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of it going as it does directly to our jurisdiction to hear this appeal. In our opinion, the plaintiff's suit being of a nature cognizable by a Small Cause Court, a second appeal is precluded by s. 586 of the Civil Procedure Code. The preliminary objection must therefore prevail and the appeal will accordingly be dismissed with costs.

Appeal dismissed.

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 June 18.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

DEBI PRASAD AND OTHERS (DEFENDANTS) v. JAFAR ALI (PLAINTIFF).*

Determination of Title by Revenue Court—Res judicata—Estoppel—Act IX of 1871 (Limitation Act), s. 29 and sch. ii, arts. 14, 15, 118, 145—Limitation—Suit for possession of immoveable property—Suit for a declaration of proprietary right.

In 1864 the defendants served a notice upon the plaintiff demanding rent for land in his possession for which the plaintiff had not paid them rent previously. The plaintiff thereupon instituted a suit in the Revenue Court contesting his liability to pay rent for such land on the ground that he was the proprietor thereof. A decree was made in that suit on the 16th August, 1865, directing the plaintiff to execute a *kabuliyat* to pay the defendants rent for such land at a certain rate. The plaintiff did not appeal from that decree, but from its date until August, 1877, paid the defendants rent for such land. On the 8th August, 1877, the plaintiff instituted the present suit against the defendants in the Civil Court in which he claimed a declaration of his proprietary right to such land, and to be maintained in possession thereof as proprietor, free from the liability to pay rent, and to have the decree of the Revenue Court dated the 16th August, 1865, declared null and inoperative. *Held* that, the plaintiff's suit in the Revenue Court not being one which that Court was competent to entertain, the decision in that suit could not be held final on the question of title raised in the present suit; that there was nothing in the conduct of the plaintiff which estopped him from instituting the present suit; that the limitation applicable to the present suit was not that provided by art. 118 of sch. ii of Act IX of 1871, but that provided by art. 145 of that schedule, a suit by a person in the possession of land for a declaration of proprietary right being substantially a suit for possession of immoveable property, and the present suit was therefore within time; and that arts. 14 and 15 of that schedule were not applicable, there being no decree or order which the plaintiff was bound to have set aside within one year.

THE plaintiff in this suit, who was in the possession of twelve bighas twelve biswas of land situate in a village called Sudiapur,

* Second Appeal, No. 132 of 1880, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 8th December, 1879, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 30th March, 1878.

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claimed "a declaration that he was the proprietor of such land, to be maintained in proprietary possession thereof, to be protected from payment of rent to the defendants in respect thereof, and to have a decree, dated the 16th August, 1865, declared null and void." The defendants were the proprietors of Sudiapur. The land in suit had formerly belonged to one Umrao Mir Khan and one Saiyad Mir Khan, and had been confiscated by the Government in or about the year 1858, and subsequently conferred by the Government on the plaintiff in exchange for other land held by him. In 1864 the plaintiff was served with a notice in writing in which the persons represented by the defendants claimed rent for the land in suit at the rate of Rs. 58-12-0 per annum. On the 8th April, 1864, the plaintiff instituted what purported to be a suit under s. 14 of Act X of 1859 contesting his liability to pay such rent, alleging that he was the proprietor of the land. On the 16th August, 1865, the District Judge, on appeal by the defendants from the decision of the Deputy Collector in such suit, made the decree which the plaintiff sought in the present suit to have declared null and void. That decree directed the plaintiff to execute and deliver to the defendants a *kabuliyat* agreeing to pay rent for the land in suit at the rate of Rs. 35-4-0 per annum. From the date of that decree the plaintiff paid the defendants rent for the land in suit at that rate. The present suit was instituted by the plaintiff on the 8th August, 1877.

