41 All., 509.
(4) (1914) I.L.R., 36 All., 492.
(5) (1912) 10 A.L.J., 413.
(6) (1935) I.L.R., 62 Cal., 969.
(7) (1936) Pat., 321.

inasmuch as the cause of action in the present cases is based on the wrong entry, and not on any subsequent injury arising out of it. The same remarks would apply to *Ahmad Hosain Bepari* v. *Digindra Narayan Singha Ray* (1), in which it was held that if the cause of action for the suit is the entry itself, the suit must be brought within six years of the cause of action. On the other hand, so long as the entry does not injure the plaintiff, he need not come to court at all, and therefore a plaintiff is not out of time if he institutes a suit within six years of the injury which the entry creates, and which is his cause of action. We think it unnecessary to discuss the other cases. We have carefully examined them, and it will be enough to say that in every one of them there was a fresh invasion of right which gave a fresh cause of action. In the present cases, as we have already remarked, the plaintiff's claim is based on the wrong entry in the Settlement Court, and not on any fresh invasion of his rights made subsequently. The only fresh thing relied on since the making of the settlement entry is the fact of the plaintiff having become a purchaser, which, as we have already said, cannot affect the running of limitation against him. In short, the position is that the cause of action which forms the basis of the plaintiff's claim having arisen at the time of the order of the Settlement Court made in 1925, the present suits, instituted in 1933, were clearly barred by Article 120 of the Limitation Act. The plaintiff has not alleged any fresh invasion of his right within six years of the institution of the suits which could entitle him to maintain the suits. In the circumstances the lower court was perfectly right in holding the suits to be barred by limitation.

It was also argued that limitation could run against Kuar Jang Bahadur from the date of the entries only if it were shown that they were made within his knowledge, and that there was no proof that in the case of the

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entries which are in question in first civil appeals Nos. 77 of 1934 and 18 of 1935 Kuar Jang Bahadur became aware of them when they were made. It seems to us that it was the duty of the plaintiff to prove all the facts necessary to entitle him to relief. If he wanted to show that Kuar Jang Bahadur acquired knowledge of these entries for the first time some time within six years before the institution of the suits, he ought to have proved that this was so. On the contrary, exhibit A-26 shows that the settlement entries in question were made not only in favour of the defendants, but also in favour of the minor sons of Kuar Jang Bahadur, who had a one-third share in the lands, the other two-thirds being held by the defendants. The document also shows that Kuar Jang Bahadur was guardian of these sons. Furthermore, the entries in question were either disputed or undisputed. If disputed, Kuar Jang Bahadur, the only person who could dispute them, must have had knowledge of them. On the other hand, if they were undisputed, then under section 54 of the Land Revenue Act they were required to be attested by the parties interested. In the circumstances the lower court was right in presuming that the requirements of law were complied with, and in holding that Kuar Jang Bahadur must be deemed to have been aware of the entries.

Arguments were also addressed to us against the finding of the lower court, in the suits which have given rise to first appeals Nos. 19 to 23 of 1935, that the alleged fraud and collusion between Kuar Jang Bahadur and the defendants were not established. We are of opinion that the alleged fraud and collusion cannot in any way affect the question of limitation. But apart from this we have no hesitation in upholding the finding of the lower court on this point. Kuar Jang Bahadur contested the proceedings in the Settlement Court, and carried the matter in appeal to two courts. His failure to produce some material evidence

may well be due to negligence or ignorance of the existence of that evidence. We agree with the lower court that in the absence of other evidence, no collusion or fraud can be inferred from the mere fact that some important documents were not produced.

Lastly it was urged with much force that in suit No. 85 certain creditors of the principal defendants took proceedings to sell part of the lands in suit treating them as the under-proprietary holding of the said defendants, and that the said proceedings are still pending. It was also pointed out that in the case of the lands in dispute in the suits which have given rise to appeals Nos. 19 to 23 of 1935, proceedings were taken in 1930 for assessment of under-proprietary rents, under section 79 of the Land Revenue Act. It was argued that the aforesaid proceedings constitute fresh invasions of the plaintiff's right which were made within six years before the institution of the suits, and that the plaintiff should be given a decree on the basis of the new cause of action arising as a result of these proceedings. The learned counsel for the appellant frankly admitted that these causes of action were not set up in the plaints, but he contended that for the ends of justice, and in order to avoid multiplicity of litigation, he should be granted relief on their basis. At first we felt inclined to accede to the plaintiff's contention, but on further consideration we feel that it would not be fair to the defendants to allow the plaintiff to set up this fresh case at this late stage. The defendants' counsel has vehemently contended that he would be greatly prejudiced if we entertain this new case for the first time in appeal. Obviously we could not in fairness to the defendants grant the plaintiff relief on the basis of the new causes of action now brought to our notice without requiring the plaintiff to amend his plaint, and giving the defendants an opportunity to meet the new case. This would practically amount to a fresh trial of the cases. In the circumstances we have ultimately come to the conclusion

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that we should refuse to entertain the new case at this stage, and should leave it to the plaintiff to bring another suit on the basis of the alleged fresh causes of action, if so advised.

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Before taking leave of the case we should note that the counsel for the defendants-respondents did not accept the lower court's finding that they had failed to establish their claim to under-proprietary rights, but in view of the opinion formed by us on the question of limitation we did not hear arguments on that point.

The result therefore is that we uphold the decrees of the lower court on the ground of limitation, and dismiss all the appeals with costs.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice H. G. Smith

NAUSHAD ALI (APPLICANT) *v.* MOHAMMAD ISHAQ, (OPPOSITE-PARTY)*

1936 *December*, 21

Arbitration—Application by parties to suit agreeing to abide by court's decision to be given after local inspection—Use of word "arbitrator" in application—Court, if appointed arbitrator—Agreement, if legally binding on parties—Schedule II of Civil Procedure Code, if applicable to case—Oudh Civil Rules, Rule 628—Civil Judge acting as arbitrator in contravention of rules—Proceedings, if null and void.

Where the parties to a suit present an application to the court saying that they are desirous of leaving the matter entirely in the hands of the presiding officer, and that they would be bound by whatever decision he should arrive at after making a local inspection, then although the word "arbitrator" is used in the application it is not that the parties meant to appoint the presiding officer as an "arbitrator" in the case but all that the said application comes to is that the parties agreed to abide by the presiding officer's decision, which he should give after making a local inspection, without recording any evidence. There is nothing against the validity of such

*Section 115 Application No. 54 of 1935, against the order of S. Abbas Raza, Munsif, Lucknow District, dated the 4th of February, 1935.