

5 B. 662.]

[662] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice Melvill.

TULJARAM MORARJI (*Original Plaintiff*), Appellant v. MATHURADAS, BHAGVANDAS, AND PRANJIVANDAS, (*Original Defendants*), Respondents* AND MATHURADAS, BHAGVANDAS, AND PRANJIVANDAS, SONS, OF DAYARAM VIZLAL, DECEASED (*Original Defendants*), Appellants v. TULJARAM MORARJI (*Original Plaintiff*) Respondent*.

[September, 1881.]

Hindu law—Inheritance—Limited estate in immoveable property inherited by females who have become members of family by marriage—Absolute estate in immoveable property taken by females who have not become members of family by marriage—Nature of estate taken by widow, mother, grandmother, daughter, sister, maternal great-niece.

A maternal great-niece inheriting property is in the same position as regards the nature of the estate taken by her as a daughter or a sister.

The rule which in the Presidency of Bombay restricts the alienation of property by a widow succeeding to her husband or a mother succeeding to her son does not apply to women who have not become members of the family by marriage: e.g., a daughter takes an absolute estate in the property which she inherits from her father, and a sister takes a like estate in property inherited from her brother.

The above rule, which restricts the alienation of property by a widow inheriting from her husband or by a mother inheriting from her son, would seem to be applicable to a grandmother inheriting from her grandson, or to the widow of a *sapinda*, for they, like the widow and mother, enter by marriage into the family whence the property comes which they inherit.

The plaintiff sued to recover the moveable and immoveable property left by his brother's widow, Ladu, who died without issue. The property in question had been given to Ladu and her grandmother Ratan jointly by Ratan's sister, Lakshmi (Ladu's maternal grandaunt), who executed to them a deed of gift dated 17th December, 1843. On her death, Ratan and Ladu took possession and remained in joint possession until the death of Ratan, which occurred in 1867. Ladu was thenceforward until her death on April 19th, 1869, in sole possession.

The plaintiff had obtained a certificate of heirship to Ladu under Bombay Regulation VIII of 1827. The defendants were Ladu's first cousins once removed. They claimed under a deed of gift executed to them dated 27th February, 1869, and duly registered. The Subordinate Judge allowed the plaintiff's claim, holding the deed of gift to be *ultra vires* both as to the moveable and immoveable property. On appeal to the District Court the Judge varied the decree of the lower Court, holding the deed of gift to be *ultra vires* only as to the immoveable property, and he varied the decree by awarding to the plaintiff, as heir of Ladu, the immoveable property only. On appeal to the High Court the only question argued was the nature of the estate taken by Ladu in the immoveable property, her absolute right to the moveable property being admitted.

[663] Held that, whether Ladu took by grant or by inheritance from Lakshmi, she took an absolute estate, and being, as she was, without issue, had complete power to execute the deed of gift in favour of the defendants.

[E., 8 Ind. Cas. 214 (215) = 4 S.L.R. 77; R., 11 B. 285 (313); 11 B. 609 (615); 15 B. 206 (209); 21 B. 170 (174); 24 B. 192 (200) = 1 Bom. L.R. 574; 31 B. 453 (455) = 9 Bom. L.R. 834; 36 B. 546 (547) = 14 Bom. L.R. 569 (571) = 16 Ind. Cas. 343; D., 17 B. 690 (695) (F.B.)]

THESE were cross appeals from the decision of H. J. Parsons, Assistant Judge at Surat, varying the decree of Dawlatram Sampatram, Second Class Subordinate Judge of Bulsar.

* Special Appeal, No. 431 of 1874; and Cross Special Appeal, No. 432 of 1874.

1881 The facts of this case and the arguments appear from the judgment
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— *Chandulal Mathuradas* appeared for Tuljaram Morarji.
APPEL- *Nagindas Tulsidas* appeared for Mathuradas, Bhagvandas, and
LATE Pranjivandas.

