APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894. *November* 6.

BA'LKISHAN SHIWA BAKAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* WAGARSING (ORIGINAL DEFENDANT), RESPONDENT.*

Succession Certificate Act (VII of 1889), Sec. 4—Application for execution by legal representative of decree-holder without certificate—Necessity of certificate—Limitation Act (XV of 1877), Art. 179, Cl. 4, Sch. II—Execution of decree.

An application for execution of a decree made by the legal representatives of a deceased decree-holder, without the production of a certificate under the Succession Certificate Act (VII of 1889), is nevertheless one made "in accordance with law" within the meaning of article 179, clause 4, of the Limitation Act (XV of 1877).

SECOND appeal from the order of A. S. Moriarty, Acting District Judge of Khándesh, in Appeal No. 96 of 1893.

On the 19th September, 1887, one Bálkishan Shiwa Bakas obtained a decree in the Court of the Joint Second Class Subordinate Judge of Dhulia. After his death, *viz.*, on the 25th August, 1890, his heirs and legal representatives, Bankatlál and Mánaklál, presented a *darkhást* for execution of the decree, which was rejected because they did not produce a succession certificate under Act VII of 1889.

The heirs then obtained a certificate under the Act, and on the 26th September, 1892, presented a fresh *darkhást* for execution. The decree was then transferred for execution to the Court of the Subordinate Judge at Nandurbár under section 224 of the Code of Civil Procedure (Act XIV of 1882).

The learned Judge held that the first *darkhást* of 25th August, 1890, was not in accordance with law, having been presented by the heirs of the deceased decree-holder without the succession certificate as required by section 4 of Act VII of 1889. He was, therefore, of opinion that the second *darkhást* of 26th September, 1892, was barred by limitation, having been made more than three years after the date of the decree. The second *darkhást* was, therefore, dismissed and this order of dismissal was upheld on appeal by the District Judge.

The heirs of the decree-holder thereupon appealed to the High Court.

* Second Appeal, No. 224 of 1894.

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Vásudeo Gopál Bhandárkar for appellants:—Section 4 of Act VII of 1889 does not provide that an application for execution cannot be made without the production of a certificate. It merely provides that the Court shall not proceed upon such application except on the production of the certificate. That shows that the certificate may be produced *after* the application is presented.

In the present case the first *darkhást* of 25th August, 1890, was an application "in accordance with law" within the meaning of article 179, clause 4, of Act XV of 1877—*Brojo Náth* v. *Isswar*(1); *Hafizuddin* v. *Abdool*(2); *Mangal Khán* v. *Salim-ullah Khán*(3); *Mahammad* v. *Lalli*(4).

There was no appearance for the respondent.

JARDINE, J.:—The two lower Courts have rejected the *darkhást* as barred by limitation, holding that the earlier *darkhást* of the 25th August, 1890, although presented within three years of the date of the decree, was nugatory in reference to article 179, clause 4, of the second schedule of the Limitation Act (XV of 1887), because the heirs who presented it did not produce the certificate requisite under section 4 of the Succession Certificate Act (VII of 1889).

The only case cited in the Courts below appears to have been *Kendiga Madi Chetti* v. *Soobbamma*(5), which interprets section 20 of Act XIV of 1859.

Mr. Vásudeo Bhandárkar, who argues this appeal, relies on *Brojo Náth* v. *Isswar*(1), *Hafizuddin* v. *Abdool*(2) and *Mangal Khán* v. *Salim-ullah Khán*(3), where it was held that an application without the production of the certificate under the Succession Certificate Act was nevertheless one made "in accordance with law" within the meaning of article 179, clause 4. *Ramasami* v. *Seshayyangar*(6) and *Krishnáji* v. *Vithal*(7) appear to have been decided on the same principle, and the Privy Council case *Mahammad* v. *Lalli*(4) has also been cited.

We have considered an authority of a contrary tendency, *Manohar* v. *Gebiapa*(8), which is a construction of article 179,

(1) I. L. R., 19 Cal., 482.
(2) I. L. R., 20 Cal., 755.
(3) I. L. R., 16 All., 26.
(4) I. L. R., 8 Cal., 422.
(5) 5 Mad. H. C. Rep., 453.
(6) I. L. R., 6 Mad., 181.
(7) I. L. R., 12 Bom., 625.
(8) I. L. R., 6 Bom., 31.

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clause 4, in connection with the Dekkhan Agriculturists' Relief Act, XVII of 1879. The words used in section 47 of that Act are:—"No application shall be entertained unless the plaintiff produce the certificate." But in the Succession Certificate Act, section 4, the words are:—"No Court shall proceed upon an application . . . . to execute . . . a decree . . except on the production, &c."

On consideration of the difference of language used, "entertain" meaning something different to "proceed," we are of opinion that the last cited decision does not conflict with those passed at Calcutta and Allahabad referred to above. We follow them as being in accordance with the tendency of the decisions on article 179, clause 4.

The Court, therefore, reverses the decrees of the Courts below, and directs the original Court to proceed with the execution as not barred by limitation; the respondent-defendant to pay the costs incurred in the two lower Courts.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894.
November 8.

SONSHET ANTUSHET TELI (ORIGINAL DEFENDANT), APPELLANT, *v.* VISHNU BA'BA'JI JOHA'RI (ORIGINAL PLAINTIFF), RESPONDENT.*

Khoti Settlement Act (Bom. Act I of 1880)*—Landlord and tenant—Tenancy—Presumption as to nature of tenancy in absence of evidence—Payment of rent—Mortgage by tenant—Sale of tenant's interest—Rights of purchaser—Heirs of tenant cannot surrender tenancy, or affect purchaser's title—Transfer of tenancy in khoti village—Ordinary tenancy—Occupancy tenancy.*

One A'tmárám, who held certain land as tenant, mortgaged it to Hirshet and shortly afterwards died. There was no evidence to show the term of A'tmárám's tenancy. After his death the plaintiff Vishnu, who was his brother, became tenant of the land and paid rent to the khots. Some years subsequently Hirshet (the mortgagee) sued to enforce his mortgage and made the plaintiff Vishnu and his two sisters parties. He obtained a decree and sold the mortgaged land in execution. Sonshet bought it and now claimed possession. Vishnu contended that A'tmárám's interest terminated at his death, and that Sonshet was, therefore, not entitled to possession.

* Second Appeals Nos. 787 and 788 of 1892.