

guardian be appointed under Act XX of 1864. The administration and the guardianship will, under such circumstances, remain with Guracharya, as the undivided paternal grandfather of the minors, but no certificate can be granted in respect thereof.

But it may be that there is some separate property acquired by Anacharya. Guracharya in his deposition says: "I also hear that the late Anacharya had acquired some land at Kelgheri. I do not hold possession of the said land." If this be the case, it would both legal and desirable to appoint an administrator of this separate property, and the appointment of a guardian might properly be made at the same time.

The District Judge should inquire whether there is any separate property of the deceased Anacharya. If there is not, he should refused to make any order in the case. If there is such property, he should grant a certificate of administration and guardianship but should limit the certificate of administration to the separate property acquired by the deceased Anacharya. This Court would recommend that the certificate, if granted, be granted jointly to the Nazar and Guracharya, as recommended by the Subordinate Judge. It would be difficult for the Nazar to perform by himself the duties of guardian to the children, two of whom are living with Guracharya, and the eldest of whom appears content to remain under his charge.

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Case remanded.

APPELLATE CIVIL.

(81)

*Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Kemball, and
Mr. Justice F. D. Melvill.*

July 14

BASAPA APPLICANT v. MARYA OPPONENT.*

Decree—Execution—Sale—Confirmation of sale—Certificate of sale—Application for possession—Limitation—Act XV of 1877, Sch. 11, Art. 178—Civil Procedure Code (VIII of 1859), Secs. 263, 264.

A obtained a money decree against B on the 25th January 1872, in execution of which, property belonging to B was sold on the 9th of September 1874, A himself becoming the purchaser. The sale was confirmed on the 9th of October 1874, but the certificate of sale was not issued till the 23rd of January 1878. A, applied for possession on the 2nd of April 1879.

*Civil Reference No. 8 of 1879.

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Held that the right to apply for possession contemplated in sections 263 and 264 of the Civil procedure Code (Act VIII) of 1859; corresponding with sections 318 and 319 of the Civil Procedure Code (Act X) of 1877) accrued on the date the certificate of the sale was issued, and not on that on which the sale was confirmed and that, therefore, the period of limitation against the purchaser counted from the former date.

THIS was a reference under section 617 of the Code of Civil Procedure (Act X) of 1877 from Rao Saheb Raghavendra, Subordinate Judge of Saundatti, for the orders of the High Court.

One Basapa obtained a money decree against one Marya for Rs. 64 on the 25th of January 1872. In execution of this decree certain lands belonging to the judgment-debter were put up to sale at a Court's auction held on the 9th of September 1874, and the plaintiff himself became the purchaser. The sale was confirmed on the 14th October 1874, but the certificate of sale was not issued till the 23rd of January 1878. On the 2nd of April 1879 the plaintiff made an application to be put into possession of the lands.

In the statement of reference the Subordinate Judge said:—
 “The question was whether the application of the plaintiff was barred by lapse of time. It may be taken for granted that the proper law applicable is art. 178, sch. II of Act XV of 1877, which gives a period of three years from the time ‘when the right to apply accrues’. Consequently, the real point for determination is whether the right to apply for possession in the present case accrues on the date of the confirmation of the sale or the date of the issue of the certificate of sale. If the former, the application is barred; if the latter, it is not barred.”

The Subordinate Judge held that the application was barred; but, entertaining a doubt on the subject, referred the point for the orders of the High Court under section 617 of the Code of Civil Procedure (Act X) of 1877.

The parties were not represented in the High Court.

KEMBALL, J.—It seems to me that the Subordinate Judge is right, and that the auction-purchaser is debarred, under the limitation law, from seeking to get possession by way of summary procedure. I demur to the proposition that it was formerly.

necessary, under all circumstances, for the purchasers to obtain a certificate prior to applying for possession, and we know from experience that it was not so as a matter of practice; but, assuming it to have been the case, I apprehend that, whatever right the purchaser acquires, whether to have a certificate or to obtain possession of the property purchased, accrued to him on the completion of the contract, *e. i.*, when the sale was confirmed, and I fail to see how the grant of the title-deed can confer any fresh right. To give a fresh starting point from the date of the deed would be to defeat the object of the limitation law.

As my brother F. Melvill takes a different view to mine, the matter must be referred to a third Judge, and we agree to submit the question to the Chief Justice

July 2 F. D. MELVILL J.—The question is, when does the right to apply for possession of the property accrue to the auction-purchaser?

Under the new Code there would seem to be no doubt. Section 316 says that the Court shall, on confirming the sale, grant a certificate; and sections 318 and 319 both allude to the certificate being granted before the application for possession is made. But the present case is under the old Code. In section 259 it is laid down that after the sale is made absolute the certificate shall be granted, and that certificate shall be taken and deemed to be a valid transfer of the right, title and interest. These words would imply that the right, &c., is not transferred till the certificate is granted, and, if so, there can be no right to possession until the certificate is granted, for the purchaser's title is not complete. Section 263 and 264 virtually correspond with 318 and 319 of the new Code, with this exception, that the certificate of sale is not specifically mentioned in 263. It is, however, mentioned in 264, and from that it seems clear that possession under the section cannot be given without the certificate having first been granted. The two sections refer merely to the way in which possession shall be given, and not in any way to the procedure preliminary to the application. If the certificate in the one case is a condition precedent to possession, it must be so in the other, and the reason why it is not mentioned in section 263 would

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seem to merely that the certificate is not made use of in the procedure under the section. But it cannot, therefore, be argued that the previous grant of the certificate to vest the right, title, &c., in the purchaser, is the less required.

I, therefore hold that the right to possession does not accrue till the certificate is granted, and that the period of limitation must run from the date of the certificate. The question when a right to obtain that certificate would be barred, does not arise.

The case was accordingly referred to Westropp, C. J., under section 575 of the Civil Procedure Code (Act X) of 1877.

July 14. WESTROPP, C. J.—Although it may be that frequently possession of immovable property has been given after the confirmation of the sale and before the issue of the certificate of sale, yet this must, I think, be regarded as lax practice, as it seems to me to be a necessary inference from section 264 of Act VIII of 1859 that the intention of the Legislature was that the certificate of sale should precede the giving of possession, and, therefore, that, strictly speaking, the right to apply for possession did not accrue until the issuing of the sale certificate, which in the present case occurred on the 23rd January 1878, and, therefore, that the application of the purchaser for possession is within the period of three years mentioned in art. 178, sch. II of Act XV of 1877. In so holding as to the right to apply for possession I must not be understood as intending to infringe in the slightest degree upon the authority of such cases as *Anand Chandra Pal v. Panchilal Sarma* (1) and *Gamble v. Bholagir*, (2) which relate to priority of title.

Order accordingly.

(1) 5 Beng. L. R. 691.

(2) 2 Bom. H. C. Rep. 146.