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think that the principle underlying those decisions applies here—that principle being, we apprehend, this that a suit for the partition of property comprised in the Mamlatdar's order is not properly designated as a suit to recover such property. And whether that property is the only one of which a partition is claimed, or whether it is one of several such properties, is not a material question in this connection. We may further point out that in *Bhaguji* v. *Aniaba*, the suit as originally launched by the plaintiff was one for the partition merely of the one house which was comprised in the Mamlatdar's order—and although the Subordinate Judge held that there was other ancestral property also, and made a general decree for partition in favour of the plaintiff, he expressly gave a share to the plaintiff in the particular property comprised in the Mamlatdar's order. If the argument for the appellant before us is correct, the plaintiffs had under Act IX of 1871, sch. II, art. 46 coupled with s. 29, absolutely lost all right to the particular property comprised in the Mamlatdar's order, and their suit, so far as it related to the property, would have been untenable. The passage which Mr. V. G. Bhandarkar cited from Mr. Starling's book on Limitation merely states the actual decision in the two cases referred to, and is not in any way inconsistent with the view we have now expressed. We think it will be a refined distinction to hold, that where the partition suit comprises only the property to which the Mamlatdar's order related, it is altogether barred if brought more than three years after such order, while if it relates to that and also other properties, the bar of limitation does not apply to any extent whatever. In the latter case, as much as in the former, the plaintiff asks for a partition of that particular property (compare West and Bühler's Digest, p. 597 *et seq*). In the latter case, as much as in the former, it is possible to refuse him relief in respect of that particular property only. We do not think that the decisions of this Court in *Bhaguji* v. [307] *Aniaba* and *Shivram* v. *Narayan* afford any warrant for such a distinction as is here relied on.

Upon the whole, therefore, we must hold that the appellant here has not succeeded in showing that the decree of the Court below is incorrect, and we must, accordingly, confirm it with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Telang.

PARVATA AND ANOTHER (*Original Opponents*), *Appellants v.* DIGAMBAR (*Original Applicant*), *Respondent.** [7th October, 1890.]

Decree—Execution of decree—Assignee of decree under oral assignment—His right to execute decree—Civil Procedure Code (Act XIV of 1882), s. 232—Plea of fraud cannot be raised in execution proceedings.

An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution of a decree, but, as regards one who claims to be an assignee in writing or by operation of law, the Court has a discretion under s. 232 of the Code of Civil Procedure (Act XIV of 1882), whether to recognize such assignment or not.

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When an assignee of a decree applied for execution, and the judgment-debtors contended that the decree sought to be executed had been obtained by fraud, and was, therefore, a nullity and incapable of execution.

Held, that it was not open to the judgment-debtors to raise the defence of fraud in the course of the execution proceedings.

[R., 31 B. 462=9 Bom. L.R. 728 (729); 13 Ind. Cas. 78=10 M.L.T. 532=(1911) 2 M. W.N. 559.]

SECOND appeal from the decision of Rao Bahadur N. G. Phadke, Joint First Class Subordinate Judge, A. P. at Satara in appeal No. 229 of 1889.

Rango Dhonddev obtained a decree against Parvata for possession of certain lands. By an oral assignment Rango transferred his rights under the decree to Digambar Lakshman. Thereupon Digambar applied for execution of the decree, but his application was rejected by the Court of first instance, on the ground that the decree sought to be executed had been obtained by fraud, and that the assignment of the decree was also fraudulent.

On appeal against this order of rejection, the Subordinate Judge with appellate powers held that it was not open to the Court **[308]** in execution proceedings to go behind the decree for determining its fraudulent nature or otherwise, and that, under s. 232 of the Code of Civil Procedure (Act XIV of 1882), the Court had a direction to permit the assignee of a decree to enforce it. The Subordinate Judge, therefore, reversed the decision of the Court of first instance and ordered execution to issue.

Against this decision the judgment-debtors appealed to the High Court.

Daji Abaji Khare, for appellants.

Vasudev R. Joglekar, for respondent.

JUDGMENT.

