APPELLATE CIVIL.

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

1891.
July 30.

JA'MSANG DEVA'BHA'I, (ORIGINAL APPLICANT), APPELLANT, *v.* GOYÁBHA'I KIKÁBHA'I, (ORIGINAL OPPONENT), RESPONDENT.*

The Gujarát Tálukdárs' Act (Bombay Act VI of 1888*), Sections* 16, 21, *effect of—Decision of the District Court on appeal from the Tálukdári Settlement Officer—Second appeal—Stamp—Court-fees stamp on the memorandum of appeal—Article 1, Schedule I, Article 1, Schedule II of the Court Fees Act (VII of* 1870*)—Partition decree—Non-execution—Application to the Tálukdári Settlement Officer to effect partition under the decree—Decree upon which no relief could have been obtained in a Civil Court.*

A decision of the District Court on appeal from the Tálukdári Settlement Officer is subject to second appeal to the High Court.

A second appeal from an order rejecting an application for execution of a partition decree under the Gujarát Tálukdár's Act (Bombay Act VI of 1888) is not within the contemplation of article No. I of Schedule I, but is an application falling under Article No. 1 of Schedule II of the Court Fees' Act (VII of 1870). The Court-fee stamp of two rupees should, therefore, be affixed to the memorandum of the appeal.

In 1863 the appellant obtained a decree for partition, which declared his right to a one-sixth share in a certain village. The decree was never executed. In the year 1888 he presented an application to the Tálukdári Settlement Officer under section 10 of Bombay Act VI of 1888 for partition under the decree.

Held, that as the execution of the decree was barred when the Act was passed, and as no fresh suit could have been brought against the defendant upon the right declared by the decree, the application should be rejected.

THIS was a second appeal from the decision of E. M. H. Fulton, District Judge of Ahmedabad.

On the 3rd October, 1861, the appellant Jámsang Devábhái, (original applicant), obtained a partition decree in the Court of the Subordinate Judge of Gogha. The decree, which was subsequently confirmed in appeal by the District Court at Ahmedabad in the year 1863, awarded to the appellant one-third of a 50 *dokda* share in the village of Odarka. The appellant never executed the decree.

On the 1st May, 1888, the appellant relying on his decree presented an application to the Tálukdári Settlement Officer under

* Second Appeal, No. 340 of 1891.

section 10* of the Gujarát Tálukdárs' Act (Bombay Act VI of of 1888) for a partition, and that officer, notwithstanding the opponent's contention that the decree was barred, passed an order granting the application.

The respondent Goyábhái Kikábhái, (original opponent), appealed to the District Court, which reversed the order and rejected the application.

The District Judge in his judgment made the following remarks :—

"The opponent has presented an appeal in which the question arises whether the applicant was entitled to apply under section 10 of Bombay Act VI of 1888.

"In my opinion, the answer must be in the negative. The section provides that 'every person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Tálukdári estate' ... ... 'shall be entitled to have his share divided from the rest of the estate.' The Tálukdári Settlement Officer considered that the question which he had to determine was whether the applicant had ever obtained a decree of a competent Court establishing his title; but, taking the wording of the section in its most literal sense, I do not think it necessary to assign to the words 'declaring him to be entitled' any other than a present signification. I understand these words to indicate that the applicant must show that he has obtained a decree declaring him at the present time, *i.e.*, at the time of making his application, to be entitled to partition.

*Section 10.—(1) Every person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Tálukdári estate, and every co-sharer whose name is recorded, as such, in the settlement register prepared in accordance with section 5 and, pending the preparation of such register, every person whose title to any such share as aforesaid is not disputed by any other person claiming a share in the said estate, shall be entitled to have his share divided from the rest of the estate to hold the same as a separate estate.

(2) Any two or more such co-sharers or persons shall be entitled to have their shares divided from the rest of the estate and to hold the same jointly as separate estate.

1891.

Jámsang Devábhái v. Goyábhái Kikábhái.

In the present case the operation of the decree was barred many years ago by section 20 of Act XIV of 1859, and though it declared the applicant's rights at the time it was passed and for so long as it was capable of enforcement, it does not purport to declare what they are at the present day."

* * * * *

"Whether in the present case the decree-holder has been unjustly deprived of his rights, it is impossible to determine without inquiring into the merits of the compromise alleged by the opponent. But whatever may be those merits, when construing the meaning of the section, I have to be guided by the general principles which indicate that it was not the intention of the Legislature to depart from its usual policy by reviving claims already extinguished, and thereby transferring rights of possession long since assured by law to their present holders."

Against the decree of the District Court the applicant Jámsang Devábhái appealed to the High Court.

At the hearing two preliminary objections were taken on behalf of the respondent, *viz.*, first, that no second appeal lay; second, that the memorandum of appeal was not sufficiently stamped.

Govardhanrám Mádhavrám Tripathi, for the respondent, in support of the above objections :—The original application for partition was made to the Tálukdári Settlement Officer under the Gujarát Tálukdár's Act (Bombay Act VI of 1888), and the procedure, therefore, must be governed by the provisions of that Act. It contains no provision for a second appeal in a matter originally decided by the Tálukdári Settlement Officer. Section 16* of the Act contemplates an appeal to the District Court, and though section

*Section 16.—(1) An appeal shall lie from any decision, or any part of a decision, passed under the last preceding section by the Tálukdári Settlement Officer, or other officer aforesaid, to the District Court as if such decision was a decree of a Court from whose decisions the District Court is authorized to hear appeals.

(2) Upon such appeal being made, the District Court may issue a precept to the Tálukdári Settlement Officer aforesaid, requiring him to stay the partition pending the decision of the appeal.

