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On appeal by the plaintiff, the Judge confirmed the decree.

Plaintiff preferred a second appeal.

Mahadeo Chimnaji Apte for the appellant (plaintiff):—The lands in dispute were Ramji's ancestral property. He could not, therefore, make a gift of them to the prejudice of his heirs, namely, Govinda and his son Vithu. Further, the gift was not completed by delivery of possession to the donee. Ramji continued in possession after the gift, and mortgaged the property with possession to the plaintiff. On both these grounds, the gift to Mukta was invalid, and that being so she could not convey a valid title to the second defendant. The plaintiff is entitled to recover possession—*Vasudev Bhat* v. *Narayan Daji* (1).

There was no appearance for the respondents (defendants).

JUDGMENT.

SARGENT, C. J.—Both the Courts below have omitted to consider an important fact in the case, that is, that Ramji had not [690] given possession to his daughter Mukta under the deed, and the gift had, therefore, not been completed when he executed the mortgage in 1878 to the plaintiff—*Vasudev Bhat* v. *Narayan Daji Damle* (1)—and he could, therefore, confer a good title on the plaintiff. Nor is there any evidence to show that she was ever treated as the owner of the equity of redemption by Ramji or Vithu so as even to effect the latter's title. The circumstance that plaintiff attested the deed of gift in 1873 could not affect this title, as the gift was never completed by possession. Under these circumstances Mukta could confer no title on defendant No. 2; and as he only purchased in 1882 he could not have acquired title by adverse possession before the present suit was brought.

We must, therefore, reverse the decree of the Court below and order that possession of the land in question be given to the plaintiff. Plaintiff to have his costs in both the Courts below.

Decree reversed.

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18 B. 690.

APPELLATE CIVIL.

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

KEDARI AND OTHERS (*Original Defendants*) *v.* GAJAI KOM NARAYANRAO AND ANOTHER (*Original Plaintiffs*), *Respondents.** [17th October, 1893.]

Landlord and tenant—Mirasi *tenure*—Mirasi *tenure declared in a decree*—*Civil Procedure Code* (*XIV of* 1882), *s.* 258—*Subsequent payment of rent by defendants not a payment under decree but under the tenure, and so need not be certified under* s. 258 *of the Civil Procedure Code.*

The plaintiff sued the defendants to recover possession of certain land. The defendants pleaded they were *mirasi* tenants and entitled to possession as long as they paid the rent. The suit was compromised, and by a consent decree it was declared that the defendants held by *mirasi* tenure and they were directed to pay rent "as before," or in default the plaintiff should take possession. The plaintiff afterwards applied in execution for possession, alleging that the rent had not been paid. The defendants pleaded that it had been paid, and the

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* Second Appeal, No. 335 of 1893.

(1) 7 B. 131.

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plaintiff rejoined that, even if it had been paid, the Court could not recognize the payment, as it had not been certified under s. 258 of the Civil Procedure Code.

Held, that, under the circumstances, the rent when paid was to be deemed as paid under the *mirasi* tenure and not under the decree, and, therefore, s. 258 of the Civil Procedure Code (XIV of 1882) did not apply, and payment need not be certified.

[691] THIS was a second appeal from the decision of Rao Bahadur R. D. Paranjpe, First Class Subordinate Judge of Satara with appellate powers.

The plaintiff brought a possessory suit, No. 646 of 1884, against the defendants in the Court of the Subordinate Judge of Peth (now Islampur) to recover possession of certain land. The defendants set up a *mirasi* title to it. The suit was compromised, and there was a consent decree, which declared their *mirasi* tenure, directed them to pay rent as before, and ordered that as long as they did so they should not be dispossessed. The following is the material part of it:—

"The land in dispute belongs to the plaintiffs by (right of) ownership, and they admit that it has been in *miras* with the defendants from Narayanrao. Only (while) in the *miraspatra* there is a stipulation for payment of Rs. 11-4-0 every year, the plaintiffs received every year from the defendants Rs. 3-12-0 in addition. Accordingly, the defendants should hereafter pay to the plaintiffs, as before, every year Rs. 15 as (if it were) an instalment of Government assessment. And so long as the defendants (continue to) pay the amount as aforesaid, their *miras* right shall remain intact, and they will not be liable to be dispossessed of the land by the plaintiffs. If the defendants fail to pay by the 31st of July of any year the said amount of Rs. 15, which is payable every year, the land in dispute shall be taken out of the possession of the defendants. The defendants shall then have no *miras* right remaining on the land."

