1884.

DEVIDÁS JAGJIVAN v. PIRJÁDA BEGAM.

to appellant more than three years after the confirmation of the sale, relying on *In re Khája Patthanji* and *Tukárám* v. *Satváji Khandoji*(1). But those decisions must now be regarded as overruled by *Vithal Janárdan* v. *Vithojiráv Putlájiráv*(2) even if the lower Courts were entitled to take the objection of the Statute of Limitations, which may well be doubted, as pointed out under similar circumstances in the above case.

As to the appellant not having produced the registered certificate when the plaint was presented as required by section 59, we think that, as no doubt of its existence at the time the suit was instituted was even suggested, the Courts below ought not to have refused their consent to its being given in evidence, as required by section 63. We must, therefore, reverse the decrees of both the lower Courts, and send back the case for trial on the merits. Costs of appeal to follow the result.

Decree reversed.

(1) I. L. R., 5 Bom., 202 and 206. (2) I. L. R., 6 Bom., 586.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Pinhey.

May 9,

BA'I AMRIT, WIDOW OF HARIBHA'I ICHA'RA'M, APPLICANT.*

Practice—Procedure—Return of plaint—Decree passed on plaints.

The ruling in the case of *Prabhákarbhat bin Janárdanbhat* (1), which approves of the practice of returning the plaint for presentation to the proper Court when the trying Court has no jurisdiction prevailing in the Mofussil Courts and on the Appellate Side of the High Court of Bombay, does not govern, and is distinguishable from cases in which there have been decrees passed on the plaint.

Per BAYLEY, J.—The practice on the Original Side of the High Court of Bombay has always been to retain a plaint, unless it has been returned on presentation.

Per BAYLEY, J.—*Quære*, whether a ruling of three Judges of the High Court of Bombay on a case referred by a Division Bench of two Judges for decision by the Full Bench can be regarded otherwise than a ruling of a Division Court of three Judges?

THIS was an application for the return of a plaint for presentation to the proper Court.

Mánekshá Jehángirshá Taleyárkhán for the applicant.

* Civil Application, No. 103 of 1884.

(1) *Supra*, p. 313.

1884

In re BÁI AMRIT.

The facts are fully stated in the following judgments :—

BAYLEY, J.—On 8th March, 1884, Mr. Mánekshán Jehángirshán Taleyárkhán presented a petition on behalf of Bái Amrit, widow of Haribhai Ichárám, praying that, as in Second Appeal No. 260 of 1882 Mr. Justice Pinhey and myself had rejected the petitioner's claim, on the ground that the value of the property being more than Rs. 5,000, the Second Class Subordinate Judge of Jambusar had not jurisdiction to try suit, the plaint might be returned to her for presentation in the proper Court.

On the 20th March last, Mr. Mánekshán Jehángirshán appeared in Court, before my brother Pinhey and myself, in support of the prayer of his petition, and cited a very recent judgment the High Court in *Prabhákarbhat bin Janárdanbhat* (1), civil application No. 52 of 1884, delivered on the 6th March last. As, however, we had not had an opportunity of perusing such judgment, we reserved our decision.

The circumstances leading up to the present application are, shortly, as follows :—

In 1869, Haribhái Ichárám, the husband of the applicant Amrit, brought a suit, No. 852 of 1869, in the Court of the Subordinate Judge of Jambusar, to recover possession of a house and lands, alleging that the same formed the ancestral property of his cousin Hargóvan Girdhar, who died in 1863, leaving surviving him a childless widow Jumna, who died in 1869. The case was not decided until 1877, when the Subordinate Judge rejected the claim on the merits.

The applicant Bái Amrit filed an appeal, No. 175 of 1877, which was decided, on the 25th January, 1882, by Mr. Hammick, the Assistant Judge (F. P.) at Broach, who found that the appellant was the next of kin and heir to Hargovan and Jumna, and reversed the decree of the lower Court, directed the appellant to recover possession of the property mentioned in the plaint, and ordered that all the costs should be borne by the respondents.

