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where an application is made more than a year after the last order made against the judgment-debtor in any previous execution, then a fresh notice must be served.

In my opinion this appeal should be dismissed with costs to the respondents to be paid by the appellant.

JWALA PRASAD, J.—I agree.

DAS, J.—I also agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

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June, 2.

SUBEDAR RAI

v.

RAMBILAS RAI.*

Estates Partition Act, 1897 (*Ben. Act V of* 1897), *section* 119—*suit by a tenant contesting an order made under Chapter VI—whether section* 119 *a bar.*

In a partition proceeding the Deputy Collector recorded certain land as the plaintiffs' kasht land but on appeal the Collector ordered that the land should be recorded in the khasra as zerait, and the partition was made accordingly. The plaintiffs, therefore, brought the present suit on the allegation that the disputed land was their ancestral guzashta kasht land from before the time when their ancestor acquired a share in the proprietary interest in the village. The defence was *inter alia* that the suit was barred by the provisions of section 119, Estates Partition Act, 1897.

Held, that the suit was maintainable as section 119, Estates Partition Act, does not bar a suit contesting an order made under Chapter VI of the Act.

* Appeal from Appellate Decree no. 1062 of 1922, from a decision of J. F. W. James, Esq., I.C.S., District Judge of Shahabad, dated the 22nd May, 1922, reversing a decision of M. Saiyid Hasan, Additional Subordinate Judge of Shahabad, dated the 21st July, 1921.

Janki Nath Chowdhury v. *Kali Narain Chowdhury*(1), *Lakhi Chaudhry* v. *Akloo Jha* (2) and *Baldeo Sahi* v. *Brajnandan Sahi*(3), followed.

Chaudhary Kesari Sahai Singh v. *Hitnarayan Singh*(4) and *Anil Kumar Biswas* v. *Rash Mohan Saha* (5), distinguished.

Appeal by the defendants.

The plaintiffs brought this suit on the allegation that 25 bighas of land was their ancestral guzashta kasht from before the time when in 1909 their ancestor acquired a half-anna share in the proprietary interest in the village. In certain partition proceedings the Deputy Collector recorded this land as the plaintiffs' kasht land; but on appeal the Collector ordered that the land should be recorded in the khasra as zerait and the partition was made accordingly. The plaintiffs claimed a declaration that the land was their kasht land and possession and mesne profits. The defence was that the land was zerait and that the suit was barred by the provisions of the Estates Partition Act.

The Subordinate Judge held that the plaintiffs had failed to prove their title; and, further, that section 119 of the Estates Partition Act barred the suit. The District Judge reversed both these findings. He held that the plaintiffs had proved that they had possessed this land as raiyats at least since 1899 and that they had acquired the status of occupancy raiyats in the land. With regard to section 119 he was of opinion that as the order in the partition case which was contested in this suit was made under Chapter VI of the Act, section 119 had no application, and that there was nothing in the Act that barred the suit which was instituted by the plaintiffs in their capacity of raiyats. The defendants appealed.

(1) (1910) I. L. R. 37 Cal. 662. (2) (1911-12) 16 Cal. W. N. 639.
(3) (1918) C. W. N. (Pat.) 164. (4) (1920) 1 Pat. L. T. 507.
(5) (1923-24) 28 Cal. W. N. 46.

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Sultan Ahmed (with him *Manohar Lall*), for the appellants.

S. M. Mullick and *P. K. Mukharji*, for the respondents.

Ross, J. (after stating the facts set out above, proceeded as follows): With regard to the first finding it was contended by the learned Counsel for the appellants that inasmuch as the land was under water up to 1908, it was impossible that the plaintiffs could have acquired occupancy rights in the same. Now there is only one piece of evidence which refers to the land being under water, as appears from the judgment of the Subordinate Judge, viz., Exhibit A, a written statement by the mortgagee in a suit for redemption. The learned District Judge has dealt with this evidence and has held that a recital of this kind is of no value as evidence of fact. He was entitled to hold that opinion and in that view no objection can be taken to this finding of fact as to the status of the plaintiffs.

The substantial question in the appeal is as to the effect of section 119 of the Estates Partition Act. Two cases were referred to by the learned Counsel for the appellants, *Chaudhary Kesari Sahai Singh* v. *Hitnarayan Singh*(1) and *Anil Kumar Biswas* v. *Rash Mohan Saha*(2). Neither of these cases deals with an order under Chapter VI. They were both cases between proprietors and the substance of the partition was directly in issue in both. Section 119 clearly barred the plaintiffs' suit in both cases and these authorities throw no light on the present case where the plaintiffs are not asserting any right as proprietors but are claiming a raiyati right acquired long before they became proprietors. On the other hand in *Janki Nath Chowdhry* v. *Kali Narain Roy Chowdhry*(3), the question was as to a miras right held by one who was also a proprietor in the village. In that case also it was argued that there had been

(1) (1920) 1 Pat. L. T. 507. (2) (1923-24) 28 Cal. W. N. 40.
(3) (1910) I. L. R. 37 Cal. 662.

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a decision of the revenue authorities against the plaintiff as to the reality and extent of his tenure and that it was not open to him to have the matter reagitated in the Civil Court. On this argument their Lordships observed as follows: "No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be over-ruled. It is manifest that if, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would in our opinion be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings." This language applies precisely to the present case. Similarly, in *Lakhi Chaudhry* v. *Akloo Jha*(1) the question was discussed with regard to an order passed under Chapter VI and their Lordships said, "In the second place section 119 of the Estates Partition Act specifies the orders of the revenue authorities which cannot be questioned by a suit in any Civil Court. An order under section 45 or 46 is not one of the orders mentioned in section 119. The reason for the exclusion is obvious. The determination by the revenue authorities is of a summary character and it cannot be taken to conclude finally a question of title between one of the proprietors and a stranger to the proceedings." The same view has been taken in this Court in *Baldeo Sahi* v. *Brajnandan Sahi*(2). A partition deals with the rights of proprietors and so far as raiyati lands are concerned they

(1) (1911-12) 16 Cal. W. N. 639.
(2) (1918) Cal. W. N. (Pat.) 164.

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are only entitled to a distribution of the rents. It could not have been the intention of the Act that the rights of tenants should be conclusively determined by the record-of-rights prepared for the purpose of partition and that this is so is clear from the fact that Chapter VI and section 111 are not covered by section 119. There is in my opinion nothing in that section to bar the present suit. The learned Subordinate Judge was of opinion that section 119 must bar the suit because the effect of decreeing the plaintiffs' suit would be to upset the whole partition. In my opinion that is not so. Section 89 provides for the case of dispossession of the proprietor of a separate estate by a decree of a Court of competent jurisdiction and enacts that in such case the partition shall not be disturbed, but such proprietor shall be entitled to recover from the proprietors of the other separate estates formed by the partition such compensation as may be fair and equitable. That section does not apply in terms to the present case; and there is no reason why the principle should not be applicable. If the value of the defendants' estate is reduced by the declaration of the plaintiffs' raiyati right in this land, their remedy in my opinion would be to seek compensation from the other proprietors; but there is no ground in justice why the fact that a partition has been made on the basis that this land is proprietor's land should debar the raiyat from asserting his raiyati right.

I would therefore dismiss this appeal with costs. As it appears that during the pendency of the suit possession was delivered and the plaintiffs were dispossessed, the decree will entitle them to recover possession with mesne profits.

DAS, J.—I agree.

Appeal dismissed.