

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kimball.

GIRDHARLAL KRISHNAVALABH (PLAINTIFF) v. BAI SHIV, WIDOW
OF HARIBHAI BAPU (DEFENDANT).*

1884.

February 21.

*Suit against legal representative—Assets—Decree—Execution—Civil Procedure Code
Act XIV of 1882, Sec. 252—Bombay Act VII of 1866.*

A plaintiff is entitled to sue the legal representative of his deceased debtor and to obtain a decree against him, without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed. The decree should mention that it is against the defendant in that character, and should be executed as directed by section 252 of the Civil Procedure Code, Act XIV of 1882.

Ráyáppá Chetti v. Ali Sáheb (1) followed.

UNDER section 617 of the Civil Procedure Code (Act XIV of 1882) this case was submitted for the decision of the High Court by Ráo Sáheb H. M. Mehtá, Second Class Subordinate Judge of Jambusar.

The plaintiff Girdharlál had a claim against one Haribhai Bápu, deceased. He sued Haribhai's widow as the legal representative of her husband, and prayed for a decree to be satisfied from the estate of his deceased debtor. It appeared from the evidence that the defendant had not taken possession of the estate left by her husband, but that it was in the possession of his relations.

The question referred by the Subordinate Judge was whether a decree could be passed against the defendant as the legal representative of a deceased debtor, to be recovered from his estate, of which the defendant had not taken possession.

The Subordinate Judge was of opinion that, under the provisions of (Bombay) Act VII of 1866, no decree could be passed against a Hindu heir as the representative of his deceased ancestor, unless he had taken possession by himself or by his agent of the property belonging to the deceased.

There was no appearance of parties in the High Court.

SARGENT, C. J.—We agree with the ruling of the Madras High Court—*Ráyáppá Chetti v. Ali Sáheb*(1) (the more especially

* Civil Reference, No. 7 of 1884.

(1) 2 Mad. H. C. Rep., 336.

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as that would appear to be the general practice)—that a plaintiff is entitled to sue, and on proof of his debt to obtain a decree against the legal representative of his deceased debtor, without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed. The decree should mention that it is against the defendant in that character, and it will, of course, be executed as directed by section 252 of Act XIV of 1882. The suit in question should not, therefore, in our opinion, be dismissed, but a decree passed against the defendant as the legal representative of the deceased debtor.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Kimball and Mr. Justice West.

February 20.

HINGANGHAT MILL COMPANY, LIMITED, MORTGAGOR, v.
REKCHAND BHIKAMCHAND, MORTGAGEE.*

Stamp Act I of 1879, Sch. I, Art. 44, Cls. (a) and (b)—Construction.

A mortgage deed dated the 4th August, 1883, stipulated that possession was to be given to the mortgagee after the 31st May, 1888, if the mortgage loan was not entirely repaid by that date. On the question being referred to the High Court, whether clause (a) or clause (b) of article 44, schedule I, Stamp Act I of 1879, applied to the case,

Held that clause (b) applied.

The intention of clause (a) is to cover cases of mortgage with possession, and the words "agreed to be given" are to be read as if the words "at the time of execution" immediately followed and qualified the word "given".

Clause (a) should be read as if it were worded "when possession of the property * * * is given by the mortgagor at the time of execution, or is agreed to be then given, and not * * * "is then agreed to be given."

UNDER section 46 of Act I of 1879 this case was submitted for the decision of the High Court by the Chief Commissioner, Central Provinces.

The Hinganghat Mill Company executed a mortgage deed to one Rekchand on the 4th August, 1883. The deed contained a

* Civil Reference, No. 2 of 1884.