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No. 624 of 1879 after 10 o'clock on the 12th August, 1879; that the *inam chithi*, which bears the same date as the *vakalatnama*, was executed some hours before the filing of the latter in the said suit; that the Marwari plaintiff in that suit sued for Rs. 310, and his suit was rejected as against the defendants; that their costs, which amounted to Rs. 15-14-10, were not awarded to them; that their defence was actually conducted by the plaintiff, though another pleader was also retained in the case.

[261] The High Court (WESTROPP, C.J., and BIRDWOOD, J.) in making the rule absolute on the 8th February, 1881, gave the following judgment:—

JUDGMENT.

WESTROPP, C.J.—This case differs materially from that of *Ramchandra Chintaman* v. *Kalu Raju* (1), inasmuch as the acceptance of the *vakalatnama* by the pleader (the plaintiff in this case) and the execution of the agreement sued upon, were contemporaneous, and the *vakalatnama* was not filed by the pleader until after the execution of the agreement. The agreement, it is true, is called an *inam chithi*, but it was evidently given as the sole intended remuneration for the professional services of the pleader; and, looking at Act I of 1846, s. 7, we cannot say that such an agreement is illegal. The words "we have given you a *vakilpatra*" in the past tense occur in it, but the report of the Subordinate Judge and the evidence taken by him lead us to the conclusion already expressed that the acceptance of the *vakilpatra* (or *vakalatnama*) and the execution of the *inam chithi* were simultaneous, and constituted one transaction. Although we cannot designate the remuneration as extortionate, yet we regard it as high, when the amount sued for in the case in which the plaintiff was to act as pleader for the defendants was only Rs. 310, and we feel no disposition to encourage agreements which give to pleaders a personal interest in the litigation of their clients. We must set aside the decrees of the Courts below, and direct a new trial. But we give no costs to the plaintiff either of his original suit or of the appeal, or in this Court.

Decree set aside.

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[262] APPELLATE CRIMINAL.

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.

EMPRESS v. HUSEN.* [15th February, 1881.]

Lunatic—Imbecile—Inability to understand proceedings—The Code of Criminal Procedure (X of 1872), ss. 186 and 423.

The provisions of s. 186 of the Code of Criminal Procedure do not apply to a person who is of unsound mind; they apply to persons who are unable to understand the proceedings from deafness, or dumbness, or ignorance of the language of the country, or other similar cause. But where the inability to understand the proceedings is due to unsoundness of mind, the procedure provided in chap. XXXI of the Code must be followed.

Where a Magistrate found that an accused person convicted of theft was an imbecile, and consequently unable to understand the proceedings, but that he was not of unsound mind, the High Court held that this distinction was

* Criminal Reference No. 2 of 1881.

(1) 2 B. 362.

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without a difference, and, under s. 297 of the Code, annulled the conviction, and, declaring the accused to be of unsound mind, directed that he should be released on sufficient security being given that he would be properly taken care of, and prevented from doing injury to himself or any other person, and for his appearance when required; and that, in default of such security being given, the case should be reported to Government.

[R., 7 B. 15 (18); Rat. Unr. Cr. Cas. 696 (697); U.B.R. (1892—1896) 38 (Cr.).]

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THIS was a reference, under s. 186 of the Code of Criminal Procedure (Act X of 1872), by J. R. Middleton, Magistrate of the District of Dharwar.

The accused was tried and convicted of theft by the Magistrate (Third Class), Dharwar District, and sent to Mr. Wiltshire, Divisional Magistrate, under s. 46 of the Code of Criminal Procedure, for a more severe punishment than the trying Magistrate was competent to award. The strange demeanour of the accused induced Mr. Wiltshire to subject him to the examination of the Civil Surgeon, Dr. Bell, who deposed: "Accused is an imbecile, and I consider him incapable of making his defence. I do not think that he will ever be better than he is, and I think that he has been in the same condition for years. He is so imbecile, that I consider him incapable of knowing the nature of an act: *e.g.*, theft, or that he is doing what is either wrong, or contrary to law, when committing theft." Upon this evidence the Divisional Magistrate found that the accused could not be made to under- [263] stand the proceedings; but, acting under s. 186 of the Code, proceeded with the trial, and convicted the accused.

