1875.

NA'RA'YAN BA'BA'JI v. PA'NDURANG RA'M-CHANDRA.

Judge appears to think that the plaintiff is to blame for the complications which have arisen, we must observe that, in our view, the plaintiff has done all that he could be expected to do to obtain his right, and where he has been unsuccessful, his case, whatever may be the merits of his claim, is not undeserving of sympathy.

We reverse the decree of the District Court, and remand the case in order that the appeal from the decree of the Subordinate Judge may be heard and disposed of on its merits. Costs to follow final judgment.

March 21.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 27 of 1873.

MIR AJMUDDIN KHA'N, heir of FA'TMA' BEGAM ..... } *(Plaintiff) Appellant.*

ZIA'-UN-NISSA' BEGAM and another. } *(Defendant) Respondent.*

Sanction—Act XVIII. of 1848—Slavery—Act V. of 1843.

The permission of Government in 1858 to the Agent for the Governor of Bombay at Surat to pay certain moneys of the widow of the late Nawáb of Surat to whomsoever a certificate of heirship to her might be granted by the civil court is not a sufficient authority under Act XVIII. of 1848 for the institution against her granddaughters of a general civil suit under Regulation IV. of 1827 or Act VIII. of 1859. Nor does permission given in 1871 to institute a suit authorise the continuation of a suit instituted in 1869.

The effect of Act V. of 1843 is to prevent the enforcement of any rights, which would, if that Act had not been passed, have arisen out of the status of slavery; and a suit, brought by the heir of the master of a slave-girl, emancipated by and married to such master, in his lifetime, to recover, as such heir, her property in the hands of persons descended from her, is one the cognizance of which is barred by Section 2 of the Act.

THIS was an appeal from the decision of W. H. Newnham, Judge of the District of Surat.

The original plaintiff, Fátmá Begam, who is now dead, and whom Mir Ajmuddin Khán represents in this appeal, sued the defendants to recover certain property, moveable and immoveable, which belonged to Amir-un-nissá Begam, wife of Afzuluddin Khán, the last Nawáb of Surat, alleging that this

1875.

MIR AJMUD-DIN KHA'N v. ZIA'-UN-NISSA'.

property was awarded to Amir-un-nissá Begam by the Agent for His Excellency the Governor, but since her death, on November 10, 1857, had been detained by the defendants; whereas Amir-un-nissá having been originally a slave-girl purchased by the Nawáb, the property went at her death, not to the defendants, her grand-daughters, but to the plaintiff, Fátmá Begam, as heir to her brother, the late Bakshi Mir Mohinuddin Khán, the heir of the said Amir-un-nissá.

The defendants contended, *inter alia*, that the suit was barred by Acts V. of 1843 and XVIII. of 1848, and that they, and not the plaintiff or her brother, were the legal heirs of Amir-un-nissá.

The District Judge rejected the plaintiff's claim with costs, on the grounds that the plea as to Amir-un-nissa's alleged state of slavery was inadmissible under Act V. of 1843, and that, even if admissible, it was not established.

The appeal was heard by WESTROPP, C.J., and KEMBALL, J.

Pirozesháh Mihirvánji Mehtá (with him *Khanderáv Moroji*) for the appellant.

Shántárám Náráyan for the first respondent.

Starling and *Dhirajlál Mathurádás*, Government Pleader, for the second respondent.

Pirozesháh Mehtá:—Independently of the grounds on which the Judge below relied, there was the express sanction of Government obtained on the 27th October 1871, which, though given after the institution of the suit, was nevertheless prior to the issue of any writ or process, which was all that was required by Section 1 of Act XVIII. of 1848. As to the objection that the sanction is for the institution of a suit, the operative words of the sanction simply say that the sanction required by the Act is given. With regard to the point that the suit is barred by Section 3 of Act V. of 1843, that section does not apply to the present case, in which the respondents derive their rights from a person holding the status of a freed woman, not to use the misleading term, an emancipated slave—a status, as in the civil law, with dis-

1867.

MIR AJMUD-DIN KHA'N v. ZIA'-UN NISSA'.

tinctly different rights and liabilities from that of a slave. Under the Muhammadan law besides, the respondents cannot be said to have acquired possession of the property in dispute by *inheritance* from the freed woman (3 Hedaya 444-45; 1 Baillie Dig. 386-87).

As to Section 2 of Act V. of 1843 pointed out by this Court, it is only intended for the common cases in which masters arrogate certain powers over the person and services (the section leaves out the word property) of their slaves. It does not apply to a case in which rights of inheritance are claimed to the estate and in the property of a freed woman.

