

We must, therefore, send back the case for a finding on the fourth issue after taking such evidence as both parties may wish to give. Finding to be transmitted to this Court within three months.

Case sent back for a finding.

15 B. 580.

[580] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Candy.*

NARAYAN BHAI BARTAKE AND ANOTHER (*Original Plaintiffs*) v.
TATIA GANPATRAO DESHMUKH AND OTHERS (*Original
Defendants*).* [14th January, 1891.]

Succession Certificate Act (VII of 1889), s. 4—Debtor of a deceased person—Certificate—Sale of deshmukhi hak—Vesting of the hak in the vendee—Death of the vendee—Recovery of the hak by the vendors—Suit for damages—Money had and received.

Section 4 of Act VII of 1889 (1) (Succession Certificate Act) prevents a civil Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production of one or other of the documents there mentioned.

T, and others, who were entitled to recover from the Government treasury a certain sum on account of *deshmukhi hak*, sold it to B. in 1873 in consideration of a debt due to him. B. died in the year 1884. In the year 1886 T. and his co-vendors themselves recovered from the Government the said sum, which, under the sale-deed, was recoverable by B. In a suit brought by the heirs of B. to recover the amount from T. and the other executants of the sale-deed.

Held, that a certificate under Act VII of 1889 was not required to enable the plaintiffs to sue. By the sale in 1873 the property in the amount of the *hak* sold had become vested in the deceased before his death, but the defendants never became his debtors at any time, as the amount so assigned was not received by them from the revenue authorities till after his death in 1884. For wrongfully receiving it in 1886, the defendants could either be sued in damages by the persons entitled to receive the *hak*, or treated as their debtors and sued for money had and received to their use.

[Disappr., 22 M. 139 (142); R., 18 M. 457=5 M.L.J. 61.]

[581] THIS was a reference made by C. E. G. Crawford, District Judge of Thana, under s. 617 of the Code of Civil Procedure (Act XIV of 1882).

* Civil Reference, No. 19 of 1890.

(1) Section 4 of Act VII of 1889. (1), No Court shall—

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under s. 36 or s. 37 of the Administrator-General's Act (II of 1874), and having the debt mentioned therein, or

(iii) a certificate granted under this Act and having the debt specified therein, or

(iv) a certificate granted under Act XXVII of 1860 or an enactment repealed by that Act, or

(v) a certificate granted under the Regulation of the Bombay Code No. VIII of 1827 and, if granted after the commencement of this Act, having the debt specified therein.

(2). The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

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15 B. 565.

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 15 B. 580.

The facts of the case were as follows :—

Tatia Ganpatrao Deshmukh and three others being indebted to one Bhau Manaji Bartake sold to him on the 30th March, 1873, in consideration of the debt, the whole amount of their *deshmukhi hak* which was held in deposit by the Government from the year 1862-63. They executed a sale-deed and also gave to him a power of attorney to enable him to recover the amount from the treasury when the Government should pass an order for the payment. Bhau Manaji Bartake died in the year 1884, and in 1886 Tatia Ganpatrao Deshmukh and his co-vendors themselves recovered the amount of the *deshmukhi hak* from the Government. On the 15th August, 1889, Narayan Bhau Bartake and Govind Bhau Bartake, the sons of Bhau Manaji Bartake, filed a suit against Tatia Ganpatrao and the other executants of the sale-deed to recover the said amount. The Sub-ordinate Judge of Pen (Rav Saheb Ramchandra B. Chitale) rejected their claim on the ground that a certificate under the Succession Certificate Act (VII of 1889) was necessary to enable them to sue.

The plaintiffs appealed to the District Court at Thana, and the District Judge, in referring the question as to whether a certificate under the said Act was necessary to enable the plaintiffs to sue, made the following observations :—

" This is a suit to recover the amount of the allowance due to defendants from the treasury which they had agreed that plaintiff's father should take in their stead. The agreement to this effect was made in 1873. In 1886, after the death of the plaintiffs' father, the defendants themselves drew the money from the treasury and appropriated it.

[582] " It is argued that this is not a suit to recover a debt due to the deceased; the money was appropriated by defendants, and what plaintiffs sue for is damages for breach of their agreement; when it was appropriated, the deceased was already dead, and the plaintiffs standing in his shoes, the debt is due to them and not to him. The Act does not apply to Hindu joint families, the debt being the sons' as much as the deceased father's.

