

(1879) 08 AHC CK 0011

Allahabad High Court

Case No: Second Appeal No. 195 of 1879

Kirath Chand and
Others

APPELLANT

Vs

Ganesh Prasad

RESPONDENT

Date of Decision: Aug. 21, 1879

Judgement

Robert Spankie, J.

The Judge remarks that the cause of action in respect of two of the houses arose in 1873, and of one in 1875. But he holds, on the authority of a decision of this Court (S.A., No. 1681 of 1874, decided the 23rd August 1875, unreported), that the period of limitation is governed by art. 120, sch. ii of Act XV of 1877. Art. 120 provides a limitation of six years in suits for which no period of limitation is to be found in sch. ii of the Act. It is contended by Babu Dwarka Nath Banarji, the Junior Government Pleader, on behalf of appellants, that art. 62, sch. ii of the Act, applies. He urges that the claim must be viewed as one for money payable by the defendant to the plaintiff for money received by defendant for the plaintiff's use. On the other hand, Pandit Bishambhar Nath, for the respondent, contends that art. 132 is strictly in point, and that the plaintiff has a charge on the property for the amount claimed; and he refers to the explanation below that article that the allowance and fees respectively called "malikana" and "haqq" shall, for the purpose of the clause, be deemed to be money charged upon immoveable property, in support of his contention. If the appellants' pleader be right, the limitation would be three years from the date of the receipt of the money by defendants, whereas if the pleader for the respondent has applied the proper article, the limitation would be twelve years from the date when the money sued for became due. I am not prepared to accept as correct the contention of either of the learned pleaders. If we apply art. 62, then this claim would take the English form of an action for breach of contract, and if this be so, as between the proprietor of the mohalla and the vendor and the vendee, the component parts of a contract appear to be wanting, both as regards consideration and promise to pay money to the proprietor of the mohalla, express or implied. If this were a suit for

money had and received, the sum claimed being under Rs. 500, the claim was one for a Small Cause Court. But this Court in Full Bench has decided (I.L.R., 1 All. 444) that suits of this nature are not cognizable by a Court of Small Causes. The Court observed that such a claim as one for "haqq-i-chaharam" is for a zamindari due customarily payable, it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages," and the Court adds that they must not be understood to impugn the ruling that where "chaharam" is payable in virtue of a contract, the claim would be triable by a Court of Small Causes. The claim in the present instance is one expressly founded on ancient custom, and it cannot be maintained that the record of this ancient custom in the administration-paper is a contract, express or implied, as between the owner of the mohalla and the mohalladar. The record of the custom is some evidence of its existence, and doubtless it was entered in the administration papers of 1833 and 1867, because the Settlement Officer was bound to prepare a complete record of the mahal, and to include in it all village-customs, and extra cesses and collections. As the claims in these suits are based upon ancient usage and not upon contract, the Full Bench ruling clearly applies, and this being so, one cannot say that art. 62, sch. ii of the Limitation Act governs them, still less does art. 132 apply to these cases. The "haqq" referred to in the explanation and described as fees are fixed charges upon immoveable property, of which payment could be enforced by the sale of the property so charged. It is not contended here that a zamindar could recover his one-fourth share of the sale-proceeds of a house when sold by a suit to bring the house to sale by enforcement of any lien upon it. I need not, however, dwell at length upon the question of limitation, inasmuch as I am quite ready to accept the ruling of a Division Bench of this Court on the point in Sheo Dehal v. Thakur Mathura Prasad (S.A. No. 1681 of 1874, decided the 23rd August 1875, unreported). The learned Judges in that case applied art. 118 sch. ii of Act IX of 1871, to a case of this nature, holding that there was no limitation expressly provided for such suits. I would therefore say that art. 120, sch. ii of Act XV of 1877, which represents art. 118 of the former Act, governs the limitation in these suits, and if so, all these are within time, as the limitation is six years from the time when the right to sue accrues. Douglas Straight, J.

2. I concur in Mr. Justice Spankie's judgment. I was in some doubt at one time upon the question of limitation, and was disposed to think the case within art. 62, though I never had any doubt that art. 132 was inapplicable. But, upon further consideration of the matter and the decision of this Court already referred to, I think art. 120 properly applies.