This finding was not considered sufficiently explicit by the High Court, and the Divisional Magistrate was, therefore, again directed to find specifically whether the accused was of unsound mind. The Divisional Magistrate accordingly found "that the accused is an imbecile, and, consequently, unable to understand the proceedings, but that he is not of unsound mind."

At the hearing by the High Court there was no appearance either for the accused or the Crown.

JUDGMENT.

Per Curiam.—It is impossible to understand the Magistrate's finding that the accused is an imbecile, and, consequently, unable to understand the proceedings, but that he is not of unsound mind. This is a distinction without a difference.

Section 186 of the Code of Criminal Procedure (X of 1872) is intended to provide for cases in which the accused person is deaf and dumb, or, from ignorance of the language of the country and the want of an interpreter, is unable to understand, or make himself understood. In such cases the High Court would probably order the prisoner to be detained during Her Majesty's pleasure. That was the course adopted by the Queen's Bench Division in *The Queen* v. *Berry* (1) in which the prisioner was deaf and dumb, and, consequently, unable to understand the proceedings.

But in the present case it is quite clear that if the prisoner was unable to understand the proceedings, it was from unsoundness of mind properly so called, and from no other cause. The Magistrate should, therefore, have found before trial that the prisoner was of unsound mind,

(1) L.R. 1 Q.B.D. 447.

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and should have stayed further proceedings in the case. (The Code of Criminal Procedure, s. 423).

Under the provisions of s. 297 of the Code, this Court now quashes the conviction, and declares that the accused, Husen valad Bade Miya, is of unsound mind and incapable of making his defence; and the Court directs that the said Husen be released on sufficient security being given that he shall be properly taken [264] care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required; and that, in default of such security being given, the case shall be reported by the Magistrate for the orders of Government.

Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

BHAGIRTHIBAI (*Original Plaintiff* No. 1), *Appellant v.* BAYA (*Original Plaintiff* No. 2) AND OTHERS, *Respondents.**

[1st March, 1881.]

Hindu law—Inheritance—Right of sisters to succeed—Sisters endowed and unendowed, equal right of—Appeal against a co-plaintiff—Practice—Procedure.

Hindu sisters when they succeed take equally. An unendowed sister has no prior right of succession over an endowed sister, such as an unendowed daughter has over an endowed daughter.

By consent of parties the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights.

[R., 15 B. 145 (147); 15 B. 206 (209); 16 B. 119 (122); 21 B. 739 (744).]

THIS was a second appeal against the decision of J. L. Johnson, Acting Assistant Judge of Ratnagiri, modifying the decree of M. N. Nanavati, Subordinate Judge of Malvan.

The suit was originally brought by Bhagirthibai against Jandhuri and Nardhuri to eject them from a field, they having refused to pay her rent. She alleged in her plaint that the field belonged to her father, from whom her brother inherited it, and on his death his widow, Rukhmin, became the proprietor. Rukhmin died in November, 1871, and she, the plaintiff, claimed to be her heir.

Jandhuri and Nardhuri answered that the last proprietor Rukhmin mortgaged the field to one Yesu, and bequeathed all her property to her brother Sitaram, who was, consequently, the owner of the field, and that they were Sitaram's tenants.

The Subordinate Judge of Malvan, in whose Court the plaint was filed, added Yesu and Sitaram as defendants, and it appearing that Bhagirthibai had two sisters, Baya and Chevle, they were added as plaintiffs without any objection from Bhagirthibai. [265] Baya, however, did not appear in the Court of the Subordinate Judge; and Chevle, though she appeared, expressed a desire to give up her claim in favour of Bhagirthibai. The newly-added defendant answered that, under Rukhmin's will, the defendant Sitaram was the proprietor of the field, and not any of the plaintiffs. The Subordinate Judge made a decree, directing all the defendants to give up the field to the plaintiffs.

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* Second Appeal No. 367 of 1880.