1893 MARCH 13. APPELLATE CIVIL. 18 B. 216.

family, but that question has not been distinctly raised owing to the manner in which the case has been tried, and we must, therefore, send down the following issue for that purpose :—

Has the plaintiff acquired the property allotted to Tulsa on the partition between her and Gama under such circumstances as to be binding on the first defendant?

Both parties to have power to give fresh evidence. Finding to be transmitted to this Court within a month.

Issue sent down.

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18 B. 221.

[221] APPELLATE CIVIL.

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

LAKSHMAN (*Original Plaintiff*), *Appellant v.* VITHU AND OTHERS (*Original Defendants, Nos.* 3 *to* 8), *Respondents.** [15th March, 1893.]

Landlord and tenant—Commencement and origin of tenancy—Tenancy forty years old—Section 83 *of the Land Revenue Code* (*Bombay Act V of* 1879) *applicability of.*

Section 83 † of the Land Revenue Code (Bombay Act V of 1879) does not apply to a tenancy which commenced about forty years ago, but it applies to a tenancy with respect to which there is no satisfactory evidence to show the commencement as well as the terms of a tenancy.

[F., 11 Ind. Cas. 693=7 N.L.R. 100; Cons., 18 B. 433.]

SECOND appeal from the decision of T. W. Walker, Assistant Judge of Satara.

The plaintiff sued to recover possession of a piece of land with mesne profits from the date of the institution of the suit. He alleged that the land originally belonged to one Pandurang Narayan Pendharkar, who was the inamdar and mirasdar, and [222] that at a Court-sale held on the 17th April, 1874, he (the plaintiff) purchased the right,

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* Second Appeal No. 664 of 1891.

† Section 83 of the Land Revenue Code (Bombay Act V of 1879) :—A person placed, as tenant, in possession of land by another, or, in that capacity, holding, taking or retaining possession of land permissively from or by sufferance of another, shall be regarded as holding the same at the rent, or for the services, agreed upon between them, or in the absence of satisfactory evidence of such agreement, at the rent payable or services renderable by the usage of the locality, or if there be no such agreement or usage, shall be presumed to hold at such rent as, having regard to all the circumstances of the case, shall be just and reasonable.

And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

And where there is no satisfactory evidence of the capacity in which a person in possession of land in respect of which he renders service or pays rent to the landlord, receives, holds or retains possession of the same, it shall be presumed that he is in possession as tenant.

Nothing contained in this section shall affect the right of the landlord (if he have the same either by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable, by the tenant, or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid.

1893
MARCH 15.
APPELLATE CIVIL.
18 B. 221.

title and interest of the said Pandurang Narayan Pendharkar in the land. He now sought to eject defendants Nos. 1 and 2, who had been the tenants of Pandurang Narayan, and defendants Nos. 3 to 8, who occupied the land under Nos. 1 and 2.

Defendants Nos. 1 and 2 resisted the claim, on the ground that they were the owners of the *miras* rights over the land, and that defendants Nos. 3 to 8 were in possession as their mortgagees.

Defendants Nos. 3 to 8 denied the mortgage set up by Nos. 1 and 2 and pleaded that they occupied the land as owners for sixty years on payment of the assessment to the inamdar, that the plaintiff was not entitled to evict them, and that the suit was time-barred.

The Joint Subordinate Judge (Rao Saheb B. Y. Gupte) found that the defendants did not own *miras* rights over the land in dispute, that the plaintiff was entitled to eject them, and that the suit was not time-barred. He, therefore, allowed the claim.

On appeal by defendants Nos. 3 to 8, the Assistant Judge reversed the decree. The following is an extract from his judgment:—

"* * * I am of opinion that the plaintiff has proved his title to the land, but with what rights I cannot determine.

"As to the defendants, they have been cultivating the land for a period which the witnesses variously put at twenty or forty years and the Subordinate Judge takes as fifty. During that time they have paid the Government assessment and nothing besides. What the origin of their tenancy is, there is nothing to show, the reason being its antiquity. Following the view of s. 83, Bombay Land Revenue Code, laid down in the High Court Printed Judgments for 1889, p. 363, I presume the defendant's tenure co-extensive with that of the plaintiff. The title of defendants is, in my opinion, as good as the plaintiff's, and there is quite as much reason, perhaps more, for considering them mirasdars as for so considering the plaintiff."