An appeal was admitted in the High Court, and notice was, on the 20th June, 1882, ordered to issue. Of the fourteen grounds

(1) *Supra*, p. 313.

1884

In re BÁI AMRIT.

of objection to the decision appealed against, the first was in the following terms :—"That it is contrary to law, in that the appellants in the Court of first instance having submitted that the property in dispute was of the value of more than Rs. 5,000, and that the suit, therefore, was not cognizable by the Second Class Subordinate Judge, the lower Courts erred in omitting to inquire into that question."

The appeal came on for hearing, on the 27th June, 1883, before my brother Pinhey and myself, when, after hearing the pleaders, we passed the following interlocutory judgment :—

'The jurisdiction of the Subordinate Court was challenged on the ground that the property in suit was worth more than Rs. 5,000,—first by the defendant No. 5, Becha Gangárám, in his written statement, exhibit No. 84, and again by the defendant No. 3, Jumna, in her written statement, exhibit No. 85. It was again challenged by all the defendants in their application, exhibit 87, wherein they expressly asked the Subordinate Court to raise an issue to try the question of jurisdiction. The Subordinate Court refused to raise this issue, and the point has never yet been inquired into and determined on the merits. We must, therefore, require the Assistant Judge (F. P.) at Broach to send down to the Subordinate Court for trial the following issue, *viz.* :—

'Was the value of the property in suit, at the date of the filing of the suit, in excess of Rs. 5,000 ?

'The Assistant Judge (F. P.) should certify the finding of the Subordinate Court with his own opinion thereon, and, as the suit has been pending since 1869, the finding of the Subordinate Court and the opinion of the Assistant Judge (F. P.) should be certified to this Court with the utmost possible expedition.'

On this remand the plaintiff examined eight, and the defendants ten witnesses, and the Subordinate Judge, on the 15th October, 1883, recorded his finding that the property in suit was, at the date of the filing of the plaint, worth more than Rs. 5,000, and he, accordingly, found the issue in the affirmative.

On the 11th December, 1883, Mr. Shripad Bábáji Thákur, Assistant Judge (F. P.) at Broach, recorded his finding also in the

1884

In re BÁI AMRIT.

affirmative. On the 7th February, 1884, the case came on again before my brother Pinhey and myself, when Mr. Mánekshâh declining the offer made to him by the Court to withdraw the suit under section 373 of the Civil Procedure Code, the decree was reversed with costs. Lastly, on the 20th March last, Mr. Mánekshâh asked us to allow the plaint to be returned.

There have thus, since this suit was instituted in 1869, been no less than three decrees, including orders as to payment of costs, as well as two findings on the issue sent down on the 27th June, 1883, by this Court.

I have perused the printed copy of the judgment delivered on the 6th March last by Mr. Justice West.

Mr. Justice West and Mr. Justice Nánábhâi Haridás having had an application made to them for the return of a plaint, and disapproving, as it appears, of a ruling of my brother Pinhey and myself to the effect that a plaint ought not to be returned after a case had been heard on its merits—*Jagjivan Jávherdás Seth* v. *Magdum Ali* (1)—referred the point to be dealt with by a Full Bench.

At the commencement of the judgment delivered on the 6th March last by Mr. Justice West, and doubtless written by him, occurs the following passage:—

'The practice of this as of the other High Courts from the time of their institution has been to return, or direct the return, of the plaint in ordinary cases when, in the course of the trial, either of the original suit or of an appeal, it came out that the suit had been entertained by a Court without jurisdiction: but, by a recent judgment of a Division Court, this practice has been pronounced wrong. It might have been well had the Division Court referred such matter to a Full Bench. The established practice of the Court in matters of procedure is the law of the Court, unless it be inconsistent with some higher law or legal principle; and a series of precedents ought not, we think, to be overruled without deliberate consideration by a Bench more numerous or differently constituted from the one to which the objection has occurred.'

(1) I. L. R., 7 Bom., 487.

1884

In re BÁI AMRIT.

The judgment concludes by stating that the Court was of opinion that the long-established practice of this Court as to the return of plaints was not opposed to the earlier law, and that it had, at least, been indirectly confirmed by the present law.

