

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

BAIA KADAR, APPELLANT, v. GULAM MOHIDIN, RESPONDENT.*

1883
July 19.

*Code of Civil Procedure (Act X of 1877), Sec. 313--Judgment-debtor--Representative
—Sale of immovable property—Setting aside of sale.*

In the event of the death of the judgment-debtor, notice must issue to his representative before the sale of immovable property can be set aside under section 313 of the Code of Civil Procedure, albeit that the section makes no express provision for the appearance of the representative.

THIS was an appeal, under section 588 of the Code of Civil Procedure (Act X of 1877), from an order made by Ray Saheb Ramji Santaji, Subordinate Judge of Mahad.

In execution of a decree obtained by one Gulam Mohidin against Sharifu Bibi, some immovable property belonging to the latter was put up to sale, and Bala Kadar became the purchaser. Under section 313 of the Code of Civil Procedure the purchaser applied to the Court to set aside the sale, on the ground that the person, whose property purported to be sold, had no saleable interest therein. The Court rejected the application, and confirmed the sale, but without giving notice to the representative of Sharifu Bibi, the judgment-debtor, who had died in the meanwhile.

The applicant, therefore, appealed to the High Court.

Shivram Sitaram Wagle for the applicant.

Shivshankar Govindram for the respondent.

WEST, J.—It is imperative on a Court, before making an order to set aside a sale under section 313, to see that notice has been given to the judgment-debtor or his representative. Mr. Wagle contends that the representative not being specified, notice to the representative is needless after the death of the judgment-debtor. But though “judgment-debtor” is not so defined as to include a representative, yet the reason of the thing here requires that a representative should have the same opportunity of guarding his interests as the judgment-debtor himself, and we have no doubt that this was the intention.

* Appeal from Order, No. 19 of 1882.

Mr. Shivshankar urges that a representative cannot be called forward now when more than sixty days have elapsed from the sale; but section 313 does not prescribe that the notice is to be served before the application, and schedule II, article 172 of Act XV of 1877 only requires that the application shall be made, not that the notice shall be served, within sixty days from the sale.

We must set aside the proceedings, and direct that the investigation be made anew after notice to the representative of Sharifu Bibi.

Costs to abide the event.

Proceedings set aside.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

FAKI ISMAIL (DEFENDANT), APPLICANT, v. UMABAI BIVALKAR
(PLAINTIFF), OPPONENT.*

*Mamlatdar—Jurisdiction—Removal of earth from field—Profit of land—
Bombay Act III of 1876, Sec. 4, Cl. 2.*

The removal of earth from a field is a taking of a portion of the substance, not merely of a profit, of the land; and the mamlatdar has no jurisdiction, under section 4 of Bombay Act III of 1876, to entertain an application for an injunction to restrain the defendant from obstructing the plaintiff in the exercise of her right to take earth from the defendant's land.

THIS was an application, under the extraordinary jurisdiction of the High Court, for the reversal of the order of Rav Saheb Dinkar Trimbak, Mamlatdar of Panvel.

The plaintiff alleged that she had the right to take earth from the defendant's neighbouring field for the purpose of repairing her own embankment, and that she had always exercised such right till obstructed by the defendant, and prayed for an injunction, under clause 2, section 4 of Bombay Act III of 1876, restraining the defendant from interfering with her in the exercise of her right. The defendant contended that the mamlatdar had no jurisdiction to entertain the suit. The mamlatdar overruled the contention, and on the merits directed that an injunction, such as the plaintiff prayed for, should issue. The defendant, therefore, applied to the High Court.

* Extraordinary Application, No. 101 of 1882.

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BALA KADAR
v.
GULAM
MOHIDIN.

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July 11.