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the Jakhorikar branch unsuccessfully endeavoured to repudiate it in the latter half of the last century, but which the Pimparne branch has throughout recognized until quite recently. If this be so, the fact that the services incidental to the *vatan* have been abolished, cannot affect the title of the first defendant as established by such custom.

With respect to the *pátelki vatan* and the *mirás* lands, the only evidence in the case is the first defendant's statement, that they are ancestral; but they are in no way connected with the *deshmukhi vatan*, and there is no evidence of a custom of primogeniture, except with respect to that *vatan*. We think, therefore, the general law must prevail, and that the plaintiff and other younger brothers are entitled to a partition as to that property.

The decree must, therefore, be varied by directing a partition as to the *pátelki vatan* and *mirás* lands. Appellant to pay respondents their costs of this appeal.

Decree varied.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886. *April* 20.

BA'I JAMNA' (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I ICHHA', (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, *Sec.* 14—*Civil Procedure Code* (*Act VIII of* 1859), *Sec.* 269, *summary proceedings under—Neglect to set aside order passed in such proceedings within one year by purchaser at a Court sale—Suit to establish title to property by such purchaser.*

At a Court sale held on the 15th November, 1871, in execution of a decree, the plaintiff's deceased husband purchased a house, but neglected to register his sale certificate. In attempting to recover possession he was obstructed by the defendant, who claimed the property as her own. Summary proceedings under section 269 of Act VIII of 1859 were thereupon instituted against the defendant, and the defendant's claim was upheld by an order passed on the 7th November, 1872. In the meantime the plaintiff's husband having died, plaintiff filed, on the 31st March, 1873, a regular suit to establish her title. On the 8th July, 1873, she obtained a second certificate, and registered it. The Court of first instance awarded her claim, but on appeal by the defendant the lower Appellate Court reversed that decree, on the ground that, at the institution of the suit, plaintiff had not a registered certificate of sale. That decree was confirmed on the 17th November, 1879,

* Second Appeal, No. 290 of 1884.

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on second appeal, by the High Court. On the 30th April, 1880, plaintiff brought this suit on the strength of her registered certificate. The Court of first instance allowed her claim. The defendant appealed, and the lower Appellate Court held her suit not maintainable. On appeal by plaintiff to the High Court,

Held, confirming the decree of the lower Appellate Court, that plaintiff's suit was barred. The Subordinate Judge having, by his order of the 7th November, 1872, passed in the summary proceedings, disposed of the case on the ground that the property belonged to the defendant, the plaintiff was under an obligation to displace that order by a suit instituted within one year from its date.

SECOND appeal from the decision of E. M. H. Fulton, Acting Judge of Surat.

This was a suit to recover possession of a house bought at a Court sale.

On the 15th November, 1871, plaintiff's deceased husband purchased the house in question at a Court sale held in execution of a decree against one Gorábhái, but omitted to register his sale certificate. On attempting to take possession he was obstructed by the defendant, who was then in possession, and claimed it as her own. Consequently he instituted summary proceedings against the defendant under section 269 of Act VIII of 1859, and an order was passed on the 7th November, 1872, to the effect that the house belonged to the defendant. The plaintiff's husband having died, the plaintiff on 31st March, 1873, filed a regular suit against the defendant to establish her title to the house. On the 8th July, 1873, she obtained a second certificate, and registered it. The Court of first instance awarded plaintiff's claim, but on appeal by the defendant the suit was held not maintainable, on the ground that the plaintiff had not a registered sale certificate at the time of the institution of her suit. On second appeal, the High Court confirmed this decision on the 17th November, 1879, remarking that, the fact that the plaintiff subsequently obtained a certificate, and registered it, might perhaps enable her to bring another action.

The plaintiff thereupon brought this suit on the 30th April, 1880.

The defendant *(inter alia)* contended that the plaintiff's suit was barred, as she had failed to set aside the summary order of the 7th November, 1872, passed in favour of the defendant, and that

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the defendant had been in adverse possession for about twenty years.

The Court of first instance awarded plaintiff's claim. The defendant appealed to the District Judge, who reversed the lower Court's decree with the following remarks:— * * "The most important question for consideration is, whether the decision in the summary proceedings not having been set aside is a bar to this suit under section 13 of the Civil Procedure Code (Act XIV of 1882).

