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Edward Fry's should, in our opinion, be accepted by us as affording the true answer to Mr. Raikes' argument, and we therefore hold that the first objection cannot prevail.

The Court held that the other two objections raised by Mr. Raikes were also not sustainable.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

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RAMCHANDRA PANDURANG SATHE (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNAJI VITHAL JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Second appeal—Discovery of fresh evidence—Withdrawal of second appeal—Review petition—Practice.

When on coming to the High Court under second appeal it is discovered that there is evidence which ought to have been placed before the lower Courts, the proper practice to pursue is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower Appellate Court. But this course cannot be pursued when the review petition has been already presented to and rejected by the lower Court.

SECOND appeal from the decision of J. E. Modi, Additional First Class Subordinate Judge of Thána, with Appellate Powers, confirming the decree of G. L. Chandorkar, Subordinate Judge of Pen.

The plaintiff sued to recover from the defendant Rs. 1,139-0-9, the balance of principal, including interest due, under two *ruzu khátas* (Exhibits 5 and 6), both of the same date, namely, the 4th November, 1899. The suit was filed on the 28th January, 1901.

The defendant admitted the *ruzu khátas*, but pleaded that the claim with respect to Exhibit 6 was barred by limitation.

The Subordinate Judge found that the plaintiff was entitled to recover Rs. 714-14-3 with proportionate costs and that the claim

* Second Appeal No. 719 of 1902.

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under Exhibit 6 was time-barred. He, therefore, passed a decree for Rs. 711-14-3 and rejected the rest of the claim on the following grounds :—

Plaintiff himself admits (Exhibit 18) that the money of the *khâta* (Exhibit 6) was not advanced on the day mentioned in the *khâta* itself and that the same was advanced in his father's time. He further adds that he has no knowledge either of the different items advanced from time to time or the dates on which they were advanced. Now as Exhibit 6 is a *ruzu khâta* merely and not a promissory note, plaintiff is bound to prove the dates of the original advances and to show further that the *khâta* sued upon is within time from those dates. It is now settled law that a *ruzu khâta* by itself cannot form the basis of action and that the claim must be based on the original advance and the later *khâta* must be produced to show that the claim is within time up to date. But in this case plaintiff has absolutely no material to show how many years ago the original advance was made and whether the claim as to that loan is still within time. The difficulty would have been at an end if the *khâta* sued upon (Exhibit 6) had contained a promise to pay, which is actually not the case. I therefore hold that Exhibit 6 is time-barred and find the third issue (namely : "Is any portion of the claim time-barred?") in the affirmative to the extent of the money contained in Exhibit 6 only.

On appeal by the plaintiff the Judge confirmed the decree on the 29th August, 1902. Subsequently on the 13th October, 1902, the plaintiff applied for review of judgment under section 623 of the Civil Procedure Code (Act XIV of 1882) on the ground that after the decision of the appeal he got information of certain *khâtas* and accounts which, if admitted in evidence, would prove that his claim under Exhibit 6 was not barred inasmuch as it was kept alive from time to time. The Judge rejected the application on the 24th November, 1902, on the ground that if the plaintiff had been diligent enough while the case was pending, he would have been in a position to produce in time the evidence which came to his knowledge subsequently.

The plaintiff preferred a second appeal.

Daji A. Khare (with *G. K. Dandekar*), for the appellant (plaintiff).—Our contention is that the Judge should have admitted the evidence which we had tendered with our petition of review. The facts in connection with the petition were stated in detail in our affidavit annexed to the petition. The previous *khâtas* and account-books were in the possession of our brother Krishnaji,

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who was not favourably disposed towards us and therefore would not allow us to have access to them. We had summoned him as a witness in the first Court to appear and to produce documents in his possession, but he did neither. When he came to know of the adverse decision against us in appeal, he informed us that he would produce the *khátas* and accounts in his possession if summoned by the Court. But our petition was rejected by the Court. If the evidence we sought to put in had been taken by the Court, it would have clearly shown that our claim with respect to Exhibit 6 was in time. We submit that the evidence may be admitted now under the power vested in the High Court by section 568 of the Civil Procedure Code (Act XIV of 1882).