WESTROPP, C.J.:—We affirm the decree of the District Judge, *first*, because no sufficient sanction was given by Government to satisfy Act XVIII. of 1848.

The permission of Government given in 1858 to Mr. Hebbert, the Agent for the Governor of Bombay, to pay over certain money of Amir-un-nissá to whomsoever a certificate of heirship to her might be granted by the civil court, would have authorized an application under Regulation VIII. of 1827 (Act XX. of 1864, under which certificates of administration may be obtained, not having then been passed), but certainly would not authorize the institution against the defendants of a general civil suit under Regulation IV. of 1827, or under the Civil Procedure Code, Act VIII. of 1859, brought, as the present suit was, eleven years after the order of the Bombay Government.

Nor did the permission given by Government in Mr. Wedderburn's letter dated the 27th October 1871, to institute a suit, authorize the continuation of a suit already instituted, as the present suit was, so far back as the 8th of November 1869. We see nothing to lead us to suppose that Government intended (if it could do so, as to which we say nothing,) to deprive the defendants of any benefit arising to them from the lapse of time.

We refrain from deciding whether, having regard to Act XVIII. of 1848, the plaintiff could lawfully file a plaint against the defendants without the consent of Government

1875.

MIR AJMUD-DIN KHA'N v. ZIA'-UN-NISSA'.

first obtained, or whether the court had any jurisdiction to receive such a plaint. It is sufficient for us to say that there was not any such consent of Government to the issuing of any process, to bring the defendants before the court in a suit such as this, instituted in 1869, or to proceed with it beyond the filing of the plaint, as Act XVIII. of 1848 at the very least requires.

Secondly.—We think that Act V. of 1843 deprived the plaintiff of any right to bring this suit. Amir-un-nissá died in 1857, when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights, which would, if that Act had not been passed, have arisen out of the status of slavery. The right claimed by the plaintiff rests solely upon the alleged fact that Amir-un-nissá had been at one time the slave of the late Nawáb. He is said by the plaintiff to have enfranchised Amir-un-nissá; and on the authority of 1 Baillie's Dig. 386-87, and 3 Hedaya 444-45, it is contended that he, as her emancipator, or, he being dead, his nearest male relative, or in default of him, that male relative's heir, would be her heir, and that neither her daughter nor the defendants, who are that daughter's daughters, are so. That right, if it ever existed, is, in our opinion, one arising out of an alleged property of the late Nawáb in Amir-un-nissá's person and services before he enfranchised her, and as such is one of the rights which every civil court in British India is prohibited, by Section 2 of Act V. of 1843, from enforcing. We are not prepared to say whether this case would not also come within the prohibition in section 3 of the same enactment.

It is unnecessary for us to give any opinion as to whether the doctrine laid down in 1 Baillie's Dig. 386-87 and in 3 Hedaya 444-45 would apply to such a case as the present, in which the plaintiff substantially admits that the mother of the defendants was the legitimate daughter of the emancipator (the Nawáb) by the emancipated (Amir-un-nissá), nor do we think it necessary to give any opinion as to the extent to which the defendants are bound by the admission

1875.

MIR AJMUD-DIN KHA'N v. ZIA'-UN-NISSA.

as to the Muhammadan law which the District Judge, in his judgment, states as made on their behalf.

We also deem it unnecessary to give any opinion on the question as to whether or not Amir-un-nissá had been a slave. Assuming that she had been so, as contended on behalf of the plaintiff, we, for the reasons already stated, hold this suit to be unsustainable.

The decree of the District Judge must be affirmed, with one set of costs of this Regular Appeal, to be paid by the plaintiff to the defendants.

Decree affirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 423 *of* 1872.

1873.
August 13.

RA'VJI SHIVRA'M JOSHI...(*Original Plaintiff*) *Appellant.*

KA'LURA'M, son of MALUK-CHAND, deceased, his widows and heiresses, CHABA'BA'I and BHAGA'BA'I, and another. } (*Original Defendants*) *Respondents.*

Decree—Execution—Application after decree—Act XXIII. of 1861, *Section* 11 *—Mortgage—Redemption.*

An application to the court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.

The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose.

Jćnoji v. *Byaukatesh* (2 Bom. H. C. Rup. 371) over ruled.

THIS was a case referred for the decision of a Full Bench by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J. The reference was heard by a full bench consisting of WESTROPP, C.J., MELVILL, WEST, and NA'NA'BHA'I HARIDA'S, JJ.