"It is with some regret that I have been obliged to come to the conclusion that it is a bar. In the summary proceedings the defence set up by the defendant was that she was the owner of the land in dispute, and the decision was in her favour, on the ground that the property belonged to her as its owner. No doubt the plaintiff's claim in the summary proceedings might have been dismissed on the ground that the plaintiff did not properly represent the judgment-debtor, not being in possession of a registered certificate of heirship. Had such a defence been set up, and had the summary proceedings been decided on it, I should properly have agreed with the Subordinate Judge in holding that they were no bar to this suit. But the defence which the defendant, as a matter of fact, took, was equally open to her, and the decision, that she was the owner of the property and not the judgment-debtor, is conclusive against the plaintiff so long as such decision remains in force. * * * * * * * * * * The next point to be considered is, whether this suit is within time to set aside the decision in the summary proceedings. I am afraid that question must be answered in the negative. The only way in which the commencement of the present suit could possibly be brought within time would be by holding that the plaintiff was entitled to the benefit of section 14 of the Limitation Act XV of 1877. But I think that it is quite clear that he is not entitled to that benefit. I doubt whether this suit, which is based on the new certificate of sale, can be said to be founded upon the same cause of action as the abortive suit which was dismissed by the High Court on the express ground that the plaintiff for want of a registered certificate had no right of

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action. But, however this may be, I consider that it cannot be said that the Courts were unable to entertain the former suit 'from defect of jurisdiction or other cause of a like nature'. The subject has been discussed in *Jotárám Bechar* v. *Bái Gangá*[1], and I think there can be no doubt that the plaintiff's omission to bring forward the necessary evidence (*i. e.* registered certificate) in support of his claim is not a cause of a like nature to want of jurisdiction. That the period of limitation in a suit of this sort is one year from the date of the summary order, appears established by the decision of the High Court in *Krishnáji Vithal* v. *Bháskar Rangnáth*[2]. Either article 11 or article 13 of Schedule II of the Limitation Act XV of 1877 would apply to this suit.

"It was argued that the suit had become time-barred long before Act XV of 1877 came into force under section 269 of the Civil Procedure Code (Act VIII of 1859),—Act IX of 1871 never applying to a suit of this kind, owing to an apparent omission to repeal the last few words of section 269. How this omission occurred it is unnecessary to consider. As I hold that the plaintiff is not entitled to the benefit of section 14 of the Limitation Acts, it is not material whether these Acts or section 269 of the old Code constitute the law of limitation to be applied.

"On the first issue I find that the cause of action arose on the 7th November, 1872, the date of the order in the summary proceedings; on the second, that the claim is time-barred; and on the third, that the summary proceedings bar this suit.

"I reverse the decree of the Subordinate Judge, and dismiss the plaintiff's claim. As the plaintiff has failed on very technical grounds, apparently solely owing to his ignorance of the necessity of registering his first certificate of sale, I direct that the parties respectively pay their own costs throughout."

The plaintiff preferred a second appeal to the High Court.

Máhádev Chimnáji A'pte for the appellant:—The omission on the part of the appellant to set aside the order of the 7th November, 1872, does not bar the present suit, which is for the recovery of immoveable property. The first suit was for estab-

(1) 8 Bom. H. C. Rep., 228. (2) I. L. R., 6 Bom., 611.

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lishing a better title to the house. If the Court thought that that suit was not maintainable without a registered sale certificate, there was no cause of action to the appellant—see *Harkisandás* v. *Bái Ichhá*[1], and the Court had no jurisdiction. The appellant's prosecution of the suit to second appeal may be looked upon as included in the expressions "defect of jurisdiction" or 'other cause" in section 14 of the Limitation Act XV of 1877. Appellant all that time was proceeding with due diligence, and this time must be excluded—see *Chunder Madhub* v. *Bissessure Debea*[2]; *Luchman Pershad* v. *Nimhoo Pershad*[3]; *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar*[4]; *Deo Pershad Singh* v. *Pertab Koeree*[5]. The first suit was brought within one year from the date of the order, and proved abortive, and failed on a mere technical ground. Another suit can be brought within twelve years. The appellant, though she had not got a registered certificate at the institution of the suit, was entitled to get another, and she did get one, and registered it subsequently—*Lakshman's Case* . A second suit on such subsequently registered certificate should be allowed—*Ishri Dat* v. *Har Náráin*[7].

