

**(1923) 01 AHC CK 0058**  
**In the Allahabad High Court**

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| Musammat Akbari Begum and Others | Vs | APPELLANT  |
| Shaikh Zamin Ali and Others      |    | RESPONDENT |

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**Date of Decision :** 02-01-1923

**Acts Referred:**

Limitation Act, 1963 — Section 5

**Citation :** 79 Ind. Cas. 402

**Hon'ble Judges :** Gokul Prasad, J

**Bench :** Single Bench

**Final Decision :** Disposed Of

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## Judgement

Gokul Prasad, J.—This appeal arises out of a suit for ejectment filed in the Revenue Court. The defendants pleaded inter alia their own proprietary rights. This plea was decided in the negative by the first Court but it dismissed the plaintiffs' suit on other grounds. The plaintiffs went up in appeal to the Commissioner and naturally did not raise the question of proprietary title as they could not do so, inasmuch as the point had been decided in their favour by the Court of first instance. The defendants, however, tried to support the decree of the first Court on the ground that they were proprietors and the finding of the first Court on that point was wrong. The Commissioner allowed the appeal and decreed the plaintiffs' claim. The defendants went up in appeal to the Board of Revenue and the Board decided that, as soon as the question of proprietary title was raised before the Commissioner, he ceased to have jurisdiction and remanded the case with a direction that he should return the memorandum of appeal for presentation before the Judge. This order was passed in July and in compliance therewith the Commissioner returned the memorandum of appeal to the plaintiffs on the 31st of August 1920 and the plaintiffs filed their appeal before the Judge on the 4th of September following. The appeal was by that time much beyond time and the plaintiffs asked the District Judge to give them an extension of time u/s 5 of the Limitation Act. The District Judge refused to do so and has dismissed the appeal as being barred by time. The plaintiffs come here in second appeal and their learned Advocate has put forward two contentions

before me: (1) that inasmuch as the question of proprietary title was not a matter in issue in appeal, the Commissioner had jurisdiction to hear the appeal and the appeal was rightly filed in his Court, and (2) that even if the appeal was not rightly filed in his Court the District Judge has failed to exercise his discretion rightly in as much as he ought to have granted the extension of time prayed for. In my opinion an appeal lies u/s 177 (e) to the District Judge from a decree of the Revenue Court in cases in which a question of proprietary title had been in issue in the Court of first instance and is a matter in issue in appeal. In the present case the question of proprietary title had been decided in favour of the plaintiffs although the suit was ultimately dismissed on other grounds. The plaintiffs naturally could not raise the question of proprietary title in their memorandum of appeal as that point had been decided in their favour and could not know that the defendants would like to support the decree of the Court of first instance on the ground of their own proprietary title. The appeal was, therefore, rightly filed in the Commissioner's Court. However, the Board of Revenue, the final Appellate Court, has held the contrary and I cannot compel the Commissioner to bear the appeal again. The point of law raised was a doubtful one and the plaintiffs had in good faith filed the appeal in the Commissioner's Court. Within five days of the return of the memorandum of appeal by the Commissioner it was filed before the District Judge and in my opinion the District Judge ought to have granted an extension of time u/s 5 of the Limitation Act. I, therefore, allow the appeal, extend the time for filing the appeal up to the date when it was filed in the lower Appellate Court, set aside the decree of that Court and send the case back to it for restoration to its original number and disposal according to law. Costs here and hitherto will abide the event.