" On the other hand it is argued that plaintiffs have succeeded to their father's rights, and that, therefore, a succession certificate is necessary. The Act applies to all succession whether by inheritance or survivorship and to all cases in which money is due, as is shown by and except as excepted in sub-s. (2) of s. 4 of the Act.

" My own opinion is in accordance with the arguments last set out, but as I entertain considerable doubt as to its correctness, and my decision in this appeal will be final, I refer the point, namely,

" Is a certificate under Act VII of 1889 necessary to enable the plaintiffs to maintain this suit? "

There was no appearance for the parties in the High Court.

ORDER.

SARGENT, C.J.—Section 4 of Act VII of 1889 prevents a civil Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production of one or other of the documents there mentioned. Here the defendants had, on 30th March, 1873, sold to the deceased Manaji Bartake the amount due on account of the *deshmukhi hak* which the Sarkar might please to order to be debited. The property, therefore, in the amount of the *hak* so sold became vested in the deceased

before his death, but the defendants never became his debtors at any time, as the amount so assigned was not received by the defendants from the Revenue authorities until after his death in 1884. For wrongfully receiving it in 1886 the defendant could either be sued in damages by the persons entitled to receive the *hak*, or treated as their debtors and sued for money had and received to their use. We are, therefore, of opinion that a certificate was not required to enable plaintiffs to sue.

Order accordingly.

1891
JAN. 14.
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APPEL-
LATE
CIVIL.
—
15 B. 580.

15 B. 583.

[583] APPELLATE CIVIL.

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

YESU RAMJI KALNATH, DECEASED, BY HIS SONS AND HEIRS VISHRAM YESU AND ANOTHER (*Original Plaintiff*), *Appellant v.* BALKRISHNA LAKSHMAN AND OTHERS (*Original Defendants*), *Respondents*.*
[19th January, 1891.]

Mortgage by mortgagee—Suit for redemption by original mortgagor against mortgagee and sub-mortgagees—Adverse possession by sub-mortgagees—"Purchaser for value"—"Valuable consideration"—S. 5 of the Limitation Act (XIV of 1859)—Art. 134, sch. II of the Limitation Act (IX of 1871)—Art. 134, sch. II of the Limitation Act (XV of 1877).

Held, that the expression "purchaser for valuable consideration," in art. 134 of the Limitation Acts (IX of 1871 and XV of 1877), includes a mortgagee as well as a purchaser properly so called.

Semble.—The words "*bona fide*," which appeared in art. 134, sch. II of the Limitation Act (IX of 1871), were advisedly omitted from art. 134, sch. II of the Limitation Act (XV of 1877), to exclude the possible inference that absence of notice of the real owner's claim was necessary to enable a purchaser to avail himself of the article.

[*Diss.*, 6 M.L.J. 260; N.F., 8 O.C. 233 (238); F., 36 B. 146=13 Bom. L.R. 1057=12 Ind. Cas. 737; *Appr.*, 22 B. 225 (228); R., 20 A. 482 (F.B.); 29 A. 471=4 A. L.J. 375=27 A.W.N. 133; 18 B. 337 (339); 19 B. 140 (143); 23 B. 614 (618); 19 C. 544 (568) (F.B.); 24 M. 471 (F.B.); 2 C.L.J. 546 (553).]

THIS was a second appeal from the decision of G. C. Whitworth, District Judge of Ratnagiri.

The suit was filed on the 14th April 1885, to redeem lands mortgaged under a mortgage-deed, dated May, 1825, by the plaintiff's grandfather, Fatji Dadji Kalnath, to the father of defendant No. 1, Ram Bable Parab, for Rs. 94-9; the plaintiff alleged that by the terms of the mortgage the property was redeemable at any time on payment of the principal amount; that he was ready and willing to pay up the amount, but that the defendants would not restore the lands.

Defendants Nos. 1 and 2, (Ram Bable Parab and Babu Lakshman Parab), denied the mortgage, and alleged (*inter alia*) that the lands belonged to them, and that they had mortgaged the land in question to defendants 15 and 18, in whose possession they had been for many years.

The Court of first instance passed a decree for the plaintiff. The District Court reversed that decision. In second appeal to the High Court

* Second Appeal, No. 537 of 1888.