From the above passages I collect that it was intended to intimate that the practice of returning plaints had all along been adopted by the High Court of Bombay, as well in its Appellate Side as in its Original Jurisdiction, and, consequently, that in future those of the Judges; like myself, who sit on the Original Side are to consider ourselves bound to follow the above ruling.

Assuming that the judgment was intended to represent what was considered to have been the practice on the Original Side, I take this opportunity of stating that such practice has, in fact, been quite different from that which the Court has assumed it to be, seeing that, from the time the High Court was established in 1862, the practice on the Original Side has been not to return plaints except on presentation.

I may here remark that section 57 of the Civil Procedure Code (Act XIV of 1882), which provides that, under certain circumstances, a plaint is to be returned to be presented to the proper Court is, by section 638 of that Act, expressly declared not to apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, and the corresponding section (57) in the Civil Procedure Code of 1877 was, by section 638 of that Code, similarly exempted from application to suits on the ordinary and extraordinary original civil jurisdiction of the High Court.

In the case of *Kávasji Frámji* v. *Wallace* [1], decided in 1863, where, on the case coming on for settlement of issues, Sir Joseph Arnould held that the Court had no jurisdiction, the defendants' temporary residence of a few days in Bombay not being a "dwelling" within the meaning of clause 12 of the Letters Patent the report states that the case was struck out and the plaint returned; but I am informed by the Prothonotary that such statement was incorrect, that the plaint was never returned, and has been on the files of the Court up to this day.

[1] 1 Bom. H. C. Rep., at p. 113.

In 1864 the point came before the Court of Appeal, consisting of Sir Mathew Sausse, C. J., and Mr. Justice Couch, Judges surpassed by few in India as regards the respect paid to their decisions, and I quote from a note taken in his Court Minute Book by the late Mr. Spencer Compton in his capacity of Prothonotary of the High Court.

On the 24th November, 1864, an appeal, No. 122—*Thucker Khutáv Ladha* v. *M. H. Scott*—was called on before those learned Judges. It was an appeal against an order of Mr. Justice Westropp rejecting a plaint. Mr. White, for the appellant, addressed the Court. The Chief Justice said that the Court had come to the conclusion that it ought not to alter the decision come to by Mr. Justice Westropp. They thought that the plaintiff could not be considered to have acted under an error.

Mr. White asked to have the plaint and other papers returned.

The Prothonotary objected that he would have no record or ground for drawing the order: '*C. J.—An order must be drawn up in this appeal, and there must be a record. We do not see how the plaint can be returned, or the memo. of appeal.* We see no objection to your having back the documents which are set out in the plaint.'

The Prothonotary of the High Court, who has held that office since 1866, informs me that the practice on the Original Side has always been to retain a plaint when further proceedings in the suit have been stopped for want of jurisdiction, and that he is not aware of any instance in which any plaint has been returned, except when, on presentation, the sitting Judge in chambers has been of opinion that it disclosed no cause of action, or that it appeared to him that the suit ought to be brought in another Court.

In *Sujanchund Shivdás* v. *Mulchand Johárimál*[1], where the case was set down for argument on the preliminary point of jurisdiction before Mr. Justice Green on the 25th July, 1872, that learned Judge held that the Court had no jurisdiction, and is reported to have said: 'As the leave of the Court has not been obtained under clause 12 of Letters Patent, I have no option but

(1) 9 Bom. H. C. Rep., 270.

1884

In re BAI AMRIT.

to follow the course adopted in *Frámji* v. *Wallace*[1], and direct the plaint to be returned to the plaintiff, and the plaintiff must pay the defendant his costs.' The report says 'order accordingly.'

The plaint, however, was not returned, nor did the order, as drawn, contain such a direction. It simply said (I presume after the sanction of the Judge had been obtained) "Doth reject the said plaint."

Apart from the provisions in the Codes of 1877 and 1882 that section 57 is not to apply to suits brought on the Original Side of the High Court, there seems to me to be good grounds for the practice hitherto invariably followed in it, and of which the case before Sir Mathew Sausse, C. J., and Mr. Justice Couch in 1864 affords an early instance.