CIVIL. The following authorities were referred to in argument :—

5 B. 662. *Mayukha Vyav.*, ch. vi. sec. viii, pl. 3, and sec. x, pl. 1, 5, 7, 8, 9,
10, 26, 28; *Vinayak Anandrav v. Lakshmibai* (1); *Pranjivandas v.*
Dekuparbai (2); Norton's Leading Cases, 26; *Doe d. Kullamal v. Kuppu*
Pillai (3); *Vijarangam v. Lakshuman* (4); *Sengamalathammal v.*
Valayuda (5); *Bhugwandeem Doobey v. Mina Bai* (6); *Srinath Ganga-*
padhya v. Sarbamangala (7); *Chotay Lall v. Chunnoo Lall* (8); *Mitaks.*,
ch. ii, sec. xi, pl. 2, 11; *Gangadaraiya v. Parameswaramma* (9); *Krishnaji*
Venkatesh v. Pandurang Naik (10); *Narsappa v. Sakharam* (11);
P. Bachiraju v. Venkatappadu (12); Cole, Dig. 417, 479; *Navalram v.*
Nandkishor (13).

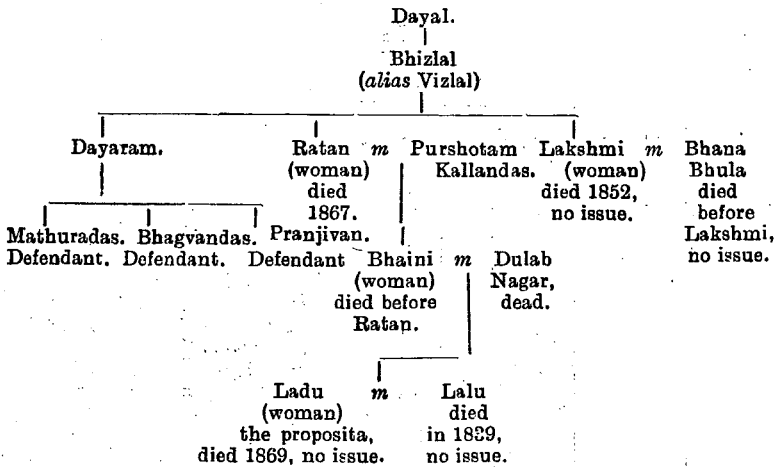
JUDGMENT.

WESTROPP, C. J.—The plaintiff brought the suit, in which these
appeals have arisen, to recover certain moveable and immoveable prop-
erty, which had been in the possession of the plaintiff's childless sister-
in-law, Ladu, at the time of her death, and was then taken possession of
by the defendants. The most remote male owner, to whom the evidence
traced the property, was Bhikari Jagdish. The following pedigree, taken
from a pedigree agreed to and signed by the pleaders on both sides in
the Court of first instance (which pedigree has been supplemented from
the other evidence), will show the relationship between the plaintiff and
Bhikari Jagdish :—

(1) 1 B. H. C. R. 117. (2) 1 B. H. C. R. 130. (3) 1 M. H. C. R. 85.
(4) 8 B. H. C. R. O.C.J. 244. (5) 3 M. H. C. R. 312.
(6) 11 M. I. A. 487. (7) 2 B. L. R. A. J. 144.
(8) 22 C. W. R. 496 C. R. = 14 B. L. R. 235.
(9) 5 M. H. C. R. 111.
(10) Printed Judgments (Bom.) for 1875, p. (52).
(11) 6 B. H. C. R. A.C.J. 215.
(12) 2 M. H. C. R. 402. (13) 1 B. H. C. R. A.C.J. 209.

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Ladu's relationship to Lakshmi, her maternal great-aunt, (through whom both parties admit that Ladu obtained the property in dispute), and Ladu's relationship to the defendants are shown in the following table:—



The plaintiff Tuljaram relied on a certificate of heirship to Ladu which certificate he had obtained under Bombay Reg. VIII of 1827 after a contest with the defendants; and in his plaint he described himself as "the heir of the deceased Ladu, being the full brother of her husband Lulu." He, in that plaint, made no mention of Bhikari Jagdish.

The defendants claimed under a deed of gift to them by Ladu (Ex. 8) dated 27th February 1869. It is duly stamped, attested, and registered, and is found by the Assistant Judge to have been executed by Ladu. The Subordinate Judge held it to be *ultra vires* as regarded both the moveable and immoveable property, and made a decree for the plaintiff as prayed by him. The Assistant Judge, holding that deed to be *ultra vires* so far only as regarded the immoveable property, varied the decree of the Subordinate Judge by awarding to the plaintiff, as heir of [666] Ladu, the immoveable property only, and leaving the moveable property in the possession of the defendants.

