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v.

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or other person in possession of the land. The answer to the question referred will be in the affirmative.

STRAIGHT, J.—In answer to this reference I would say that, in my opinion, the defendant did not hold the relation of a co-sharer to the plaintiff, and therefore could not be sued by him in the Revenue Court for arrears of Government revenue under the provisions of cl. (g), s. 93 of the Rent Act, for he was a mere mortgagee without possession, and had not the full proprietary rights of a co-sharer. Such obligations as existed between them were embodied in the mortgage-deed, and it is in his character of mortgagor that the plaintiff is entitled to claim, and not as lambardár. It therefore seems to me that the suit was not cognizable by the Revenue Court.

On the case again coming before the Division Bench (PEARSON, J., and STRAIGHT, J.) for disposal, the following judgment was delivered by the Division Bench :

PEARSON, J.—The Judges of the Full Bench being equally divided in opinion on the question referred to it, we proceed to dispose of the appeal irrespectively thereof. Whether the suit be cognizable by a Revenue or by a Civil Court, the Judge was competent to dispose of it on the merits under s. 207, Act XVIII of 1873. On the facts found by the lower Courts, we think that the first ground of appeal should be disallowed, and we see nothing in the remaining grounds to warrant interference with their decision. The appeal is therefore dismissed with costs.

1880
August 11.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield,
and Mr. Justice Straight.*

ZULFIKAR HUSAIN AND ANOTHER (DEFENDANTS) v. MUNNA LAL AND ANOTHER
(PLAINTIFFS)*

*Suit on accounts stated—Act IX of 1871 (Limitation Act), sch. ii, No. 62—Act
XV of 1877 (Limitation Act), s. 2, sch. ii, No. 64—“ Title.”*

The accounts in a suit on accounts stated were stated when Act IX of 1871 was in force and were not signed by the defendant or an authorized agent on his behalf. Had that Act been in force when the suit was instituted the suit would have been

* Second Appeal, No. 302 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 23rd January, 1880, affirming a decree of Munsif Lalta Prasad, Munsif of Cawnpore, dated the 18th September, 1878.

within time under No. 62 of schedule ii of that Act. The suit was brought, however, after the passing of Act XV of 1877, and by reason of the accounts not being signed did not come within the scope of No. 64 of schedule ii of that Act. *Held* that the words in s. 2 of Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871," did not save the plaintiff's right to sue on the accounts stated, a right to sue not being meant by or included in the term "title acquired," that term denoting a title to property and being used in contradistinction to a right to sue; that the last clause of that section was not applicable, because Act XV of 1877 did not prescribe a shorter period of limitation than that prescribed by Act IX of 1871, but attached a new condition to the suit, *viz.*, that the accounts must be signed by the defendant or his agent duly authorized in that behalf; and that the suit was in consequence barred by limitation.

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THIS was a suit for Rs. 652-7-6, principal moneys, and Rs. 132-6-0, interest thereon, the suit being based on accounts stated between the parties. The principal sum claimed represented the price of goods sold and delivered to the defendants between the 1st November, 1867, and the 21st April, 1869. The accounts between the parties were stated in writing on the 6th June, 1876, in the presence of the agent of the defendants, when Rs. 682-7-6 were found to be due from the defendants to the plaintiffs. The agent of the defendants paid the plaintiffs Rs. 30 on account, which reduced the balance due to the plaintiffs to Rs. 652-7-6. The statement of accounts was not signed by the defendants or their agent. The suit was instituted on the 22nd February, 1878. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants it was contended on their behalf that the suit was not one on accounts stated within the meaning of No. 64, sch. ii of Act XV of 1877, as the accounts were not signed by the defendants or their agent, and the suit was therefore barred by limitation under that Act. The lower appellate Court held that, as the accounts were stated before Act IX of 1871 was repealed and Act XV of 1877 came into force, under s. 2 of the latter Act the law of limitation applicable was that contained in Act IX of 1871 and not that in Act XV of 1877, and that the suit, being one on accounts stated within the meaning of No. 62, sch. ii of Act IX of 1871, was within time. The defendants appealed to the High Court, contending that Act XV of 1877 applied, and that the suit, not being one on accounts stated within the meaning of that Act, was barred by limitation.

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The Division Bench before which the appeal came for hearing (PEARSON, J., and STRAIGHT, J.), on the 5th July, 1880, referred to the Full Bench the question whether the suit was barred by limitation, the order of reference being as follows :—

ORDER OF REFERENCE.—The account in this case was stated on the 6th June, 1876, and was not signed by the defendant or a duly authorized agent on his behalf. At that time Act IX of 1871 was in force, and had it been in force when the present suit was instituted, the suit would be within time, under art. 62, sch. ii of that Act. But it has been brought after the passing of Act XV of 1877, and by reason of the account not being signed does not appear to come within the scope of art. 64, sch. ii of the enactment, unless any of the provisions of s. 2 thereof be held to be applicable.