By the Letters Patent of 1862, cl. 1, the High Court was constituted, and by the Letters Patent of 1865 it was continued a Court of Record. The Charter, dated the 8th December, 1823, establishing the Supreme Court of Judicature, cl. 6, had constituted that Court to be a Court of Record, as also had been the Court of the Recorder of Bombay which was erected by Letters Patent dated the 20th February in the thirty-eighth year of the reign of King George III. (See recital of it in clause 3 of the Supreme Court Charter).

Sir William Blackstone in his Commentaries says: 'A Court of Record is that where the acts and judicial proceeedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself, that is upon bare inspection, whether there be any such record or no, else there would be no end of disputes. All Courts of Record are the Courts of the Sovereign in right of the Crown and royal dignity * * * * * In the Courts not of record, the proceedings are

(1) 1 Bom. H. C. Rep., 113.

not enrolled; or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried or determined by a jury [1].

A High Court in India, being a superior Court of Record, has, amongst other powers, that of punishing summarily for contempt,—a power it possesses, not from the Civil or Criminal Procedure Code or the Penal Code, but from the fact of its being a Court of Record. A very recent decision on that point is *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court of Calcutta*, decided by the Privy Council on July 18, 1883[2].

I am informed that the practice of entering the proceedings on parchment was discontinued before the Supreme Court of Bombay ceased to exist, and has never been followed in the Prothonotary's office since the High Court was established; but that makes it, in my opinion, all the more necessary to retain and to preserve carefully the proceedings which have been taken. Although the suit was eventually decided to have been brought in a Court which was without jurisdiction to try it, the proceedings in the suit now before us cannot, I think, be treated as an absolute nullity. Decrees have been made in the subordinate Court, in that of the Assistant Judge at Broach, and in the High Court; costs have been ordered to be paid, and probably have been, or will be, paid under such decrees, and such proceedings ought, I think, undoubtedly to be preserved.

Suppose the applicant were now to sue in the Court in which her husband ought to have brought his suit in 1869. The question might well arise under the Limitation Act (Act XV of 1877) whether, having regard to section 4 of that Act, that a suit is instituted in ordinary cases when the plaint is presented to the proper officer, the provisions of section 14 do not apply. That section enacts that, in computing the period of limitation, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant shall be excluded where the proceeding is founded on the same cause of action, and

(1) 3 Stephen's Commentaries, pp. 380, 381.
(2) I. L. R., 10 Cal., 109, and L. R., 10 I. A., 171

1884

In re BÁI AMRIT.

is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. Now, it is clear to my mind that the proceedings in the Courts at Jambusar and Broach, as well as those in the High Court, ought to be preserved, and preserved in a complete and unmutilated state, which they would not be if the plaint, which was the foundation of all the proceedings during the subsequent fifteen years, were withdrawn and handed over to the applicant to use or not to use in another proceeding at her pleasure.

Had the decision relied on by Mr. Mánekshâh been the ruling of a Full Bench in the sense in which that expression has been and is generally used and understood, and had it been in print, I should, of course, unhesitatingly bow to such an authority. No doubt the printed judgment is headed 'Judgment of the Full Bench;' but that does not make it one, and, as at present advised, I feel some difficulty in regarding it otherwise than the decision of a Division Court of three Judges, arrived at, after hearing an *exparte* application, with no one to represent or urge the opposite view.

Now almost if not every volume of the Calcutta Weekly Reporter, of the Bengal Law Reports, and of the Indian Law Reports, Calcutta Series, contains what are called "Full Bench Rulings" which have always been heard by five Judges, and in some few cases of very great importance by more than five Judges. In this Court we are not unfamiliar with the Full Bench of five Judges. I may cite the case of *Reg.* v. *Pestonjee Dinsha*[1] where the conduct of the Judge who had presided at the Criminal Sessions of the High Court was impugned, but unsuccessfully, upon points certified to the Court by the Advocate General under clause 26 of the Letters Patent and which points were argued before a Full Court of five Judges. The recent questions as to the right of the High Court pleaders to practise in the Bombay Court of Small Causes (*In re the Pleaders of the High Court* [2]), in which the Judges took different views on some points, and as to the power to give costs against an unsuccessful pauper plaintiff, in which last case it was held that there was one practice in force in the Mofussil and another on the

(1) 10 Bom. H. C. Rep., 75. (2) I. L. R., 8 Bom., 105.