The plaintiff preferred a second appeal.

[223] *Jardine* (with *Mahadeo Chimnaji Apte*), for the appellant (plaintiff):—The Assistant Judge, it seems, accepted the finding of the Subordinate Judge that the respondents have been tenants for fifty years and yet he held that the origin of their tenancy could not be ascertained owing to its antiquity. Even in their written statement the respondents say that they have been on the land for sixty years. Therefore, their title cannot be co-extensive in duration with that of our vendor, who was both the inamdar and mirasdar. Under these circumstances the respondents cannot assert their *mirasi* rights. Section 83 of the Land Revenue Code is not applicable—*Kalidas* v. *Bhaiji* (1).

Macpherson (with *Daji Abaji Khare*), for the respondents (defendants Nos. 3 to 8):—The Assistant Judge has clearly found that the origin of our title is lost in antiquity. This is a finding of fact, and cannot be interfered with in second appeal. There is no evidence in the case with respect to the origin of our tenancy. The Judge has not accepted the finding of the Subordinate Judge with respect to the origin. If he had done so, he would not have reversed the decree.

JUDGMENT.

SARGENT, C. J.—It is not clear from the language of the judgment of the lower Court whether the Assistant Judge intended to decide that

(1) 16 B. 646.

the tenancy commenced between twenty-five and forty years ago, but not more than forty. If he did, s. 83 of Act V of 1879 would not apply, as ruled in *Kalidas* v. *Bhaiji* (1). If, on the contrary, he did not so intend, and by saying that there was no evidence to show the "origin of the tenancy" he meant that there was no satisfactory evidence to show the commencement of it as well as the terms of it, the section would apply. Having regard to this ambiguity in the judgment, we think it safer to reverse the decree of the Court below and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed and case sent back.

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18 B. 224.

[224] APPELLATE CIVIL.

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

HIRACHAND HARJIVANDAS AND ANOTHER (*Original Applicants*), *Applicants v.* KASTURCHAND KASIDAS (*Original Opponent*), *Opponent.**
[23rd March, 1893.]

Practice—Procedure—Decree—Appeal—Execution—Death of judgment-debtor after appellate decree—Representatives of judgment-debtor—Civil Procedure Code (Act XIV of 1882), ss. 234, 248, 361 to 372, 583.

The Civil Procedure Code (Act XIV of 1882) does not contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. There is no express provision for it in the sections relating to execution. Sections 361 to 372 relate to changes during suit, and speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree and not to proceedings in execution between the judgment-creditor and judgment-debtor.

A Court of appeal having confirmed the decree of a Second Class Subordinate Judge, the decree was transferred for execution to the First Class Subordinate Judge. After the transfer the judgment-debtor died. The judgment-creditor then applied to the First Class Subordinate Judge to substitute on the record the name of the representative of the deceased. The First Class Subordinate Judge rejected the application and referred the judgment-creditor to the Second Class Subordinate Judge, who also rejected the application on the ground that the decree which was being executed was the appellate decree in which his decree was merged, and, therefore, he had no jurisdiction to entertain the application.

Held, that the course open to the judgment-creditor was by way of application to execute the decree against the legal representative of the deceased as provided by s. 234 of the Civil Procedure Code (Act XIV of 1882), in which case the application to execute the decree, having regard to s. 583, would be to the Second Class Subordinate Judge, although by s. 248 the notice to the party against whom execution was applied for, would be issued by the First Class Subordinate Judge to whom the decree was transferred for execution.

[F., 21 B. 314 (317); **Appr.**, 28 M. 466 (471)=15 M.L.J. 116; **Expl.**, 34 B. 142=11 Bom.L.R. 1358 (1366)=4 Ind. Cas. 839; **R.**, 17 A. 243 (245); 10 C.L.J. 396 (399)=14 C.W.N. 752=3 Ind. Cas. 324.**]**

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb M. B. Hora, Second Class Subordinate Judge of Surat.

One Kasidas Harjivandas filed a suit against Hirachand Harjivandas and another in the Court of the Second Class Subordinate Judge of Surat,

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* Application No. 200 of 1892 under Extraordinary Jurisdiction.

(1) 16 B. 646.