

[37] Section 244, however, does not bar the suit. It could have no application except as regards the property affected by the decree, and it is evident from the decision of the Assistant Judge that a part, at any rate, of the property now in suit was not included in the decree. Moreover, the plaintiff does not claim title from the judgment-debtor in the former suit, and the defendant No. 2, the auction-purchaser, cannot be held to be the representative of either party. See *Hira Lal Chatterji v. Gourmoni Debi* (1); *Jagat Narain v. Jag Rup* (2); *Ramchhaibar Misr v. Bechu Bhagat* (3). In the second reason also we cannot concur. As soon as the plaintiff's title was denied, as it clearly was when his property was sold in execution as belonging to some one else, he was entitled to bring his suit. He was not obliged to wait until he was actually dispossessed: see *Baji Yeshvant v. Trimbak Atmaram* (4).

We reverse, therefore, the decree of the lower appellate Court and remand the appeal for a hearing on the merits. It is stated that the plaintiff has now been dispossessed by defendant No. 2. If that is so, or if, in consequence of any proceedings subsequent to the sale, the Court thinks that a prayer for consequential relief should be made, there would be no objection to the Court permitting such an amendment of the plaint as may, under the circumstances, be necessary. Costs to abide the result.

*Decree reversed.*

13 B. 37.

APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

SHRI VISHWAMBHAR PANDIT *alias* NANA MAHARAJ (*Applicant*) v.  
VASUDEV PANDIT *alias* BABA MAHARAJ (*Opponent*)\*

[29th February, 1888.]

*Regulation VIII of 1827, s. 9—Construction of the words "may appoint"—Appointment of administrator—Imperative and not discretionary.*

Where the right of succession to the estate of a deceased person is disputed between two or more claimants, and none of them have taken possession, the [38] District Judge within whose jurisdiction the property is situate is bound, on the application of one of the parties concerned, to appoint an administrator under s. 9 of Reg. VIII of 1827.

The words of the section are imperative and not permissive.

The use of the words "*may appoint*" in this section does not imply that the District Judge has any discretion in a proper case to appoint or not to appoint an administrator. If any discretion is given as to the exercise of the power thereby conferred, it is that of determining whether the occasion has arisen in the particular case.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The material facts of this case, as set out in the application, were as follows:—One Tatia Maharaj died in 1866 possessed of several *inam* villages and lands situate in the districts of Poona, Belgaum and Satara. He left a childless widow by name Umabai. She succeeded to the widow's estate in her deceased husband's property. During her lifetime she was in full possession and enjoyment of the whole of her husband's property.

\* Application, No. 137 of 1887, under Extraordinary Jurisdiction.

(1) 13 C. 326.

(2) 5 A. 452.

(3) 7 A. 641.

(4) Printed Judgments for 1887, p. 287.

1888  
 FEB. 29.  
 —  
 APPEL-  
 LATE  
 CIVIL.  
 —  
 13 B. 37.

One Baba Maharaj, alleging himself to be the adopted son of the deceased Tatia Maharaj, laid claim to his property, and tried to get possession of it from the hands of Umabai. She resisted, and he then petitioned the revenue authorities to assist him in realising the revenues of the *inam* villages. On their refusal he petitioned the Government of Bombay, which, after a full consideration of the matter, passed a Resolution, No. 2194, dated 14th March, 1885, declaring that the widow should be recognised as the person in possession, and entitled to receive the income of the villages until Baba Maharaj should establish his title by adoption in a Civil Court.

Baba Maharaj accordingly filed a suit (No. 4 of 1886) against Umabai in the Court of the Agents for Sardars at Poona (1) for a declaration that he was the adopted son of the deceased Tatia Maharaj, and (2) to recover possession of his property from the hands of his widow.

In the course of this suit the Collectors of Poona, Belgaum, and Satara were appointed as receivers, under s. 503 of the Civil Procedure Code (Act XIV of 1882), with authority to take possession [39] of the *inam* villages in dispute and collect their revenues till the final decision of the suit.

Pending this suit, Umabai died on 25th September, 1887. The suit thereupon abated.

On the 14th October, 1887, one Nana Maharaj, who claimed to be the nearest kinsman and reversionary heir of the deceased Tatia Maharaj, applied to the District Judge of Poona, praying that the deceased's property in the possession of the Collectors of Poona, Belgaum, and Satara should be handed over to him, or that an administrator should be appointed under s. 9 of Reg. VIII of 1827 to take charge of the said property, until the right of succession to the deceased's estate was determined in a regular suit.

This application was rejected by the District Judge, who gave his decision as follows :—

"The words of s. 9 of Reg. VIII of 1827 are not directory or mandatory, but permissive—'The Judge *may* appoint,' &c. And it is clear that the object of the provision is that the property may not be in danger of being wasted, destroyed, or alienated. I do not think that any such danger is likely to arise. Baba Maharaj has been treated all along as the adopted son of Tatia Maharaj. In suit No. 4 of 1886, which has just abated, Baba Maharaj sued his adoptive mother for the possession of certain property of the deceased Tatia Maharaj, as the adopted son of Tatia Maharaj. The mother of the applicant has herself also sued the opponent in the Court of the Subordinate Judge as the adoptive son of Tatia Maharaj for certain property, and although it has been rightly contended that such recognition would not amount to an estoppel so as to prevent the applicant from now disputing the validity of the adoption, it does go to show that Baba Maharaj was held to be in possession of the property. The words "entitled and willing" do not mean strictly legally entitled, but *prima facie* entitled, and it would be a great hardship on the alleged adoptive son to remove him from such possession as he now has, and to appoint an administrator at the intervention of any outsider who chooses to set up [40] a title on the strength of an alleged adoption by a distant relative of the deceased \* \* \* \* The application is refused."

