

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Goldstream.

SMAIL AND OTHERS (PLAINTIFFS) Appellants

versus

BAHAB AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2634 of 1922.

Indian Limitation Act, IX of 1908, Article 120—Suit for declaration that defendants were not entitled to demand partition, defendants having applied for partition—Fresh cause of action—Limitation—whether affected by Revenue Records shewing co-ownership.

The land in suit had been shewn in the Revenue Records since 1872 as owned by the plaintiffs *and* the defendants (the possession being with the plaintiffs), an application by the plaintiffs in 1897 for alteration of the entries as to ownership having been rejected, the defendants in 1921 applied for partition and the plaintiffs, pleading their title, were referred to the Civil Court.

Held, that the application for partition was an act of invasion which gave a new cause of action and rendered the suit for a declaration filed by the plaintiffs within 6 years therefrom within time.

Hakim Singh v. Waryaman (1), and *Jahana v. Wali* (2), followed.

Held further, that the question of limitation was not affected by the entries in the Revenue Records shewing the defendants as co-owners.

Second appeal from the decree of O. F. Lumsden, Esquire, District Judge, Montgomery at Lahore, dated the 11th August 1922, modifying that of Sardar Ali Hussain Khan, Kazilbash, Subordinate Judge, 1st class, Montgomery, dated the 21st March 1922, and dismissing the plaintiffs' suit.

(1) 140 P. R. 1907.

(2) 89 P. R. 1919.

ZAFAR-ULLAH KHAN, for ABDUL AZIZ, and
ANANT RAM, for Appellants.

AZIZ AHMAD, for Respondents.

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JUDGMENT.

BROADWAY J.—The only point for determination in this appeal is whether the suit brought by the plaintiffs is within limitation. The trial Court held that it was. The Lower Appellate Court came to the conclusion that it was not. It is not necessary to set out the facts of this case in any detail. The Revenue records show that the land in suit in the "ownership" column is entered as belonging to the plaintiffs and the defendants but the possession is with the plaintiffs. This state of affairs has existed since 1872 or thereabouts. In 1897 an attempt was made by the plaintiffs to have the Revenue records altered and their names entered not only as in sole possession but as sole owners. This application was rejected. In 1921 one of the defendants applied for partition of the land in suit. The plaintiffs pleaded their title and were referred by the Revenue authorities to the Civil Court. In my judgment the suit is clearly within limitation. In *Hakim Singh and others v. Waryaman* (1) a similar question arose for decision and it was held that the application for partition was an act of invasion which gave a new cause of action. *Jahana and Dula v. Wali* (2) is an authority to the same effect. Mr. Aziz Ahmad for the respondent very frankly accepts the propositions enunciated in those authorities but has attempted to differentiate this case from those on the ground that in the reported cases the entries showed sole ownership whereas

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in the present case the entries related to co-ownership. This is a distinction no doubt, but I do not think it affects the question.

I would therefore accept this appeal and return the case to the Court of the District Judge, for disposal of the other questions raised in appeal. Costs in this Court will follow the event. The stamp on appeal will be refunded.

COLDSTREAM J.

COLDSTREAM J.—I agree.

N. F. E.

*Appeal accepted.**Case remanded.*

APPELLATE CIVIL.
Before Mr. Justice Broadway and Mr. Justice Coldstream.

BHOLA RAM-KUNDAN LAL (PLAINTIFFS)

Appellants

*versus*THE EAST INDIAN RAILWAY CO., BOMBAY
(DEFENDANTS) Respondents.

Civil Appeal No. 2552 of 1924.

Railways—Carriage of goods under Risk Note “B”—Damage subsequent to unloading at destination—whether Railway liable for—Indian Railways Act, IX of 1890, section 55—Notice of sale—insufficiency of—whether plea can be entertained for the first time on appeal—and whether of any effect where sale actually took place more than 15 days after notice.

40 bales of gunnies despatched under risk note “B” had been placed under cover by the Railway on the arrival of the goods at destination but owing to exceptionally heavy rain and wind five days later suffered damage, which the Railway Goods Inspector agreed would be fairly assessable at Rs. 400. The consignees, however, refused delivery unless the Railway promised unconditionally to pay this sum and to waive its claim to wharfage. On 30th November 1920 the

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July 8.