

1890

JULY 15.

APPEL-

LATE

CIVIL.

15 B. 73.

JUDGMENT.

TELANG, J.—The lessee in this case seems to me to be properly designated as a "cultivator." He is so called, in fact, in the Registrar's endorsement upon the lease, and I do not see why he is not to be treated as a "cultivator" within the meaning of art. 13 (b) of sch. II of the Stamp Act I of 1879. The distinction between agriculture and horticulture, which is dwelt upon by the Subordinate Judge, need not be considered, because neither word is used by the Legislature. The only question is whether a person taking a lease of land for planting cocoanut trees is, in respect of that occupation, necessarily to be regarded as not a "cultivator" although his occupation generally is in reality that of a cultivator. I see nothing in the Act which requires us to decide in that sense. Of the cases referred to by the Subordinate Judge, it is enough to say that the Bombay case—*Narayan Ramchandra v. Dhondu Raghu* (1)—relates to a lease for building purposes, and the section could hardly be deemed to apply to a case of that character; and the Allahabad case—*Reference under Stamp Act, 1879* (2)—was that of a contractor or speculator, not a cultivator.

BIRDWOOD, J.—I think that the exemption contained in sch. II, art. 13 (b), of Act I of 1879 was probably enacted for the special benefit of the class ordinarily known as the cultivating class of the country. Still the lessee in this case, though he may not belong to that class, is undoubtedly a cultivator in the strict sense of the term. I think, therefore, that the *kabulayat* passed by him, which falls within the definition of a lease contained in s. 3, cl. (12) of the Act, is exempted from stamp duty if the annual rent reserved thereby does not exceed one hundred rupees.

SARGENT, C. J.—I concur.

15 B. 77.

[77] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Candy.

THE COLLECTOR OF KANARA (*Appellant*) v. KRISHNAPPA HEDGE
(*Opponent*).* [17th July, 1890.]

Civil Procedure Code (Act XIV of 1882), ss. 412, 622—Withdrawal of a suit by a pauper—Court's authority to make an order for payment of Court fees—Collector, though not a party to the suit, can move under s. 622.

The plaintiff, after having filed his suit *in forma pauperis* came to an amicable arrangement with the defendants, and asked the Court that the suit should be dismissed. The Court granted this application, but made no order as to the payment of Court fees. Thereupon the Collector applied to the High Court, under s. 622 of the Code of Civil Procedure (Act XIV of 1882), to direct the lower Court to make an order for the payment of the Court fees under s. 412 of the Code.

Held, that the Collector, though not a party to the suit, was entitled to move the High Court under s. 622 of the Code.

Held, also, that s. 412 had no application to the present case, as there was no adjudication of the rights of the parties, and the plaintiff could not, therefore, be said to have failed in the suit. The Subordinate Judge had, therefore, no jurisdiction to make the order desired by the Collector.

* Application No. 67 of 1890.

[VIII. COLLECTOR OF KANARA v. KRISHNAPPA HEDGE 15 Bom. 79

Section 412 of the Code applies only to cases of adjudicated failure and to the other cases specified, as where the plaintiff has been dispaupered, or where the suit has been dismissed under s. 97 or 98.

[Overruled, 31 B. 10=8 Bom. L.R. 689; N.F., 4 M.L.J. 98 (99); R., 18 B. 464 (466); 29 B. 102 (105)=6 Bom. L.R. 1122; D., 20 B. 86 (98).]

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

One Krishnappa Hedge filed a suit, *in forma pauperis*, in the Subordinate Judge's Court at Sirsi for cancellation of a certain document and for possession of certain moveable and immoveable property.

On the day fixed for the settlement of issues, the plaintiff intimated to the Court that he did not wish to proceed with the suit, as he had come to an amicable arrangement with the defendants. He, therefore, prayed that the suit might be dismissed.

The Subordinate Judge granted this application and dismissed the suit, but made no order as to the payment of the Court fees.

[78] The Collector thereupon applied to the High Court, under s. 622 of the Code of Civil Procedure, to direct the Subordinate Judge to make an order for payment of the Court fees under s. 412 of the Code.

