

THIS was a second appeal from the decision of R.S. Tipnis, Acting Assistant Judge of Ratnagiri.

The plaintiff brought the present suit for a declaration that the lands mentioned in the plaint were *khoti* and not *dhara* lands; he also claimed *thal* rent for one year on account of two of the plots of land in dispute.

The defendant pleaded that the lands were *dhara* lands; that the survey officers had entered them as *dhara* lands in the Government records; that in previous suits (which were brought to recover *thal* rent within the small cause jurisdiction of the Subordinate Judge's Court) he was held not liable to pay *thal* rent, and that certain persons had not been made parties to the suit.

The Subordinate Judge found that the lands in dispute were the defendants' *dhara* lands. He rejected the plaintiff's claim.

The plaintiff appealed to the District Court at Ratnagiri, which held that the question whether the lands were liable to pay *thal* rent was *res judicata* by reason of the previous suits which related to the recovery of *thal* rent and in which the claim had been disallowed. The District Judge reversed the decree of the Subordinate Judge, and declared that the lands in dispute were *khoti* lands, but rejected the claim for *thal* rent.

Against the decree of the District Court the plaintiff preferred a second appeal.

Vasudev Gopal Bhandarkar, for the appellant.

Daji Abaji Khare, for the respondent.

JUDGMENT.

[105] SARGENT, C. J.—As the previous suits were in the nature of small cause suits in which there was no right of second appeal, the decisions in those suits could not operate as *res judicata* in the present suit—*Bholabhai v. Adesang* (1) and *Babaji Pandurang Kapdi v. Dhondo Vithal Karande* (2).

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision after recording a finding on the question whether the defendant has proved that he was not liable to pay *thal*, and also, in the event of that finding being in the negative, on the fifth issue. Costs to abide the result.

Decree reversed.

15 B. 105.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

SANTAJI KHANDERAO, DECEASED, BY HIS SONS (*Plaintiffs*) v.
RAVJI AND OTHERS (*Defendants*).* [19th August, 1890.]

Succession Certificates Act, VII of 1889, s. 4—Act XXVII of 1860, s. 2—Construction.

The plaintiffs brought a suit to recover a certain sum of money due on a mortgage-bond executed by defendant No. 1 in favour of their (the plaintiffs')

* Civil Reference No. 7 of 1890.

(1) 9 B 75 (79).

(2) P. J. for 1886, p. 82.

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deceased father, by the sale of the mortgaged property, as well as from the defendants personally. Some time after the institution of the suit the parties compromised the claim. The plaintiffs applied to the Court to pass a decree in terms of the compromise. The Subordinate Judge referred the question whether a certificate under Act VII of 1889 was necessary before he could pass a decree as applied for.

Held, that a certificate was necessary. Section 4 of Act VII of 1889 distinctly and peremptorily forbids any Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production, by the person claiming, of probate or letters of administration. A decree would be "against the debtor" when passed, although he consented to it.

[F., 24 Ind. Cas. 143; R., 7 C.L.J. 658=12 C.W.N. 145; D., 28 B. 630 (632).]

THIS was a reference from Rav Saheb Vishvanath Vinayak Paranjape, Subordinate Judge of Patan, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

[106] "The case was stated as follows:—

"The plaintiff sued to recover a certain sum due on a mortgage bond executed by defendant 1 to their deceased father by sale of the mortgaged property and from the defendants personally.

"The parties then compromised the claim, and prayed for the passing of a decree in terms of the compromise.

"The plaintiffs had not produced a certificate under the Succession Act VII of 1889."

The question referred by the Subordinate Judge for the High Court's decision was:—Whether such certificate was necessary for passing a decree as desired by the parties?

There was no appearance on either side.

OPINION.

SARGENT, C. J.—The language and operation of s. 4 of Act VII of 1889 differ materially from those of s. 2 of Act XXVII of 1860, as it distinctly and peremptorily forbids any Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production, by the person claiming, of a probate or letters of administration. A decree would be "against the debtor" when passed, although he consented to it. Section 2 of Act XXVII of 1860 only provides that no debtor shall be compelled in any Court to pay his debt to the person claiming except on production of a certificate. This would not have prevented a decree by consent. This distinction in the language may be explained by the circumstance that the Act of 1889 is intended for revenue purposes, as well as to facilitate collection of debts, whereas the Act of 1860 was not originally passed with such intention, as shown by the circumstance that no fee was made payable on a certificate under the Act until the passing of the Stamp Act of 1862. We must, therefore, hold that a certificate was necessary.