The defendants stated in defence of the suit as follows :—"The land in suit is part of a garden measuring forty-two bighas of which Umrao Mir Khan and Saiyad Mir Khan were the original owners: their rights were confiscated by Government on account of their rebellion: the Government gave the garden and land confiscated by way of compensation for a garden of which the plaintiff was in possession as a tenant and which the Government appropriated: the plaintiff cut down the trees of the garden and caused it to be brought under cultivation: he having converted the garden land to agricultural land, the zamindars served him with a notice of assessment of rent under Act X of 1859: the plaintiff sued the zamindars in the Revenue Court to impeach the propriety and legality of the notice and got a decree on the 24th December, 1864:

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on appeal to the Judge a decree was passed in favor of the zamindars charging the land with rent at Rs. 3 per bigha: the plaintiff did not appeal specially from the decree of the Judge: since 1865 the plaintiff has regularly paid the rent decreed against him: the land having been charged with rent by a competent Court, no fresh suit will lie to contest the plaintiff's liability to pay rent: the plaintiff is not now competent to claim to be declared the proprietor of the land: the decree of the Judge is not null and void."

The Court of first instance gave the plaintiff a decree declaring that the plaintiff was the proprietor of the land in suit, its decision being as follows:—"The suit filed by the plaintiff in the Court of the Deputy Collector of Allahabad was not really a suit under s. 14 of Act X of 1859. It is not denied by the defendants that the plaintiff never before the notice was served on him paid rent for the land in dispute. The notice which was served upon the plaintiff was not a notice under s. 13 of that Act. The suit had really for its object to establish the plaintiff's non-liability to pay rent for the land on the ground that he and not the zamindars was its proprietor. Such being the case, the Revenue Court had no jurisdiction to hear it according to the provisions of any law in force in 1864 or 1865. The Judge in trying an appeal from a decision of an Act X Court could not exercise a higher jurisdiction than the latter Court. In my humble opinion, the decision of the Judge of Allahabad, dated the 16th August, 1865, was *ultra vires*. I record this opinion with due deference to the learned Judge who passed it. Even assuming that the Judge had jurisdiction to pass that decision in an Act X suit, it would not be binding on a Civil Court trying a question of proprietary title to land between conflicting claimants. It has been held by the Privy Council in *Khugowlee Singh v. Hossein Bux Khan* (1) that an Act X Court is not competent to adjudicate on a question of title. The plaintiff, it is admitted, has paid rent since the date of the decree, but that circumstance does not seem to me to have the legal effect of estopping the plaintiff from bringing this suit. It is indirectly admitted by the defendants in their written statement that Umrao Mir Khan and Saiyad Mir Khan were proprietors of the garden as well as of

(1) 7 B. L. R., 673.

the land covered by it which was confiscated by Government. It was decided by the Judge of Allahabad on the 20th March, 1866, in another Act X suit to which the zamindars of mauza Sudiapur were parties, that Umrao Mir Khan and Saiyad Mir Khan were proprietors of the forty-two bighas of land of which the property in dispute is a part, and that the persons to whom Government granted it became its proprietors. This decision of the Judge is not conclusive evidence on the question of proprietary title in a civil suit, but it affords some evidence which the defendants were bound to rebut, but they failed to do so. The plaintiff therefore is the proprietor of the land in dispute, and as he has instituted this suit before he had paid rent to the defendants for twelve years, his proprietary title has not yet been extinguished. The plaintiff is only entitled to a decree declaring him to be the proprietor of the land in dispute." On appeal by the defendants the lower appellate Court affirmed the decree of the Court of first instance.

On second appeal by the defendants to the High Court, it was contended on their behalf, *inter alia*, that the plaintiff, having accepted the position of tenant, could not dispute the title of the defendants as landholders; that the payment of rent by the plaintiff amounted to a waiver of his right as owner to the land; that the plaintiff could not question the validity of the decree of the 16th August, 1865, having originated the proceedings in which that decree was made, and that decree was conclusive as between the parties to the present suit; and that the suit was barred by limitation.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Pandit *Ajudhia Nath*, for the appellants.