We refer to the Full Bench the question whether the suit is barred by limitation.

The Senior Government Pleader (Lala Juala Prasad) and Shah Asad Ali, for the appellants.

Mr. Conlan, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—I unhesitatingly answer this reference in the affirmative. Since the passing of Act XV of 1877, indeed, the point has been repeatedly considered by me in other cases, and I have never had the least doubt on the subject. The question was carefully considered by Spankie, J., and myself in *Thakurya v. Sheo Singh Rai* (1), in which, while remanding the case on a minor point, we expressed a clear opinion to the same effect as that I now record. The same question appears to have been determined in the same way by the High Court of Madras in the case of *Khanji Premchand Sett v. Chandusivaji Sett* (2). The suit therefore mentioned in the present referring order is clearly barred.

PEARSON, J.—The first question raised by this reference is whether the words in s. 2, Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871," save the plaintiff's right of action in the present

(1) I. L. R., 2 All., 372.

(2) 4 Ind. Jur., 68.

suit. I cannot hold that a right to sue is meant by or included in the term "title acquired." That term appears to denote a title to property and to be used in contradistinction to a right to sue.

The last clause of the section is, in my opinion, inapplicable, because the period of limitation prescribed for this suit by Act XV of 1877 is not shorter than that prescribed by Act IX of 1871. The difference is that under Act IX of 1871 a suit could be brought on accounts stated only: under the new enactment the account must not only be stated but signed by the defendant or his agent duly authorized in that behalf. In other words, a new condition has been attached to the suit.

I am constrained therefore to conclude that, as the law stands, the present suit is in effect barred.

OLDFIELD, J.—I am of opinion that the suit is barred under art 64, sch. ii. of Act XV of 1877, and that the limitation is not saved by that part of s. 2 of the Act which provides that nothing in the Act shall be deemed to affect any title acquired under the Act of 1871 or any enactment repealed, the title acquired referred to being title to property, not mere rights of action. Nor do I consider that the latter part of s. 2 will apply to save limitation.

STRAIGHT, J.—The plaintiff bases his claim upon an account stated on the 6th June, 1876, and according to the law of limitation then in force, he was entitled to sue his debtor any time within the period of three years from that date. He did not, however, bring his present suit until the 22nd February, 1878, when, but for the passing of Act XV of 1877, he obviously had one year and eleven months remaining to him within which he might under the old law have taken proceedings. Unfortunately for the plaintiff, Act XV of 1877 requires that an account stated, in order to be available for the purpose of saving limitation, should be signed by the debtor or his legally authorized agent, and its practical effect is to render the plaintiff's unsigned account of no effect. This no doubt is a case of genuine hardship, from which it would be equitable to relieve him, but Act XV seems to me to afford us no means for doing so. I agree with Mr. Justice Pearson that plaintiff's right to sue on his unsigned account stated cannot be regarded as a

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“title acquired” within the meaning of s. 2 of the Act of 1877. Nor can I hold that the terms of art. 64 prescribe a “shorter period” of limitation than that prescribed by Act IX of 1871, when they in fact render an unsigned account stated inoperative altogether for the purpose of saving limitation. It, therefore, seems to me that the suit is barred.

1880
August 12.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

JUMNA SINGH AND ANOTHER (DEFENDANTS) v. KAMAR-UN-NISA
(PLAINTIFF)*

Act X of 1877 (Civil Procedure Code), Chapters XLI, XLII, and s. 577—Appeal—Res judicata.

M sued *K* and *J* to enforce a right of pre-emption in respect of property which he alleged *K* had sold to *J*. *K* denied that she had sold such property to *J*. *J* set up as a defence that *M* had waived his right of pre-emption. The Court of first instance dismissed the suit on the ground that the alleged sale had not taken place. *J* appealed, making *M* and *K* respondents. The lower appellate Court dismissed the appeal, also holding that the alleged sale had not taken place. *J* then appealed to the High Court, making *K* the respondent. *Held* that neither the appeal from the original decree in the suit nor the appeal from the appellate decree therein was admissible.

Held also that the finding as to the alleged sale was one between the plaintiff and the defendants in the suit and not between the defendant-vendor and the defendant-vendee, who were not litigating, and would not bar adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the sale.

THE plaintiff in this suit alleged that the defendant Kamar-un-nisa had transferred to the two other defendants, by way of conditional sale or mortgage, her shares of two villages called Alinagar and Bahlui Deh, under an instrument dated the 22nd March, 1878; that he was a co-sharer of those villages, and as such entitled, under the terms of the administration-papers of those villages, to have such transfer made to him; and that, on receiving information of the conditional sale, he had expressed his desire to purchase the shares, but the vendor's husband and the vendees had refused to sell the same to him. He claimed to have an absolute sale of the shares made to him on payment of the principal amount of the

* Second Appeal, No. 68 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 9th October, 1879, affirming a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 21st June, 1879.