

(1926) 07 PAT CK 0037
In the Patna High Court

Rai Brinandan Parshad and Others

APPELLANT

Vs

Mahabir Prasad and Others

RESPONDENT

Date of Decision : 13-07-1926

Acts Referred:

Evidence Act, 1872 — Section 78(2)
Limitation Act, 1908 — Article 176, 178

Citation : AIR 1927 Patna 142

Hon'ble Judges : Bucknill, J;Adami, J

Bench : Full Bench

Judgement

Adami, J.—The parties to the suits out of which these second appeals arise were co-sharer landlords of village Karma, There was a partition between the landlords in 1920, and by that partition the southern portion of the village from east to west fell to the share of the plaintiffs. The defendant obtained takhtas to the north of the plaintiff's takhta. At the time of the partition it was decided that the system of irrigation hitherto followed should continue. The takhta of the plaintiffs contained several Ahars. On the east was the Biskarawan Ahar, next to it on the west was the Nanki Ahar; then came an Ahri with the Theki Ahar on its west; west of that were the cultivated lands of the plaintiffs' takhta. By the partition Plot No. 22 was divided into two parts, the northern portion became Plot No. 180 and fell into the takhta of the defendants and the southern portion of it became Plot No. 186 and fell into the takhta of the plaintiffs. Plot No. 180 then is just north of Plot No. 186 which is the most northern plot of the plaintiffs on the western side of their takhta.

In 1914 the Survey and Settlement Record was finally published and at that same time the irrigation scheme was settled by the Settlement Officer. According to the fard abpashi Plot No. 180 of the defendants was to be irrigated in two ways, firstly, it was to obtain water from the Deehi Ahar belonging to the defendants which was to its east. If the Deehi Ahar had insufficient water the fard abpashi showed that the defendants would have a right to take water through a cutting in the north embankment of the Nanki Ahar of the plaintiffs,

from, Plot No. 247 to Plot No. 262, and lead that water to the Deehi Ahar. Again, this Plot No. 180, according to the fard abpashi, was entitled to receive water from the Theki Ahar of the plaintiffs by cutting the bank of that Ahar in a northwest corner and leading the water through Plots Nos. 185 and 186 to Plot No. 180.

2. The present suit was brought by the plaintiffs for a declaration that these entries in the fard abpashi drawn up at the time of the Settlement were incorrect. It was denied that the defendants had a right to take water from the Nanki Ahar into Plot No. 262 and also that they had a right to take water from the Theki Ahar. A commissioner was appointed to take levels and report, and he accordingly took levels and submitted his report but the Commissioner was not called as a witness by either party, and the learned Subordinate Judge, who tried the case, in a somewhat short judgment came to the finding that the survey was incorrect as regards Plot No. 180 being irrigated by water taken from the Theki Ahar; but he found that the defendants had a right to get water from the Nanki Ahar through a cutting in the bund between Plots Nos. 247 and 262.

3. Another question arose before the Court and that was whether the suit had abated. Mt. Chamela Kuer was entered in the Record of Rights in respect of Plot No. 180 and the takhta in which it lay. Mt. Chamela Kuer died on the 15th of July 1921. The plaintiffs informed the Court on the 22nd of August 1921 of her death and on the 6th of September 1921, applied for time to bring her heirs on the record. Accordingly the suit was adjourned to the 27th of September 1921, and the plaintiff was directed to bring the heirs on record on that date without fail.

4. On the 27th of September 1921, however, no step had been taken, and on the 8th of November, the plaintiff asked for time to find out the names of the heirs Of Defendant No. 1.

5. On the 18th of November, the plaintiff again put in a petition for time in order to substitute the heirs of Mt. Chamela whom he named in his petition. Then on the 17th of July 1922, the plaintiff put in a petition that he had no knowledge of the death of Mt. Chamola Kuer who was a purdahnashin lady. The Subordinate Judge held that under the circumstances the suit would not abate, for the petition, filed within ninety days of the death of Chamela Kuer, was a sufficient compliance with the provisions of Order 22, Rule 2. Since the application for substitution was filed within two months after ninety days after the death of Chamala Kuer, the learned Subordinate Judge thought that it should be considered to be under Order 22, Rule 9, Sub-rule (2). The learned Subordinate Judge, therefore, decreed the plaintiffs' suit in part.

6. On appeal the learned District Judge has found that the entry in the fard abpashi is correct both with regard to the taking of water from the Theki Ahar and the taking of water from the Nanki Ahar ; he has also found that the suit abated because the plaintiff had failed to bring the legal representative of Mt. Chamela Kuer on the record within ninety days. (Questions of fact were then

discussed and then his Lordship proceeded:).

7. The next point taken by Mr. Sultan Ahmed is that the lower Court is mistaken in finding that the suit abated. Having come to the finding that the fard abpashi entries are correct and that the suit was rightly dismissed it is hardly necessary to enter into this question, but it is interesting in so far as it is shown by Mr. Sultan Ahmed, relying on the case of Gobind Das v. Rupkishore AIR 1924 Lah. 65 that, at the time the suit was instituted and at the time of the death of Mt. Chamela Kuer the limitation for an application for substitution was six months and not three months. It appears that a mistake was made in the Amending Act reducing the period from six months to ninety days. The Indian Limitation and CPC (Amendment) Act (XXVI of 1920), provides that in the third division of the First Schedule to the Indian Limitation Act, 1908, in Articles 176, 178 and 179 for the word "ditto" in the second column the words "ninety days six months and ninety days" respectively shall be substituted. No mention was made of Article 177.

8. The reason for this, it appears, was that in the copy of the Act of 1908 which was being consulted, when the amendment was drafted, Article 175 showed "six months" in the second column, Article 176 showed "ditto," and Article 177 also "ditto" and it was considered that if Article 176 was amended to show "ninety days" in Column 2 the word "ditto" would stand in column 2 opposite 177 and thus the limitation would be reduced to ninety days in the case of Article 177 also; but the Act of 1908 was published in the Gazette of India, and u/s 78, Sub-section (2) of the Evidence Act the text as published in the Gazette must be taken to be the authorized text of the Act. In the Act of 1908 as published in the Gazette, Article 176 comes at the bottom of page 190, and in column 2 "ditto" is written; Article 177 begins at page 191 and against it, in the second column, are the words "six months," so that since Article 177 was not mentioned in the Amending Act of 1920, the entry "six months" will remain, and though, this may not have been the intention of the Legislature the Act, as published in the Gazette of India, must be followed and the result is that the period of six months must remain as the limitation for an application for substitution. The matter has been put right since.

9. Thus Mr. Sultan Ahmad's contention with regard to non-abatement of the suit must be upheld, but since there is no reason to interfere with the findings of the lower appellate Court on the merits, this decision as to limitation makes no difference.

10. The appeals must be dismissed with costs.

Bucknill, J.

I agree.