Both parties appealed to this Court. The plaintiff, in his memorandum of special appeal (No. 431), complained of the ruling of the Assistant Judge that the moveable property passed by Ladu's deed (Ex. 8) to the defendants, which deed the plaintiff contended was void for want of consideration. The defendants in their memorandum of special appeal (No. 432) complained of the ruling of the Assistant Judge that Ladu had not power to alienate the immoveable property, and of his not holding that the defendants were Ladu's heirs.

At the hearing before this Court the learned pleader for the plaintiff, being unable to show authority for the proposition that any consideration was necessary to support Ladu's deed of gift (Ex. 8), and declining to argue that she had not acquired an absolute estate in the moveable property of her maternal great-aunt Lakshmi, the appeal of the plaintiff (No. 431) was virtually abandoned. The contest was upon the defendants' appeal (No. 432) as to the immoveable property. Before entering upon the right of Ladu to dispose of that property, a fuller statement of facts is desirable.

Exhibits 15, 45 and 46 being all upwards of thirty years old and coming from the proper custody, *viz.*, that of the defendants, were admitted in evidence without impeachment. We proceed to mention their contents.

As already stated, the last male owner of the property in dispute (moveable and immoveable) was Bhikari, the son of Jagdish. He being childless, by a deed of gift (Ex. 15) in favour of Bhana Bhula (the husband of Lakshmi), made on the 20th August, 1815, and registered in the Surat Adalat on the 23rd May, 1816, reciting that Bhikari had brought Bhana Bhula from Navsari and had kept him in his (Bihkari's) house and maintained and educated him, and that Bhana had carefully attended and performed services for Bhikari when he was unable to serve himself, proceeded thus: "I, therefore, of my free will and accord and in sound sense give in writing as follows:—As you are my sister's son you are my *dharm-putra* (adopted son) [667] My entire inheritance [here followed an enumeration of his property, moveable and immoveable], and any other thing which is in my possession and enjoyment is given to you in gift. I have made you my heir on condition that as long as I and my wife live, the said property shall remain in our possession, and that after our deaths it shall remain in your possession and enjoyment. Nobody (else) has anything to do with it. Should any one set up any claim, the same shall be void," &c. "You are to perform the funeral ceremonies of myself and my wife. You are to be responsible for debts and dues." Beyond the recital in that deed that Bhana (the donee) was the adopted son of Bhikari (the donor), there was not any evidence of his adoption. Nor does Bhana appear to have assumed the name of Bhikari in lieu of that of Bhula, his natural father.

Bhana pre-deceased Bhikari. Nevertheless, on the death of Bhikari, Lakshmi, without opposition from the male or other heirs of Bhikari, took possession of his property, and in all respects acted as absolute owner of it. For instance, by the deed (Ex. 45), dated 30th July 1836, she, for valuable consideration, sold and conveyed to her brother Dayaram valad Vizal bin Dayal (which Dayaram was father of the defendants), the middle *gala* of a house formerly belonging to Bhikari. And by the deed (Ex. 46) of the same date she sold other portions of the same house for valuable consideration to her sister Ratan, grandmother of Ladu.

Finally, Lakshmi executed the deed of gift (Ex. 47), dated the 17th December, 1843, in favour of her sister Ratan and maternal great-niece Ladu, granddaughter of Ratan. Ladu's mother Bhaini (daughter of Ratan) as well as Ladu's husband Lalu were then dead. It proceeded thus:—"To you both I give in writing this deed of gift as follows in my lifetime and of my own free will and pleasure. Of my own womb I have no issue, neither son, nor daughter, and in the present day my age has become ripe, but except you there is not anybody to render me service by assistance, and up to this day you have given me good treatment in the way of service in every manner, and you will continue to render the same so long as I live. For this, my total property, apparel, pots, jewellery, and ornaments and all (including furniture) [668] moveables and immoveables, I have given to you as a present. Do you therefore, so long as I live, render me service, and give me good treatment. And, after I am dead, perform my funeral obsequies in the way you think best. And after that, you two should take the enjoyment of all my moveable and immoveable property, and, should one of you die, then let the survivor take the same. Henceforth I have given away my property to you. Should anybody, either on the ground of inheritance or of any other ground, make a claim

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to the same, such claim shall be null and void. Do you therefore, on my death, take into your possession all my moveable and immoveable property, and let the survivor of you take personal enjoyment of the same. You may sell, mortgage or give away the same; for this you have liberty. No one else has any claim. I have executed this of my free will and pleasure in the presence of the undernamed witnesses." The execution of that deed was not disputed. Lakshmi died in 1852. On her death Ratan and Ladu took possession of the property, and remained in joint possession until the death of Ratan, which occurred in 1867. Ladu was thence forward until her death on April 19th, 1869, in sole possession.