1884

In re BÁI AMRIT.

original civil jurisdiction side of the High Court, were heard and determined, in each case, by a Full Bench of five Judges.

Whether any such practice as that which is said to have been uniformly followed in the Mofussil and on the Appellate Side of the High Court of returning plaints be warranted by law or not, or whether the construction of section 57 of the Civil Procedure Code (which, as I have shown, is by section 638 of that Code expressly stated to be inapplicable to the High Court on its original civil jurisdiction) which the Court has put upon it in its recent judgment be the correct one or not, I offer no opinion. In *Palmer* v. *Hutchinson* the Judicial Committee of the Privy Council said (p. 628): "Their Lordships think it right to say that no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the Charter or law by which it is constituted." I shall consider myself fully competent, when any fit and appropriate occasion arises, to consider whether the very extended construction of section 57 of the Civil Procedure Code which it is said to bear, be, in my opinion, correct or not.

Assuming, however, for the purpose of the present application that the practice in the Mofussil Courts and on the Appellate Side of the High Court is as stated in the judgment under notice, I am of opinion that such judgment does not govern, and is distinguishable from the present case, where there have been three decrees, the last one being a decree of this Court, reversing a decree of the Court at Broach, with costs; and as long as the decree of this Court stands, I do not see that we, Judges in this Court of Record, would be justified in sanctioning the mutilation of the records by the withdrawal from them of one of the most important documents in the whole proceedings, and in ordering that document, the plaint, to be returned.

The application, therefore, of Mr. Mánekshâh must, in my opinion, be refused.

PINHEY, J.—This is an application for a return of the plaint in Second Appeal 260 of 1882, which was disposed of by this Division Bench on the 7th February, 1884.

I am very clearly of opinion that the application should be refused. The case has been disposed of by the High Court's decree which reversed the decree of the lower Appellate Court.

(1) L. R., 6 App. Ca., 619.

1884

In re BÁI AMRIT.

So long as the High Court's decree stands, it is, as I conceive, impossible to allow the plaint, on which that decree was passed, to be removed from the record. We are not asked to review our decree and set it aside; nor could such an application, if made, be allowed, for the decree is a perfectly right one.

Nor do I see what possible advantage the applicant would gain by the application being granted, for the court-fee stamps on the plaint have been cancelled, and could not be used again.

A person can no more use cancelled court-fee stamps a second time than he can use a second time postage stamps that have been used and cancelled.

Our attention has been called to the Full Bench decision on the application of Prabhákarbhat bin Janárdhanbhat dated 6th March, 1884, but I do not think that the decision touches the point we have to consider in this case. The Full Bench decision decides that at any stage of a trial a plaint may be returned, but it does not go so far as to say that after the High Court has passed a formal decree in a case, and while that decree subsists, the plaint in the case may be returned.

I refrain from dwelling at length on the above Full Bench decision, or saying more about it, because it is a decision of three Judges only assembled to consider a decision passed by the two Judges who constitute the present Bench, and overruled our decision. But neither of us were invited to join in that consideration, nor were we consulted on the point of law raised. Not having had an opportuntity of discussing the point with the other members of the Court before the decision was given, it is undesirable to discuss it now. I am bound, however, to notice this, as the Full Bench decision does not touch the point, and it must come up again, that whereas the Full Bench decision professes to deal with one of the grounds on which the previous decision of this Bench rested, and overrules the decision on that ground, it is wholly silent on another ground on which our decision was based, *viz.*, the futility of returning a plaint after the court-fee stamps have been cancelled, because cancelled court-fee stamps can no more be used a second time than cancelled postage stamps can be so used.

I would reject the present application.

Application rejected.