A rule *nisi* having been issued to the plaintiff in the pauper suit.

Shantaram Narayan, Government Pleader, appeared in support of the application.

There was no appearance for the opponent.

Shantaram Narayan.—I rely on s. 412 of the Civil Procedure Code; the Subordinate Judge was bound, under that section, to make an order for payment of the Court fees.

JUDGMENT.

BIRDWOOD, J.—The plaintiff withdrew his suit, which he had brought as a pauper, without asking for permission to withdraw it, with liberty to bring a fresh suit for the same subject-matter. He, merely asked that the suit might be dismissed, and the Court below granted his application; but made no order as to the payment of Court fees. The Collector now asks us to direct the Court below to make an order under s. 412 of the Code of Civil Procedure. Though the Collector was not a party to the suit, we think that he is not, on that account, debarred from moving the Court under s. 622 of the Code. We differ from the view taken by the Calcutta High Court in *The Secretary of State for India in Council* (1). In *The Collector of Ratnagiri v. Janardan Kamat* (2) the Collector was allowed to apply under s. 622. We think, however, that the present case does not fall under s. 412. It cannot be said that the plaintiff has failed in his suit within the meaning of that section. Section 411 refers to a case where plaintiff succeeds in his suit. It can only apply to cases where there has been a contest, or else an admission of the claim which has avoided a contest. It refers, therefore, to cases of adjudicated success. So, also, s. 412, when read with s. 411, can be held to apply only to cases of adjudicated failure and to the other cases specified, as where the plaintiff has been dispaupered, or the suit has been dismissed [79] under s. 97 or 98. In the present case, there was no adjudication of the rights of the parties, and the plaintiff cannot,

(1) 2 C.L.R. 461.

(2) 6 B. 590.

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therefore, be said to have failed in the suit. The case does not fall within the terms of s. 412 at all. It follows that the Subordinate Judge would have had no jurisdiction to make the order desired by the Collector. We must, therefore, discharge the rule *nisi* granted in this case.

Rule nisi discharged.

15 B. 79.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Parsons.

BALUBHAI DAYABHAI AND OTHERS (*Original Applicants*), Appellants
 v. NASAR BIN ABDUL HABIB FAZLY, DECEASED, BY HIS HEIRS
 ABDULLA AND OTHERS (*Original Opponents*), Respondents.*
 [22nd July, 1890.]

Succession Certificate Act (VII of 1889), s. 4, sub-s. 1, cl. (b)—Not applicable to proceedings in execution taken before, and pending at the time at which the Act came into force.

Clause (b) of sub-s. 1 of s. 4 of the Succession Certificate Act (VII of 1889) does not apply to applications or proceedings in execution of a decree made before and pending at the time at which the Act came into force.

The application therein mentioned must mean one made after the Act is in force, and the proceeding of the Court in execution must be an initial one under that application, and not one in continuation of proceedings taken on applications made before the Act came into force.

[F., 14 M. 458 (459); R., 15 B. 265 (267).]

APPEAL from the order of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in application for execution No. 76 of 1888.

The appellants sought to execute a decree passed by the High Court in original suit No. 533 of 1871.

The plaintiff's Naginbhai and Rupchand having died after the decree, the present appellants were put on the record as the legal representatives of the deceased decree-holders.

The decree was then transferred for execution to the Court of the First Class Subordinate Judge of Surat.

[80] In February, 1888 the present appellants presented a *darkhast* (No. 76 of 1888) for execution of the decree. The *darkhast* was granted, and the judgment-debtor's property was ordered to be attached.

On the 1st May, 1889, during the pendency of the execution proceedings under the above application, the Succession Certificate Act (VII of 1889) came into force. Thereupon the judgment-debtors objected to the appellants proceeding with execution until they had obtained a certificate under Act VII of 1889.

This objection was allowed, and, on the appellants refusing to produce the certificate, the Subordinate Judge dismissed the application.

Against this order of dismissal, the present appeal was preferred to the High Court.

* Appeal No. 103 of 1889.