On the 27th February, 1869, Ladu duly executed the first above-mentioned deed of gift (Ex. 8), (the validity of which is now in contest), in favour of her three first cousins once removed: namely, Mathuradas, Bhagvandas and Pranjivandas (the sons of her great-uncle Dayaram), the defendants in this suit and appellants in Special Appeal No. 432. This deed has been duly registered under Act XX of 1866. If that deed be valid, the certificate of Tuljaram's heirship to Ladu cannot prevail against it. Such a certificate is not conclusive and may be declared null in a plenary suit such as the present suit is: Bombay Reg. VIII of 1827, s. 7, cl. ii.

Bhikari, being without male issue, and not a member of an undivided family, was competent to dispose even of his ancestral property by deed of gift or will: *Bhika v. Bhana* (1); *Narottam Jagjiwan v. Narsandas* (2); *Baboo Beer Purtab Saheb v. Maharajah [669] Rajender* (3). There may be some difficulty in determining whether Ex. 15, which Bhikari executed in favour of Bhana, is to be regarded as a deed of gift or as a will. It does not appear that Bhana was ever in possession under it. If Ex. 15 be a will, the devise to Bhana lapsed, inasmuch as he predeceased Bhikari. The date of Bhikari's death has not been fixed with certainty, but he must have died before 1836. It is admitted that Lakshmi, the wife of Bhana, possessed herself of Bhikari's property on his death, and, except so far as she alienated parts of it as above mentioned, continued in uninterrupted possession down to her own death in 1852, and was succeeded by her donees under Ex. 47, Ratan and Ladu, who continued in joint possession from 1852 to 1867, when Ratan died, and Ladu continued thence until her own death in 1869 in sole possession. Whether Ex. 15 be or be not considered as conferring title upon Lakshmi, and whether or not Bhana be deemed to be the adopted son of Bhikari, certain it is that, before the death of Ladu in 1869, there had been a possession by Lakshmi and, after her, by Ladu of, at the very least, 33 years, which possession was adverse to Tuljaram and the heirs of Bhikari. The plaint in the present suit was not filed until 1872. At Bhikari's death several of his *sapindas* were in existence, and the pedigree first above given shows that there still are some, whereas Bhana being a sister's son was only a *bandhu*. (4), and neither he nor his widow Lakshmi in right of him could have succeeded in accordance with Hindu law until the *sapindas* were exhausted.

But inasmuch as Tuljaram, the plaintiff, is related to Bhikari only through his (Tuljaram's) mother Kesar, and there are *sapindas* of Bhikari in existence of the unbroken male line, it is as necessary for Tuljaram as for the defendants to treat Lakshmi and Ladu as legitimate owners of

(1) 9 Harr. S. D., A. 446.

(3) 12 M.I.A. 1. (38, 39), *per* Sir James Colville.

(4) West and Buhler, 2nd ed., p. 205.

(2) 3 B.H.C.R.A.C.J. 8.

the property in dispute, and, as above remarked, Tuljaram in his plaint rests his claim as heir to Ladu on his being brother to Lalu, the husband of Ladu, and says nothing in that plaint of Bhikari. He does not dispute Lakshmi's right to make the deed of gift (No. 47) in favour of [670] Ratan and Ladu, and yet he inconsistently denies the power of Ladu to bestow the property on the defendants, her first cousins once removed. The Courts below have pronounced Tuljaram to be the heir of Ladu as brother of Lalu. Whether he is so or not, it is unnecessary for us to decide, inasmuch as we are of opinion that, according to the law and usage of this Presidency, Ladu had power to dispose of the property by deed or will, and has by Ex. 8 effectually disposed of it in favour of her kinsmen, the defendants.