BAYLEY, J.—In this case the applicant sought for execution of a decree obtained by one Rango against the defendants, alleging that the decree had been transferred to him under an oral assignment by Rango. On behalf of the defendants, the appellants, it was contended before us among other defences, firstly, that the decree had been obtained by fraud, and was, therefore, a nullity and incapable of execution; and, secondly, that, in any event, the applicant had no right to obtain execution of it under the provisions of the Code of Civil Procedure. We decided at the hearing that the defence of fraud was not one which it was open to the appellants to raise in the course of execution proceedings such as the present. On the second point, we took time to consider, having regard to the definition of "decree-holder" which is contained in s. 2 of the Civil Procedure Code, and to which no specific reference is made in the judgment of this Court in *Javermal* v. *Umaji* (1).

We have now considered the point and also spoken to the Chief Justice on the subject, and we are clearly of opinion that the decision in *Javermal* v. *Umaji* is right, and ought to be followed. If the definition of "decree-holder" contained in s. 2 of the Civil Procedure Code is applied in the construction of s. 230, the result will be that the Court, which has no discretion to refuse to issue execution at the suit of a person who obtains a decree (see *Ishan Chunder Roy* v. *Ashanoollah Khan* (2))

(1) 9 B. 179.

(2) 10 C. 817.

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will have equally no discretion when applied to by one [309] to whom such person transfers a decree by assignment, oral or written. But by s. 232 of the Code such a discretion is given in plain terms, when the application for execution is made by one to whom a decree is transferred by assignment in writing or by operation of law. It is impossible to suppose that the Legislature can have intended this result. The only rule that would harmonize the sections in question is the rule laid down in substance in *Javermal* v. *Umaji*, namely, that an assignee under an oral assignment has, as such, no *locus standi* at all to apply for execution of a decree, but that as regards one who claims to be an assignee in writing or by operation of law, the Court has a discretion whether to recognize such assignment or not. And this result can be arrived at by not applying the definition in s. 2 to the construction of s. 230 as being "repugnant to the context."

This being our view, the order of the Court below must be reversed, and the application of the applicant dismissed with costs.

Order reversed.

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15 B. 309.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

KALIDAS JIVRAM AND OTHERS (*Original Defendants*), *Appellants v.* GOR PARJARAM HIRJI AND OTHERS (*Original Plaintiffs*), *Respondents.** [8th October, 1890.]

Civil Procedure Code (Act XIV of 1882), *ss.* 26 *and* 30—*Joint suit by persons who had a common cause of action—Declaratory decree—Denial of right—Perpetual injunction—Specific Relief Act (I of* 1877), *ss.* 42 *and* 54.

The plaintiffs were the herditary *gors*, or priests, a residing at Dakor, who ordinarily conducted their *yajmans*, or patrons, to the temple of Shri Ranchhod Raiji, performed worship there on their behalf, and received remuneration for their services. The defendants were the *shevaks*, or ministers, of the idol; it was their duty to remain in constant attendance on the idol, perform the daily services at the temple, collect the offerings, and apply the same to the purposes of the foundation.

[310] On 12th October 1883 the *shevaks* issued rules prohibiting people from entering the *Nij Mandir* and *Saja Mandir*, which were particularly sacred chambers in the temple, except on payment of certain fees. Every visitor was required to purchase a ticket of admission to the interior parts of the temple.

The plaintiffs thereupon sued for a declaeation of their right of free access to the *Nij Mandir* and *Saja Mandir* at all times and on all occasions when the temple was open for purposes of public worship. They alleged that the new rules framed by the *shevaks* constituted as infringement of their immemorial rights of going into the said *mandirs* without any let or hindrance of worshipping the idol there for themselves and their patrons, and of receiving whatever their patrons gave them. They, therefore, sought for a perpetual injunction restraining the *shevaks* from interfering with their rights.

The plaintiffs were 208 in number. They filed the present suit under s. 30 of the Code of Civil Procedure (Act XIV of 1882).

The defendants contended, *inter alia*) that the plaintiffs had each a separate cause of action; that they had no right to sue jointly; that they were not entitled to a declaratory decree under s. 42 of the Specific Relief Act, and that

* Appeal, No. 36 of 1888.