Máneksháh Jehángirsháh for respondent:—The lower Court was right in holding that the plaintiff's suit was barred on account of the plaintiff's failure to sue within one year to set aside the order in the summary suit. The case of *Ishri Dat* v. *Har Náráin*[8] is in my favour. Section 14 of the Limitation Act XV of 1877 does not apply. It was laches on plaintiff's part to omit to register the certificate. The Court had jurisdiction when it dismissed the suit. There was no "defect of jurisdiction" or "other cause of a like nature" within the meaning of section 14. When the plaintiff found that her suit was not maintainable without a registered certificate, she ought to have withdrawn it under section 373 of the Civil Procedure Code (Act XIV of 1882); but, instead of that, she elected to proceed with it to second appeal. Her proper course

(1) I. L. R., 4 Bom., 155.
(2) 6 Calc. W. R. Civ. Rul., 184.
(3) 17 Calc. W. R. Civ. Rul., 266.
(4) 12 Calc. W. R. Civ. Rul., 45.
(5) 13 Calc. Rep., 218.
(6) I. L. R., 9 Bom., 472.
(7) I. L. R., 3 All., 334.

was to apply, within one year, to set aside the summary order passed against her. So long as that order is in force, it is binding on the plaintiff, and debars her from bringing any suit to establish her title by a regular suit.

SARGENT, C. J. :—The second appeal in this case raises two questions : first, whether the plaintiff can claim the benefit of section 14 of the Limitation Act XV of 1877, by deducting the time she was engaged in prosecuting the first suit. That suit was dismissed, owing to the plaintiff not having a registered certificate at the date of the institution of the suit. It was contended for the plaintiff that the real object of the suit was to determine whether the judgment-debtor or the defendant had the better title, and that the Court was thus prevented from entertaining the suit within the contemplation of section 14. Assuming this to be so, for the sake of argument, the question arises, whether the cause was of "a like nature" to "a defect of jurisdiction," and we think that the Acting Judge was right in answering it in the negative. The plaintiff's inability to produce a registered certificate at the time of the institution of the suit was owing entirely to her own laches. A defect of jurisdiction, on the contrary, is due to the provisions of the law itself. The cause of the summary dismissal of her suit was of a nature which, doubtless, might well have satisfied an application, under section 373 of the Code of Civil Procedure (Act XIV of 1882), for leave to withdraw the plaint with liberty to file another; but, in that case, the Statute of Limitation would have run against the plaintiff, as if the first suit had not been brought.

It was secondly urged that, notwithstanding the plaintiff's having resorted to the summary proceedings provided by section 269 of the Code of Civil Procedure (Act VIII of 1859), she was entitled to sue in ejectment within twelve years; those proceedings being, it was said, null and void owing to the plaintiff's not having a registered certificate. But plaintiff's right to institute those proceedings arose from the fact of process for delivery of possession having been issued to her, and the execution of it having been obstructed by the defendant; and the Subordinate Judge having disposed of the case on the ground that the property belonged to

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defendant, the plaintiff was under an obligation to displace that order by suit instituted within a year.

We must, therefore, confirm the decree, with costs on appellant.

Decree confirmed.

FULL BENCH.

Before Mr. Justice West, Mr. Justice Nánábhái Haridás, and Mr. Justice Birdwood.

1886. *June* 24.

VITHAL KRISHNA, (ORIGINAL PLAINTIFF), APPLICANT, *v.* BA'LKRISHNA JANA'RDAN AND OTHERS, (ORIGINAL DEFENDANTS), OPPONENTS.*

Stamp—Court Fees Act VII of 1870, *Secs.* 6 *and* 12, *and Schedule II, Art.* 17*—Valuation by Subordinate Court—Power of High Court to revise it under extraordinary jurisdiction—Practice—Civil Procedure Code (Act XIV of* 1882), *Sec.* 622, *and Reg. II of* 1827, *Sec.* 5*—Suit to re-establish judgment-debtor's right to property on removal of attachment.*

A decision by a Subordinate Court on a question of valuation, determining the amount of a Court fee, is, notwithstanding its declared finality, subject to revision by the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882) and section 5 of Regulation II of 1827.

Where, on the removal of an attachment at the instance of a third party, the judgment-creditor brought a suit to establish the right of his judgment-debtor to the property from which the attachment had been removed, and to get the summary order to remove the attachment set aside,

Held, that the proper stamp on a plaint of that kind was Rs. 10 under section 6 and Schedule II, article 17 of the Court Fees Act VII of 1870.

THIS was a reference to a Full Bench by the Division Bench consisting of Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Justice.

The reference was as follows:—

"Regard being had to section 12 of Act VII of 1870, if a District Judge determines what stamp duty ought to be paid on an appeal presented to him, can the High Court, as a Court of appeal or revision, in a case where his decision is not to the detriment of the revenue, alter such decision, on the ground that he misconceived the nature of the suit, or on any other ground?"

Ghanashám Nílkanth Nádkarni for the applicant:—An erroneous decision by a Subordinate Court on a question of Court

* Extraordinary Application, No. 211 of 1884.