Here, in this Presidency, the widow, who, as such, takes the property of her husband dying without leaving male issue and separated from his kinsmen, is, except for certain limited purposes, restrained from alienating such portion of that property as is immoveable. In it she has only an estate *durante viduitate*, but she is entitled to his moveable estate absolutely: *Pranjivandas v. Devkuvarbai* (1); Mayukha, ch. iv, s. 8, pl. 3, 4; see also 8 Bom. H. C. Rep. at p. 156, O. C. J.; 4 Bom. H. C. Rep. at p. 163, O. C. J.; and 6 Bom. H. C. Rep., p. 1; Act XV of 1856, s. 2. A mother, inheriting from her son, is, as to the nature of the estate which she takes in moveable and immoveable property, in the same position as that of a widow inheriting from her husband: *Narsappa v. Sakharam* (2). The same rule would seem to be properly applicable to the grandmother inheriting from her grandson, or to the widow of a *sapinda* succeeding, under circumstances similar to those under which Mankuvarbai succeeded in the case of *Lalubhai Bapubhai v. Mankuvarabai* (3), for they, like the widow and mother, enter by marriage into the family whence the property comes which they inherit.

But to females, who have not become members of the family by marriage, the restriction as to the alienation of property has not been applied in this Presidency. For instance, a daughter takes an absolute estate in the property which she inherits from her father, and a sister takes a like estate in the property which she inherits from her brother: *Vinayak Anandrav v. Lakshmbai* (4) [671] *Pranjivandas v. Devkuvarbai* (1); *Haribhat v. Damodarbhat* (5); *Babaji v. Balaji* (6); West and Buhler, 2nd ed., 471.

Referring to *Vinayak Anandrav v. Lakshmbai* (4), Mr. Mayne, the learned and able author of a Treatise on Hindu Law (7), says rightly that the force of the decisions given in that case by the Supreme Court of Bombay and Her Majesty's Privy Council consists in the fact that they were given on *dumurrer*. But he hazards a conjecture that "it is probable that the general allegation of waste was not put in any form which would have supported a decree." We have procured from the Equity Records of the Supreme Court the bill in that suit, and find that, amongst several other specific charges of waste committed by Lakshmbai, is the following in paragraph 13 of the bill:—"The defendant Lakshmbai has

(1) 1 B.H.C.R. 130.

(3) 2 B. 383=7 I. A. 212.

(5) 3 B. 171.

(6) Sec. App. 470 of 1880. Printed Judgments of 1881, p. 157.

(7) 2nd ed., pl. 533.

(2) 6 B.H.C.R.A.C.J. 215.

(4) 1 B.H.C.R. 117 (124).

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sold the said piece of land or ground situate at Warli forming part of the immoveable estate of her deceased husband, and is still attempting to sell part of the immoveable property of the said Bhagwantrav Venkaji, (her late husband) with a view of appropriating the money to her own use, although she did not and does not pretend that there was or there is any necessity for the said sale, and several brokers have during the last year and a half, at her request, gone into the bazaar at Bombay, and on several occasions offered the said last-mentioned property for sale." This paragraph (the truth of which for the purpose of the demurrer was admitted) was alone quite sufficient to support a decree and injunction, if the plaintiffs had any interest in the property, the subject of the suit. The Supreme Court and Privy Council, however, held that the plaintiffs had not any interest, reversionary or otherwise, in the property. It may here be properly mentioned that the decision of the Supreme Court in 1859 in *Pranjivandas v. Devkuvarbai* and its decision in 1861 in *Vinayak Anandrav v. Lakshmbai* were in accordance with the pre-existing traditions in that Court and in the legal profession in Bombay. With the single exception of Sir Erskine Perry's useful volume of Oriental Decisions there were [672] not then any reports of cases in the Supreme Court and the Bar was dependent on tradition for its knowledge of the course pursued in such matters by the Court. The principal depositaries of that tradition were the late Mr. LeMessurier and late Mr. William Howard, and the assistance which they generously rendered to members of the Bar on first arriving in Bombay in acquiring a knowledge of the practice of the Court and the legal usages of the country must ever be gratefully remembered. The former had been in Bombay from 1822 to 1854, during the latter 20 years of which time he filled the office of Advocate-General. The career of Mr. William Howard extended from 1836 to 1856, during the greater part of which time he was emphatically the leader of the Bombay Bar. The experience of these two gentlemen extended far beyond that of any of the Judges of the Supreme Court. Those Judges very rarely exceeded their allotted period of ten years' service. The appellants in *Vinayak Anandrav v. Lakshmbai* resorted to Her Majesty's Privy Council against the advice given to them by counsel. The decision in that case and that in *Pranjivandas v. Devkuvarbai* have been steadily followed by the High Court in numerous unreported cases, and by the legal profession in advising upon titles. Any departure now from those decisions would cause much confusion and injustice throughout this Presidency, and no advantage that we can perceive. We, therefore, must abide by the principles which they clearly indicate.