The *Senior Government Pleader* (Lala Juala Prasad), Munshi *Ram Prasad*, and Babu *Oprokash Chandar Mukarji*, for the respondent.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The suit is in respect of a garden; twelve bighas twelve biswas, part of land which once belonged to Umrao Mir

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Khan and Saiyad Mir Khan, and which was confiscated by Government about 1858 for rebellion. The land in suit was subsequently transferred to plaintiff by Government in exchange for other land. It appears that in 1864 defendants, or rather those whom the defendants before us represent, served a notice on plaintiff demanding rent on the land: plaintiff filed a suit in the Revenue Court to contest the demand: this suit was decreed by the Deputy Collector, but on appeal by the defendants in that suit the Judge ordered the plaintiff to execute a *kabuliyat* to pay rent, and the rent has been paid since that time, 16th August, 1865. The plaintiff instituted this suit on the 8th August, 1877, for a declaration of his right as proprietor, free from liability to pay rent to the defendants, and to have the proceedings taken in 1864 and 1865 declared null and inoperative. The Courts below have decreed the claim. Defendants appeal on several grounds :—(i) that the decree of the Judge in 1865 is final ; (ii) that the plaintiff is estopped from setting up a proprietary title ; (iii) that the suit is barred by limitation ; (iv) that plaintiff is in fact a tenant and liable to pay rent ; (v) that he cannot succeed against defendants who are purchasers from those in whose favor the decree in 1865 was made.

The first plea fails. Although the plaintiff in 1864 brought a suit in the Revenue Court ostensibly under s. 14, Act X of 1859, he did not in fact come in acknowledging his tenancy and disputing liability to pay rent on any ground on which a suit could be maintained in the Revenue Court, but on the ground that he was a proprietor, and asking for his right to be established. Such a suit was not one which the Revenue Court was competent to entertain, and the decision in that suit cannot be held final on the question of the title now in litigation. Nor is the plea of estoppel valid. The plaintiff only submitted to what he considered to be a valid order of the Court, and there has been no renunciation of his right in favor of defendants, and nothing in his conduct towards defendants, or those whom defendants represent, which can estop him in this suit if brought within the term of limitation. All he did was to refrain from taking earlier steps to obtain his rights and this was done through ignorance of his rights. We are asked to apply the law of limitation in art. 118, Act IX of 1871, the Act applicable to this

suit; but we think the suit should be governed by art. 145. By s. 29, "at the determination of the period hereby limited to any person for instituting a suit for possession of any land, his right to such land shall be extinguished." The right may be enforced so long as the remedy by suit for possession is not barred, and the law of limitation for a suit for possession of immoveable property should govern the suit for the declaration or enforcement of the proprietary right, the latter being substantially a suit for possession in the fullest sense, *i. e.*, holding and dealing with the property as owner. In this view the suit is not barred. Nor are we of opinion that arts. 14 and 15 apply, there being no decree or order which it was incumbent on plaintiff to have set aside within one year. The defendants as purchasers are in no better position to defend this suit than those from whom they purchased; the objection on this point therefore fails; and we are shown no grounds for interference in second appeal with the finding of the Courts on the question of title. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

GAURI SAHAI AND ANOTHER (PLAINTIFFS) *v.* RUKKO (DEFENDANT).*

Hindu Law—Mitakshara—Inheritance—Females.

According to Mitakshara Law none but females expressly named can inherit, and the widow of the paternal uncle of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case.

Munshi *Hanuman Prasad*, Pandit *Bishambhar Nath*, and Mir *Zahur Husain*, for the appellants.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the respondent.

The order of remand of the High Court (PEARSON, J., and OLDFIELD, J.,) was made by

* First Appeal, No. 83 of 1879, from a decree of Maulvi Sami-ul-lah Khan, subordinate Judge of Moradabad, dated the 24th June, 1879.