

## APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894.  
September 26.

TULJA'RA'M (ORIGINAL PLAINTIFF), APPELLANT, v. BAMANJI KHAR-  
SEDJI (ORIGINAL DEFENDANT), RESPONDENT.\*

*Indian Succession Act (X of 1865), Sec. 190—Letters of administration to the estate of a deceased Pársi—Right of suit—Mámlatdár's order—Suit to set aside the order—Bom. Act III of 1876, Sec. 18.*

No suit will lie to set aside an order validly passed by a Mámlatdár under Bom bay Act III of 1876, though such an order may be superseded by a decree of a civil Court.

The land in dispute belonged originally to a Pársi named Dádábhai, who died intestate. After his death, one of his brothers without taking out letters of administration sold the land to the plaintiff. The defendant claimed a right of way over this land, alleging that it was public land. He obtained an injunction from the Mámlatdár's Court, restraining the plaintiff from obstructing his alleged right of way. Thereupon the plaintiff filed a suit to set aside the Mámlatdár's order, and for a declaration that he was owner of the land, and that defendant had no right of way over it. Both the lower Courts rejected the plaintiff's claim on the ground that under section 190 of the Succession Act (X of 1865) plaintiff could not establish his right to the land in the absence of letters of administration to the estate of Dádábhai, the original owner.

*Held*, reversing the decrees, that section 190 of Act X of 1865 did not apply. Neither the plaintiff nor the defendant relied as the basis of his right on the previous title of Dádábhai. There was no question of administration.

*Held*, also, that a person sued as a trespasser cannot, without proof of his own right, oust an apparent owner by pointing out some defect in the title of the latter.

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat, in Appeal No. 60 of 1892.

A Pársi named Dádábhai Pestonji died intestate, leaving a brother named Dosábhai and other near relations.

No letters of administration were taken out to the deceased's estate by any of his heirs.

Certain land which had belonged to the deceased was subsequently sold by Dosábhai to the plaintiff.

The defendant asserted a right of way over it and obtained an injunction in the Mámlatdár's Court, restraining the plaintiff from obstructing him in the enjoyment of his alleged right.

\* S. A. No. 941 of 1893.

Thereupon the plaintiff filed the present suit to have the Mámlatdár's order set aside, and for a declaration that the land belonged to him and that the defendant had no right of way over it.

1894.  
TULJA'RA'M  
v.  
BAMANJI  
KHARSEDJI.

The defendant denied the ownership of the plaintiff and of his vendor. He alleged that the land was public land; and that he had acquired a right of way over it by more than forty years' user.

The Subordinate Judge dismissed the suit on the preliminary point that the plaintiff could not establish his right to the land in the absence of letters of administration to the estate of the deceased Dádábhai Pestonji, to whom the land originally belonged.

The decision was upheld, on appeal, by the District Judge, whose judgment was as follows:—

"Section 190 of the Indian Succession Act (X of 1865) provides that no right to any part of the property of a deceased intestate can be established in any Court of justice unless letters of administration have been granted by a Court of competent jurisdiction. The fact that plaintiff does not claim any right over the land as the deceased owner's heir, but only by purchase from a person who claims to be the heir, makes no difference. If Dosábhai cannot establish his claim, no more can the person to whom Dosábhai sells it."

Against this decision the plaintiff preferred a second appeal to the High Court.

*Goverdhan M. Tripáthi* for appellant (plaintiff):—Section 190 of the Indian Succession Act does not apply. The plaintiff derives his title not from the deceased Dádábhai, but from his brother Dosabhai, who sold the land. The plaintiff was in possession until ousted by the defendant, who is a mere trespasser. Section 190 was intended to give protection to heirs and debtors of a deceased person.

*Ganpat Sadáshiv Ráo* for respondent.—Section 190 of Act X of 1865 is wide enough to cover a case like this. If the plaintiff's vendor Dosábhai could not sue to establish his title to the land in suit without taking out letters of administration to Dádábhai's estate, much less can the plaintiff sue. Refers to *Ha'ji Mahomed*

1894.

TULJA RAM  
v.  
BAMANJI  
KHARSEDJI.

*Mitha v. Musaji Esaji*<sup>(1)</sup>; *Frámji Dorábji Gháswálla v. Adarji*<sup>(2)</sup>;  
*Sukh Nandan v. Rennick*<sup>(3)</sup>.

JARDINE, J. :—In a suit brought by the defendant in the Court of the Mámlatdár he obtained against the plaintiff an order affirming his right to the user of the land which the plaintiff now claims as his own.

Among other reliefs in this suit the plaintiff prayed that the order of the Mámlatdár be set aside. We are of opinion that this prayer was rightly refused. A suit for that purpose is not contemplated by section 18 of Bombay Act III of 1876. The order of the Mámlatdár, properly made, is good and valid, and is not to be set aside, though it may be superseded by a decree of a civil Court.

The Courts below have found that the land in suit once belonged to one Dádábhai, whose brother Dosábhai, after Dádábhai died intestate, sold it in 1889 to the plaintiff. The District Court has recorded no finding as to Dosábhai's title. The Subordinate Judge remarks : "While Dosábhai's brothers are alive, they might yet come forward and dispute Dosábhai's title and right to sell the land. His story of the oral devise or gift to him (it is not clear which it was) might be true : but in proof of it there is the evidence only of the plaintiff's vendor." This is not a definite finding of fact ; and the Subordinate Judge has, like the District Judge, based his rejection of the whole claim on the legal ground that as the vendor Dosábhai could not establish his right without taking out letters of administration to Dádábhai (section 190 of Act X of 1865 being cited as an authority) his vendee cannot establish his right as against the defendant.

This inference cannot, however, be drawn in the absence of a finding of fact as to whether the property had vested in Dosábhai under a gift before the death of Dádábhai. It is only after a finding in the negative that section 190 can have any application to this case.

(1) I. L. R., 15 Bom., 657 at p. 669.

(2) I. L. R., 18 Bom., 337.

(3) I. L. R., 4 All., 192.

The more important question is, whether a person sued as a trespasser can without proof of his own right oust an apparent owner by pointing out some defect in the title of the latter, *viz.*, that the property once belonged to a person who died intestate and was sold to the apparent owner by a relation who administered the estate without getting letters of administration. No case interpreting section 190 in this fashion has been cited. Some reliance was placed on *Háji Mahomed v. Musáji*<sup>(1)</sup>. But the question there was, whether the plaintiff had failed to show the defendant a good title, and the judgment only deals with section 187, which along with section 179 is treated by Sir C. Sargent in *Shaik Moosa v. Shaik Essa*<sup>(2)</sup> as merely stating the rules of English law. In the absence of any authority we see no reason for upholding the very extended view of section 190 taken by the Courts below. It appears to be the negative complement of what rights are declared positively in section 242. The words of section 190 do not apply to the present pleadings. Neither party relies as the basis of his own right on a previous title in a person who was owner when he died intestate. There is no question about administration; nor can the result of this suit prejudice the rights of any heirs who may possibly exist.

The Court, therefore, confirms so much of the decree as refuses the prayer to set aside the order of the Court of the Mámlatdár; and in other respects reverses the decrees of both the lower Courts and remands the cause to the District Court for a re-hearing of the appeal; costs of both appeals on the present respondent; costs of the suit to be allotted on passing new decree.

*Decree reversed and case remanded.*

(1) I. L. R., 15 Bom., 657, at p. 669.

(2) I. L. R., 8 Bom., 241, at p. 253.

1894.

TULJARA'M  
v.  
BAMANJI  
KHARSEDJI.