21* refers to the jurisdiction of the High Court, still there is no provision made for a second appeal. Section 584 of the Civil Procedure Code (Act XIV of 1882) relating to second appeals is not applicable to a case governed by a special enactment which gives no second appeal. The Tálukdári Settlement Officer is not a Civil Court, and no plaint is presented to him. He proceeds upon a mere application, and the proceedings before him are of a summary nature. The proceedings before him being not in the nature of a suit, his order cannot be a decree as defined in section 2 of the Civil Procedure Code. It is only an order. In order that there may be a second appeal, there must be first a decree of a Court of original jurisdiction; second, a decree in appeal of an appellate Court.

Further, we contend that the memorandum of appeal in this second appeal is not adequately stamped, because a Court-fee stamp of Rs. 2 only is annexed to it. If article 17, clause i, of Schedule II of the Court Fees' Act (VII of 1870) be held applicable to the present case, then a Court-fee stamp of Rs. 10 would be necessary; but if article 11 of Schedule II be held applicable, then the Court-fee stamp of Rs. 2 would be sufficient. Further, if article 1, Schedule I be held applicable, then an *ad-valorem* stamp would be required. We contend that either a Court-fee stamp of Rs. 10 or an *ad-valorem* stamp according to the value of the claim, namely Rs. 275, must be furnished by the appellant.

Gokuldás Kahándás Parekh for appellant:—We contend that a second appeal lies: section 21* of the Gujarát Tálukdár's Act (VI of 1888) reserves the jurisdiction of the High Court. As to the stamp objection this is a second appeal against a decision on an application. When a suit is based on a plaint, it is then only that an *ad-valorem* stamp is required to be paid for the memorandum of the appeal, and the reason for the payment of such a stamp is that the plaint is required to be so stamped. Applications never require an *ad-valorem* stamp, they being

* Section 21.—No Civil Court shall entertain any suit or application for the partition of a Tálukdári estate: Provided that nothing in this section shall be deemed to affect the jurisdiction of Her Majesty's High Court of Judicature at Bombay.

1891.

JÁMSANG DEVÁBHÁI v. GOVÁRHÁI KIKÁBHÁI.

invariably made on a Court-fee stamp of annas 8. Therefore, an appeal against an order made on an application would require a Court-fee stamp of Rs. 2 only, and not more. Appeals against decrees passed in execution proceedings are stamped with a Court-fee stamp of Rs. 2 even under the provisions of the Court Fees Act. Since the passing of the Court Fees Act appeals in execution proceedings are merely called second appeals, but before that Act was passed such appeals were called miscellaneons second appeals, and were stamped with a Court-fee stamp of Rs. 2 only. Although the nomenclature has now changed, still that circumstance has not made any change with respect to the Court fees—*Lakshman Shiváji* v. *Ráma Esu*[1].

Originally the suit was valued at Rs. 275, and the appeal also is valued at that amount. The provision as to the subject-matter of the suit relates to appeals on decrees, and not to appeals on orders.

[SARGENT, C. J. :—As to the first point, we think that in this case a second appeal lies, having regard to the provisions of sections 16 and 21, and as to the stamp objection we hold that the Court-fees stamp of Rs. 2 affixed to the memorandum of appeal is sufficient, this being a miscellaneous appeal arising from an order, and not from a decree.]

The appeal was then argued on the merits.

Gokuldás Kahándás Párekh for the appellant :—The question is, whether we can apply under section 16, although the execution of the decree, which we obtained in 1863, is barred by limitation. The Act then in force was Act XIV of 1859, which only barred the remedy, but did not extinguish the right. Act IX of 1871 extinguished the right only in some cases. The present Act (XV of 1877, section 28) does not apply to proceedings in execution of a decree. Section 3 provides that "suit" does not include an appeal or an application, and we contend that the bar created by section 28 applies to those cases only in which the remedy is sought by a suit. There is no suit here only an application—*Bandu* v. *Naba*[2].

(1) 8 Bom. H. C. Rep., A. C. J., 17. (2) I. L. R., 15 Bom., 238.

Govardhanrám Mádhavrám Tripathi for the respondent:—When the appellant applied to the Tálukdári Settlement Officer for execution of the decree, he had no title. It is admitted that we have been in adverse possession of the property in dispute from a time anterior to 1863 when the appellant got his decree for partition. The appellant's title has become extinguished and our title has become perfect by our adverse possession for more than twelve years. Under the provisions of the Gujarát Tálukdárs' Act the appellant could get such title only as was in existence at the time he made the application. When the present Limitation Act (XV of 1877) came into operation, the appellant had already lost his title to the property—Section 28 and article 144, Schedule II of the Act.

Sargent, C. J. :—We think that the effect of the concluding words of section 16 of Act VI of 1888 is to give the decision of the District Court on appeal from the Tálukdári Officer the same character in all respects as a decree from an ordinary suit before a subordinate officer, and that, therefore, like all such decrees, such decision is subject to second appeal to this Court. This view is assisted by the concluding words of section 21, which shows that they must, if possible, be construed so as not to affect the High Court's jurisdiction.

As to the stamp on such appeal, we do not think that the appeal is one within the contemplation of No. 1 of Schedule I of the Court Fees Act of 1870, but is an application falling under No. 1 of Schedule II, for which 2 rupees should be paid.

As to the decree passed in the suit of 1861, declaring the right of the applicant to a one-sixth share in the village, we agree with the District Judge that it could not have been the intention of the Legislature to give effect by the Tálukdári Act to a decree upon which no relief could have been obtained in a Civil Court when the Act was passed, and, therefore, that, inasmuch as the applicant admittedly could not have brought a fresh suit for relief against the defendants upon the right as declared by the decree in that suit, the Court was right in rejecting the application. Parties to pay their own costs of this appeal.

Decree confirmed.