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necessary that the proceeding should be a proceeding in execution. Under the provision of section 20 of the Dekkhan Agriculturists' Relief Act an order for instalments can be made at any time.

[SARGENT, C. J. :—Such an application must be made to the Court which carries out the decree.]

We made an application to that Court, but it referred us to this Court, as the final decree was passed by this Court in second appeal.

SARGENT, C. J. :—The applicant in this case asks for an order under section 15 B of the Dekkhan Agriculturists' Relief Act that the amount payable by the mortgagor shall be payable by instalments. Such an order, if it can be made at all under the circumstances of this case, as to which we express no opinion, can only be made as being one in "the course of proceedings under the decree," *i. e.*, by the Court which carries out the decree. Such is the view taken by West and Nánábhái, JJ., in *Gulábpuri v. Pándurang*⁽¹⁾. I must, therefore, discharge the rule, and dismiss the application with costs.

Rule discharged.

(1) P. J., 1886, p. 142.

APPELLATE CIVIL.

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

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PATEL MAFATLA'L NA'RANDA'S (ORIGINAL PLAINTIFF), APPELLANT,
v. BA'I PARSON ALIAS BA'I ITCHA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Will—Certificate—Regulation VIII of 1827—Amendment of plaint—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 144.

A plaintiff can sue to establish his title under a will without producing a certificate under Regulation VIII of 1827.

Mulchand v. Motichand⁽¹⁾ distinguished.

For the purposes of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented, and not from the date of its amendment.

* Second Appeal, No. 727 of 1892.

(1) 9 Bom. H. C. Rep., 37.

SECOND appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad, confirming the decree of Ráo Bahádur Lálshankar Umiáshankar, First Class Subordinate Judge of Ahmedabad.

One Mañsukh Nánábhai died on the 25th November, 1878, having made a will appointing the plaintiff his executor. He left him surviving a widow (defendant No. 1), two daughters (defendant No. 2 and another who was not a party to the suit), and his son-in-law (defendant No. 3).

The plaintiff applied for a certificate under the will according to Regulation VIII of 1827, and his application was granted by the District Court on the 26th July, 1879, but he did not take out the certificate.

On the 12th October, 1881, the plaintiff served the defendants with a notice calling on them to deliver up to him Mansukh's property which was in their possession, and they having failed to do so, he filed the present suit in 1890 to recover possession from them of a house and for an injunction restraining them from obstructing him in erecting a building on a certain piece of land. Subsequently, on the 15th August, 1891, the plaintiff amended the plaint by limiting his claim for possession to the upper story of the house only, as under the will the first defendant had a right to reside on the ground floor for her life.

Defendants Nos. 1 and 2, the widow and daughter respectively of Mansukh, replied (*inter alia*) that the claim was time-barred; that the plaintiff could not sue without producing a succession certificate, and that as the first defendant was already in possession of the site on which the plaintiff wanted to erect a building, the claim for injunction would not lie.

Defendant No. 3 disclaimed any interest in the property in suit.

The Subordinate Judge dismissed the suit, holding that the claim was not time-barred; that under the will the plaintiff was not entitled to obtain possession of the upper story of the house; that the suit could not be maintained without a certificate under Regulation VIII of 1827; and that as the plaintiff was not in

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possession of the building site, the claim for injunction would not lie.

On appeal by the plaintiff the Judge confirmed the decree on the grounds (1) that the claim to the upper story was time-barred under article 144, Schedule II of the Limitation Act (XV of 1877), the suit being held to have been instituted on the day the plaint was amended,—that is, after the lapse of twelve years from the death of Mansukh; (2) that, according to the ruling in *Mulchand v. Motichand*⁽¹⁾, the suit would not lie without a certificate of heirship or executorship; and (3) that the claim for injunction with respect to the building site could not be granted, as the site was in the possession of the first defendant. With respect to the injunction, the Judge stated as follows :—

“There is no doubt, on the evidence, that the defendant widow is in possession of the building site in respect of which an injunction is sought. Therefore an injunction cannot be granted.”

The plaintiff preferred a second appeal.

Ganpat Sadashiv Rao for the appellant (plaintiff) :—We contend that no certificate under Regulation VIII of 1827 is necessary for the maintenance of the suit. This is not a suit to recover a debt due to the testator. Next, we say that it is not necessary for an executor appointed under a will to obtain a probate.

The suit is not barred. The time of limitation must be reckoned up to the date on which the suit was filed, and not up to the day on which the amendment of the plaint was made—*Rám Lal v. Harrison*⁽²⁾; *Khem Karan v. Har Dayál*⁽³⁾; *Mengur Munder v. Báboo Huree Mohun*⁽⁴⁾.

Motilál M. Munshi for the respondent (defendant) :—In the plaint as it was originally filed the plaintiff did not set up a title under the will. Subsequently by the amendment he sought to recover the property as a legatee under the will. The amendment changed the original nature of the suit. The Judge was,

(1) 9 Bom. H. C. Rep., 37.

(3) I. L. R., 4 All., 37.

(2) I. L. R., 2 All., 832.

(4) 23 Cal. W. R., 447.

therefore, right in holding that the suit was instituted on the day the plaint was amended.

SARGENT, C. J.:—We think that the Joint Judge was in error in holding that the plaintiff could not establish his title under the will without producing a certificate under Regulation VIII of 1827. The decision in *Mulchand v. Motichand*⁽¹⁾ was in a case in which the plaintiff was suing to recover *debts* due to the estate of the deceased, and is not applicable to the present case.

We are also of opinion that the Joint Judge was wrong in holding that for purposes of limitation the suit commenced from the date of the amendment of the plaint and not from the date on which the plaint was originally presented. Taking the latter date as the one on which the suit was instituted, it is clear that it was within time under article 144 of Schedule II of the Limitation Act.

We are unable to accept as a sufficient finding the Joint Judge's statement that there is no doubt, on the evidence, that the defendant is in possession of the building site in respect of which an injunction is sought. The fact is disputed, and the Joint Judge should have given the reasons which led him to the conclusion at which he has arrived.

We must now reverse the decree of the lower appellate Court and remand the appeal for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

Decree reversed and case sent back.

(1) 9 Bom. H. C. Rep., at p. 38.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Rånade.

NINGA'PPA' AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v.
SHIVA'PPA' AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Procedure—Plaint—Alternative reliefs—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Second appeal.

The plaintiff sued to recover possession of the northern half of a certain plot of land, alleging that it had fallen to his share at a partition made in 1837, and

* Second Appeal, No. 666 of 1892.

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