Against this order Nana Maharaj made the present application to the High Court under its extraordinary jurisdiction.

A rule nisi was granted calling upon Baba Maharaj to show cause why the District Judge's order should not be set aside.

*Badrudin Tyabji* (with him *Mahadev C. Apte*) showed cause:—The opponent is both entitled and willing to take charge of the property in dispute. He is the adopted son of *Tatia Maharaj*, deceased. During his minority the widow managed it as his guardian. Her possession was, therefore, the possession of the adopted son. The present case is governed by the first clause of s. 9 of Reg. VIII of 1827.

[*BIRDWOOD, J.*—We do not think so. We have here a dispute as to the right of succession to the deceased's property between two claimants, and neither of them is in possession. The second clause of s. 9 therefore applies.]

But the dispute is not a *bona-fide* one. Our title has already been recognised by the applicant. His previous conduct estops him from contesting our title. We are, moreover, in constructive possession. The Collector is at present in management as our agent. Under these circumstances the District Judge has exercised a wise discretion in refusing to appoint an administrator.

[*BIRDWOOD, J.*—The language of s. 9 is, in our opinion, imperative and not permissive. The District Judge has proceeded on an erroneous construction of the section, and thus failed to exercise the jurisdiction vested in him by law.]

*Latham* (Advocate General), *Farran*, and *Jardine*, (with them *Pandurang Balibhadra* and *Ganpat Sadashiv Raw*), for the applicant, were not called upon to support the rule.

#### JUDGMENT.

*BIRDWOOD, J.*—We are of opinion that the District Judge has wrongly held in this case that the words of s. 9 of Reg. VIII of 1827 are not directory or mandatory, but permissive. The use of the words "may appoint" in this section does not imply that the District Court has any discretion in a proper case to appoint or not to appoint an administrator. The principle [41] to be applied to the construction of the section is that laid down by the Court of Common Pleas in *MacDougall v. Paterson* (1), where it was said that "when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application; and that the exercise of such power depends, not upon the discretion of the Court or Judge, but upon the proof of the particular case out of which such power arises.

If any discretion is given by s. 9 of the Regulation as to the exercise of the power thereby conferred, it is not that of exercising the power or not at pleasure when the occasion arises, but only of determining whether the occasion has arisen in the particular case. (See *Maxwell on Statutes*, 2nd ed., page 300.) The District Judge has practically, by the view he has taken of the requirements of the law, failed to exercise the jurisdiction vested in him. When the application was made, he should have considered (1) whether the right of succession to the property in question was disputed between two or more claimants, and (2) whether none of them had taken possession. If he found both these points in the affirmative, he should have proceeded to appoint an administrator. We

(1) 11 C. B. 755 (773).

1888  
FEB. 29.  
—  
APPEL-  
LATE  
CIVIL.  
—  
13 B. 37.

reverse his order and return the case that the application may be disposed of according to law.

Costs of this application to be dealt with by the District Judge when he finally disposes of the case.

*Order reversed.*

NOTE:—Section 9. Whenever there is no person on the spot entitled and willing to take charge of the property of a person deceased, where the right of succession is disputed between two or more claimants, none of whom has taken possession, or where the heirs are incompetent to the management of their affairs, from infancy, insanity, or other disqualification, and have no near relations entitled and willing to take charge on their behalf, *the judge within whose jurisdiction such property is, may appoint an administrator for the management thereof, until the lawful heir, executor, or administrator appears, or the right of succession is determined, or the disqualification of the heir is removed, as the case may be, when the Judge, on being satisfied of the facts, shall direct the administrator in charge to deliver over the property to such person, with a full account of all receipts and disbursements during the period of his administration.*

13 B. 42.

[42] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

KEVAL VANMALI (*Original Plaintiff*), *Appellant v. FAKIRA JIVAN, DECEASED, BY HIS HEIRESS, HIS SISTER, BAI LAKAI AND OTHERS (Original Defendants), Respondents.\** [14th February, 1888.]

*Assignment of a chose-in-action, validity of—Public policy—Indian Contract Act (IX of 1872), s. 23—Void contract—Transfer of mortgage-bond for valuable consideration.*

An assignment of a mortgage-bond for a valuable consideration is not void under s. 23 of the Indian Contract Act (IX of 1872) as being opposed to public policy.

SECOND appeal from the decree of S. Hammick, Acting District Judge of Surat, in appeal No. 26 of 1884.

The plaintiff Keval Vanmali sued to recover Rs. 198 due on a mortgage bond executed in favour of one Parshotam Bhagvan by Fakira Jivan, deceased. The bond was dated 17th October, 1871. It was assigned by Parshotam to the plaintiff for Rs. 60 some time in 1882. This suit was filed in 1883.

The defendants contended (*inter alia*) that they knew nothing of the mortgage-bond, and that the assignment in plaintiff's favour, if made at all, was of a champertous nature.

The plaintiff's evidence about the assignment was as follows:—

"I bought the mortgage-bond at my house. Parshotam came and asked me what he should do with the bond. I replied he might sue himself, or, if he liked, he might transfer it to me. He then asked me what I would pay for it; he wanted Rs. 99; I said I would pay Rs. 50. At last the bargain was struck for Rs. 60 paid at the time in cash. This was orally done. He then gave over the bond to me."

The vendor Parshotam stated as follows:—"I sold the bond at Surat in the plaintiff's house \* \* \* I went with this bond to consult a *vakil* whether any suit was maintainable thereon. I consulted no *vakil* \* \* \* I then went to plaintiff's house, because his house was close by. I showed the documents to the plaintiff, and asked him if any suit was maintainable thereon. [43] He replied that I might sell these to him, and

\* Second Appeal, No. 757 of 1885.