

JUDGMENT.

SARGENT, C.J.—The decision in *Tamaya v. Timaya Ganpaya* (1) with respect to the private sale by defendant No. 2 to defendant No. 5 in that case shows that in the absence of any clause of re-entry in the event of alienation by the mulgaidar contrary to the terms of the lease, the mulgar cannot treat the alienation as void and recover possession from the alienee. See also *Nil Madhab Sikdar v. Narattam Sikdar* (2). We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on plaintiff here and in the Court below.

Decree reversed.

18 B. 606.

APPELLATE CIVIL.

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

JAGANNATH BRAKHBHAU (Original Defendant), Applicant v. J. E. SASSOON AND OTHERS (Original Plaintiffs), Opponents.*

[3rd October, 1893.]

Practice—Procedure—Service of summons—Service by post—Return through the post of packet containing the summons endorsed “refused”—Evidence—Civil Procedure Code (Act XIV of 1882), ss. 82 and 632—Material irregularity.

A Small Cause Court having forwarded the summons to the defendant in a registered packet through the Post Office, the packet was returned endorsed ‘refused,’ the Small Cause Court held the service of the summons to be good service and passed an *ex parte* decree against the defendant.

Held, that the delivery of the summons by the post to a person who was not shown to be the defendant, was not good service.

[R., 29 M. 324; D., 21 B. 412 (418); 35 B. 213=13 Bom. L R. 322=11 Ind. Cas. 351.]

APPLICATION under the extraordinary jurisdiction against the decision of Khan Bahadur C. M. Cursetji, one of the Judges of the Court of Small Causes at Bombay.

E. D. Sassoon and Company brought a suit (No. 23362 of 1892), in the Bombay Court of Small Causes against the applicant Jagannath Brakhbhau, residing at Kampti and Nagpur in British territory and trading at those places under the name of [607] Brakhbhau Jagannath, to recover the balance of an account. The summons in the suit was sent through the post office in a registered packet, but the packet was returned to the Court by the Post Office endorsed ‘refused.’

On the day of hearing, the applicant failed to appear, and an *ex parte* decree was passed against him. Subsequently the applicant applied for restoration of the suit to the file, but the Court rejected the application, holding that under s. 82 of the Civil Procedure Code (Act XIV of 1882) the service through the post was sufficient.

The applicant thereupon applied under the extraordinary jurisdiction, and obtained a *rule nisi* calling upon the opponent to show cause why the *ex parte* decree should not be set aside.

Macpherson, with *Payne*, *Gilbert* and *Sayani*, appeared for the opponent to show cause.—The summons was originally served upon a

*Application No. 65 of 1893 under extraordinary jurisdiction.

(1) 7 B. 262.

(2) 17 C. 826 (828).

1893
OCT. 3.
—
APPEL-
LATE
CIVIL.
—
18 B. 606.

person who was said to be the agent of the applicant. On the day of hearing, this person appeared in Court and said that he was not the agent. The hearing was then adjourned, and a summons was sent in a registered packet addressed both to Kampti and Nagpur. The registered packet went to Kampti and came back with an endorsement that it was refused. The refusal to accept the packet was held by the Court to be a good service, and a decree was passed in our favour.

[BAYLEY, J.—There is nothing to show that the defendant himself refused to take the packet. The post peon may have presented the packet at the defendant's residence or place of business, and some one may have declined to take it.]

Section 114 of the Evidence Act (I of 1872) shows what presumption should be drawn in such a case.

Mahadeo Chimmaji Apte, for the applicant, in support of the rule, was not called upon.

JUDGMENT.

SARGENT, C. J.—The Small Cause Court has acted with material irregularity in treating the delivery of the summons by the post to a person, who was not shown to have been the defendant, as good service, and, therefore, in exercise of our extraordinary jurisdiction we must make the rule absolute, and reverse [608] the decree, and direct the Small Cause Court to proceed according to law.

Applicant to have his costs of and incidental to the rule.

Rule made absolute.

18 B. 608.

APPELLATE CIVIL.

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

DAVE LILADHAR KASHRIRAM (*Original Applicant*), *Applicant v.*
BAI PARVATI (*Original Opponent*), *Opponent.** [4th October, 1893.]

Succession Certificate Act (VII of 1889), ss. 1 (4), 6 (a) and 7 (1)—Will, application for a certificate under—Validity of will—Hindu Wills Act (XXI of 1870).

Clause 4 of s. 1 of the Succession Certificate Act (VII of 1889) does not preclude an applicant from obtaining a certificate under the will of the deceased.

A will having been held to be genuine in a contest between the parties, and there being no suggestion that the will was one to which the Hindu Wills Act (XXI of 1870) applied.

Held, that the Court could not refuse to grant the certificate.

APPLICATION against the order of J. J. Heaton, Acting Joint Judge at Ahmedabad.

Applicant applied to the Court of the Subordinate Judge of Dholka for a certificate under Act VII of 1889 in respect of the estate of deceased Bhavanishankar Kurnashankar under a will alleged to have been passed by the deceased.

The opponent, who was the widow of the deceased, opposed the application on the ground that the will under which the applicant claimed the certificate was a forgery, and prayed that as she had preferred an

* Application No. 48 of 1893 under extraordinary jurisdiction.