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.

---

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,

---

* Application No. 200 of 1892 under Extraordinary Jurisdiction.

(1) 16 B. 646.

1893
MARCH 23.
APPELLATE CIVIL.
18 B. 224.

who dismissed the suit and ordered each party to bear his own costs. Kasidas appealed to the District Judge of Surat, who confirmed the Subordinate Judge's decree and ordered Kasidas to pay the respondents' costs of the appeal. In [225] order to recover these costs the respondents, now judgment-creditors, applied for the execution of the decree to the Second Class Subordinate Judge, and prayed that the execution proceedings should be transferred to the First Class Subordinate Judge within whose local jurisdiction the judgment-debtor Kasidas was living. The application was granted, and the execution was transferred as prayed for. Some time after the transfer, the judgment-debtor died. The judgment-creditors, therefore, applied to the First Class Subordinate Judge to put the name of the son and heir (Kastur) of the deceased on the record. This application was rejected and the judgment-creditors were directed to apply to the Second Class Subordinate Judge and to produce from him a certificate with respect to the substitution of the name.

The judgment-creditors thereupon presented an application to the Second Class Subordinate Judge, who dismissed it on the ground that he had no jurisdiction to entertain it, because the decree that was being executed was the decree of the appellate Court in which the Subordinate Judge's decree had become merged.

The judgment-creditor then applied to the High Court under its extraordinary jurisdiction and obtained a *rule nisi* calling on the opponent Kastur to show cause why the order of the Second Class Subordinate Judge should not be reversed.

Motilal Mugutlal Munshi, in support of the rule.—Either the First Class Subordinate Judge had jurisdiction to entertain our application to substitute the name of the heir of the deceased judgment-debtor on the record, or the Second Class Subordinate Judge had it. We presented applications to both the Courts, and both of them held that they had no jurisdiction to entertain the application. Against those two orders we have presented two applications under the extraordinary jurisdiction of the High Court including the present application, which relates to the order made by the Second Class Subordinate Judge. Some Court must put the heir of the deceased on the record under ss. 361 to 372 of the Civil Procedure Code (Act XIV of 1882). One of our applications should, therefore, be granted.

Govardhanram M. Tripati, for the opponent, showed cause:—

No *rule nisi* has yet been granted on the application against the order of the First Class Subordinate Judge. We are, therefore, [226] not now concerned with that application. The present application cannot be granted. The explanation to s. 248 of the Civil Procedure Code (Act XIV of 1882) shows that the Court empowered to act under that section is the Court which actually executes the decree, and not the Court which passed it. The Second Class Subordinate Judge had, therefore, no jurisdiction to act under s. 248, and his order is, therefore, correct. It is for the applicant to find out what course is open to him. It is difficult to see under what section the application, whether to the First Class Subordinate Judge or the Second Class Subordinate Judge, can be made, as ss. 361 to 372 of the Civil Procedure Code apply to "plaintiffs" and "defendants," and these words have been under s. 582 extended to "appellants" and "respondents," while there is no provision extending them to "judgment-creditors" and "judgment-debtors."

Motilal Mugutlal Munshi, in reply:—We have a right to proceed before the Second Class Subordinate Judge under s. 234.

1893
MARCH 23.

APPELLATE CIVIL.

18 B. 224.

JUDGMENT.

SARGENT, C.J.—The Civil Procedure Code does not, we think, 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. The ss. 361 to 372, which relate to changes during suit, 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. The course for the judgment-creditor to adopt is that provided by s. 234, 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 is applied for would be issued by the First Class Subordinate Judge, to whom the decree had been transferred for execution.

There is, therefore, under the circumstances, no reason for our interfering with the decision of the Second Class Subordinate Judge, and we must discharge the rule with costs.

Rule discharged.

---

18 B. 227.

[227] ORIGINAL CIVIL.

Before Mr. Justice Starling.

DAWOOD DURVESH (*Plaintiff*) *v.* VULLUBHDAS PURSHOTAM (*Defendant*).* [22nd August, 1893.]

Hindu law—Damdupat—*Rule of* damdupat *when applicable—Interest—Amount of interest recoverable by a Hindu—Mortgage—Hindu creditor claiming interest from a debtor not a Hindu—Redemption suit—Supreme Court Charter, cl.* 29.

In a redemption suit brought by a Mahomedan against a Hindu, it was found on taking the accounts that a sum of Rs. 17,519 were due by the plaintiff (mortgagor) to the defendant (mortgagee). Of this sum Rs. 6,500 were the principal and the remainder (Rs. 11,019) was for interest. The plaintiff contended that the defendant being a Hindu was bound by the rule of *damdupat*, and could not claim as interest more than the amount of the principal.

Held, that the rule of *damdupat* did not apply; and that the plaintiff was liable to the defendant for the whole amount. The rule of *damdupat* only applies when the debtor is a Hindu.

[R., 21 B. 38 (40).]

ON Commissioner's report. The plaintiff in this suit was a Mahomedan and the defendant a Hindu. On the 1st December, 1865, the plaintiff mortgaged his house in Bombay to one Purshotam Bhimji (since deceased) to secure the principal sum of Rs. 6,500, with interest at 9 per cent. per annum. In 1867 the mortgagee was put into possession, and he received the rents and profits of the house until his death in 1873, when his son, the defendant, took possession.

In 1890 the plaintiff brought this suit for redemption, and on 24th February, 1891, it was referred to the Commissioner to take an account of the principal and interest due upon the mortgage and also of the rents.

* Suit No. 309 of 1890.