One the 21st March, 1892, the plaintiffs applied for execution of the decree, and prayed for possession of the land, alleging that the assessment of 1890-91 had not been paid by the defendants.

The defendants pleaded that it had been paid, and contended that they could not, therefore, be dispossessed.

The plaintiffs denied the alleged payments, and argued that (even if it had been) the Court could not recognize any payment which was not certified to the Court under s. 258 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge allowed evidence of the alleged payment to be given. On the evidence, he found the payments proved and rejected the plaintiffs' application.

On appeal by the plaintiffs, the First Class Subordinate Judge reversed the order, holding that the Subordinate Judge was not right in admitting evidence of a payment which he could not [692] recognize under s. 258, which section applied to all sums of money payable under a decree. He, therefore, made an order directing execution to proceed by giving the lands in plaintiffs' possession.

The defendants preferred a second appeal.

Macpherson (with *Vasudeo R. Joglekar*) for the appellants (defendants):—Section 258 of the Civil Procedure Code has no application to a case like the present. It was not necessary to certify these payments. The rent is payable, and has been paid, not under the decree, but under the original *mirasi* tenure. The decree merely confirmed the tenure and

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gave certain directions with regard to the payment. We have paid all the instalments as they fell due.

We further contend that the clause in the decree with respect to the recovery of possession is penal, and should be relieved against—*Vaguran* v. *Rangayyangar* (1).

Mahadeo C. Apte, for the respondents (plaintiffs) :—When litigant parties come to an understanding, and a decree is passed on the terms of that undrestanding, anything directed by the decree that is done subsequently to the decree must be considered as done under it. We, therefore, submit that any payments made were made under the decree and not under the old *mirasi* tenure, and ought to have been certified to the Court in accordance with s. 258. Not having been so certified, they cannot be recognized. When a forfeiture clause comes into operation under a decree, it cannot be avoided, because there has been no change of the relationship of the parties under the decree.

JUDGMENT.

SARGENT, C. J.—The original suit in which the decree was made was a possessory suit brought by the inamdar against the defendants, who set up a right to hold the lands under a *mirasi* tenure. The decree declares that such was the nature of the tenure and directs that the rent "should be paid as before." We think that under these circumstances the rent when paid is to be deemed as paid under the *mirasi* tenure and not under the decree, and, therefore, that s. 258, Civil Procedure Code, does not apply.

[693] The decree must, therefore, be reversed and the case sent back for decision on the merits; and we may observe that the defendant will not be precluded by ss. 56 and 64 of the Dekkhan Agriculturists' Relief Act from proving the payment of the instalment in question by any one of the ordinary legal modes of proof.

Decree reversed.

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18 B. 693.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KAZI SUJAUDIN (*Original Defendant*), *Appellant v.* MADHAVDAS (*Original Plaintiff*), *Respondent.**

[17th October, 1893.]

Right of suit—Cause of action—Religious processions—Public road—Suit to enforce a right to conduct a religious procession along a public road—Obstruction to a public road—Public nuisance—Special damage—Injunction.

A civil action will not lie to enforce a right to conduct a religious procession along a public road without an allegation of some personal loss or damage to the plaintiff.

Saiku v. *Ibrahim* (2) followed.

[Appl., 34 B. 571 (573)=12 Bom. L. R. 586=7 Ind. Cas. 663; R., 32 M. 478=1 Ind. Cas. 716=19 M. L. J. 617 (626); 11 Bom. L. R. 372 (375)=2 Ind. Cas. 494.]

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* Second Appeal, No. 422 of 1893.

(1) 15 M. 125.

(2) 2 B. 457.