The Assistant Judge, omitting to notice Ex. 47, seems to have regarded Ladu as having inherited from Lakshmi. If this were so, Ladu would have so inherited as maternal great-niece of Lakshmi. Under such circumstances we think that her position, as to the nature of the estate which she would take, would be the same as that of a daughter or sister. There is not, to our knowledge, any precedent in this Presidency for applying the restriction upon alienation by females to women who have inherited otherwise than by virtue of marriage. We think that the analogy existing between the cases of a daughter, a sister, and a great-niece, necessitates the application to the last-mentioned of the rule applicable to the two former.

Whether, therefore, we regard Ladu as taking by grant (Ex. 47) or by inheritance from Lakshmi, we must hold that Ladu [673] took an

absolute estate, and being, as she was, without issue, had complete power to execute the deed of gift (Ex. 8) in favour of the defendants.

We must accordingly reverse the decrees of the Courts below, and make a decree for the defendants, with costs of suit and of both appeals.

Decree reversed.

5 B 673 (F.B.).

APPELLATE CIVIL—FULL BENCH.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice,
Mr. Justice Melvill and Mr. Justice Kembal.*

BHIKAMBHAT (*Original Applicant*), Appellant v. JOSEPH FERNANDEZ, DECEASED, BY HIS SONS AND HEIRS ANDREW FERNANDEZ AND OTHERS (*Respondents*).^{*} [29th and 30th August, 1881.]

Decree on bond specially registered—Execution—Registration Act XX of 1866, ss. 53 and 55—Summary decision—Civil Procedure Code (Act X of 1877), ss. 2.244 (c), 591—Right of appeal—Limitation Act, IX of 1871, sch. II, arts. 166 and 167—Decree or order in regular suit—Act XIV of 1859, ss. 20 and 22—Applications for execution in suits instituted before 1st April, 1873.

An appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866.

An application for the execution of a decree made under s. 53 of Act XX of 1866 falls within art. 166, and not within art. 167, sch. II of Act IX of 1871. *Jai Shankar v. Tetley* (1) dissented from.

A proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and a decree made in such a proceeding is a decision of a Civil Court other than a decree passed in a regular suit.

The ruling of the Privy Council in *Mungal Pershad Dicit v. Gria Kant Lahiri Chowdhry* (2)—that Act XIV of 1859, and not Act IX of 1871, applied to applications in suits instituted before the 1st April, 1873—followed.

On the 13th July, 1872, the appellant obtained a decree, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. He applied for the execution of it,—first on the 2nd September, 1872, and, again, on the 18th August, 1875. The Court made an order on the 15th November, 1874, dismissing the proceedings on his second application for execution. The decree not being fully satisfied, he again applied for its execution on the 11th September, 1878.

[674] *Held*—that the application of the 11th September, 1878, was barred both under s. 22 of Act XIV of 1859 and art. 166 of sch. II of Act IX of 1871, no proceeding having been taken to enforce the summary decree within one year next preceding the said application.

[F., 12 O. 511; R., 6 B. 54 (62); 10 C. 196 (P.C.) = 13 C.L.R. 385 = 10 I.A. 113 = 4 Sar. P.C.J. 421.]

THIS was a second appeal from an order made in an execution proceeding by A. L. Spens, District Judge of Kanara, affirming the decision of Munjunathaya Shantapa, Subordinate Judge of Honore.

On the 13th July, 1872, the appellant, Bhikambhat, obtained a decree against the defendant, Joseph Fernandez (deceased), for Rs. 2,064 and costs, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. On the 2nd September, 1872, he applied for the execution of the decree, and recovered Rs. 1,150 by the attachment and sale of certain immoveable property in the possession of Andrew Fernandez, one of the sons and heirs of the deceased defendant. On the 18th

^{*} Second Appeal No. 2 of 1879 from order.

(1) 1 A. 586.

(2) 8 I.A. 123.