Trimkamlal R. Desai (with *V. N. Manohar*), for the respondent (defendant).—The order rejecting an application for review is final under section 629 of the Civil Procedure Code and it cannot be interfered with in second appeal. Besides this, the evidence referred to in the petition of review consisted merely of *khátas*. Such evidence is not sufficient to keep the original transaction alive: *Gobind Sundari* v. *Jagadamba Debia* [1]; *In the Goods of Premchand*; *Upendra Mohan Ghose* v. *Gopal Chandra Ghose*.[2]

S. R. Bakhle (for *D. A. Khare* with *G. K. Dandekar*) in reply.—The evidence produced along with our petition of review consisted not only of *khátas* but also *baitha khátas* (account-books), evidencing payment of interest as well as part-payment of principal. Such evidence would save the bar of limitation.

In *Nanabhai* v. *Nathabhai* [3] this Court allowed the second appeal to be withdrawn so that the appellant might apply to the lower Court for review of judgment on the ground of the discovery of fresh evidence. Joint Second Appeals Nos. 8 and 9 of 1900 from the Ratnágiri District were decided by this Court (Candy and Crowe, JJ.) on the 26th August, 1901, and in Second Appeal No. 9 evidence was allowed to be put in and the decree of the Judge was modified.

(1) (1868) 3 Beng. L. R. P. C. 25. (2) (1894) 21 Cal. 484, 486.
( ) (1872) 9 Bom. H. C. R. 89.

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JENKINS, C. J.—The 11th ground of appeal is in these terms :—"The lower Appellate Court should have taken in evidence the *khátas* and account-books produced by the plaintiff with his review application." The facts with regard to this point are that the plaintiff was unable to produce the *khátas* and the account-books prior to the first hearing of the appeal by the lower Appellate Court, but, subsequently to its decree, the position had altered and the plaintiff was in a position to produce those documents, and it seems clear from the statements that have been made before us that, had those documents been forthcoming, the plaintiff would have had a very much better chance indeed of establishing his case and meeting the plea of limitation. These matters were placed before the lower Appellate Court by way of review. But it was there decided that the plaintiff should not be afforded the opportunity he sought. We very much regret that decision, as it was not calculated to advance the ends of justice. However there the matter ends, for that order is final. It has been suggested however that we can interfere on the second appeal.

Now I am clear that the case does not fall within section 568, Civil Procedure Code, even if it can be contended that clause (*b*) of that section could apply in second appeal. So we have to see whether there is anything else that we can do. We have been referred to a decision of an Appellate Bench of this Court in which evidence no doubt was admitted in second appeal. But the ground on which that course was taken is not sufficiently apparent to allow us to accept that case as a guide to us in this appeal. We think there can be no doubt as to the proper practice to pursue when on coming to this Court on second appeal it is discovered that there is evidence which ought to have been placed before the lower Courts. It is indicated as far back as 1872 in the case of *Nanabhai Fallabdas* v. *Nathabhai Haribhai*,[1] where Sir Michael Westrop points out that the practice is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower Appellate Court. I think it has always been recognized that in that practice the Court has

[1] (1872) 9 Bom. H. C. R. 89.

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strained its powers to its utmost limits, and I do not think that we would be justified in going beyond that. Now what would be the result if we were to adopt such a course here? It would obviously be fruitless, because the review petition has already been presented to and rejected by the First Class Subordinate Judge, A. P.

I see no alternative in this case but to confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

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ABDUL ALI ABDUL HUSEN (ORIGINAL DEFENDANT), APPELLANT, *v.* MIRJA KHAN ABDUL HUSEN (ORIGINAL PLAINTIFF), RESPONDENT.*

Registration Act (III of 1877), section 77—Making of the order—Date of the order—Date of communication—Running of time for suit.

The expression "making of the order," in section 77 of the Indian Registration Act (III of 1877), means not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it.

Hence, a suit brought under the provisions of section 77 of the Indian Registration Act (III of 1877) for a decree directing a document to be registered, may be filed within thirty days of the date on which the order of refusal was communicated to the party concerned.

SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, confirming the decree passed by Lallubhai P. Parekh, First Class Subordinate Judge at Surat.

On the 17th June, 1901, a deed-of-gift was passed in favour of the plaintiff by Mariambu, the mother of the defendant. Mariambu died the next day. On the 8th October, 1901, plaintiff presented the document to the Sub-Registrar for registration. But the Sub-Registrar refused to register the document, as the defendant failed to appear in obedience to the summons issued to him. Against this order plaintiff preferred an appeal to the District Registrar, who rejected the appeal, on the 21st December, 1901, on the ground that there was no mark of the executant

* Second Appeal No. 173 of 1903.