

1886.

THE  
COLLECTOR  
OF POONAv.  
KASHINATH  
KHASGIWALA.

damages. Looking at the whole of the evidence, and especially that of the claimant Kusbabá, we think that Rs. 1,200 would be ample compensation to the claimants 2 and 3.

We agree with the District Judge in thinking that for the mere possibility of any treasure trove in the land in dispute no compensation can be awarded, and also that the question of the alleged right of pre-emption cannot be dealt with in these proceedings under the Act. The claimant No. 1 claims to have his right to carry water through the aqueduct reserved to him, and Mr. Macpherson says he has no objection to that.

We, accordingly, vary the award of the District Judge, and award Rs. 19,739-2 as the compensation for the property, to which 15 per cent. must be added as provided by section 42. From this sum, Rs. 1,200, with an addition of 15 per cent., should be paid by the Collector to claimants 2 and 3, and the remainder to claimant No. 1. Interest to be paid on these sums at 6 per cent. from 14th March, 1883, the day on which possession was taken by the Collector. As to the costs, we think that as the compensation ultimately awarded exceeds the sum fixed by the Collector, he must pay the first respondent his costs before the two District Judges, but the first respondent must pay the appellant the costs of this appeal.

*Decree varied.*

## APPELLATE CRIMINAL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice  
Nánubhai Haridós.*

GOVIND BHATCHAND AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS,  
v. KALNA'K AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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*Limitation Act XV of 1877, Art. 147--Mortgage--Mortgagee, suit by a, to realize mortgage debt by sale of mortgaged property, under power of sale--Cause of action--Construction.*

By a mortgage bond the first defendant mortgaged on the 1st January, 1864, certain property to plaintiffs' deceased father, with an implied power to sell the same if the debt was not satisfied at the expiration of seven years from that date.

\* Second Appeal, No. 721 of 1883.

On the 2nd January, 1883, the first plaintiff filed a suit in his own name, as manager of the family, to have the debt realized by the sale of the mortgaged property. The third defendant insisted upon plaintiff's other two brothers being joined as co-plaintiffs, and they were so joined on the 1st March, 1883, at which date both the lower Courts were of opinion that the suit was barred under section 22 and article 132 of the Limitation Act XV of 1877. On appeal by the plaintiffs to the High Court,

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*Held*, reversing the lower Courts' decrees, that plaintiffs' suit was governed by article 147 of the Limitation Act XV of 1877, and, therefore, not barred. By the instrument sued on, the property in question was mortgaged to the plaintiffs' father with an implied, if not express, power to sell the same in the event of the mortgage debt not being paid at the expiration of seven years from the date of the mortgage. The period of limitation was sixty years from the 1st January, 1871.

THIS was a second appeal from the decision of E. Hosking, Acting Judge of Thána.

Suit to have a mortgage debt realized by the sale of the property mortgaged. On the 1st January, 1864, the first defendant mortgaged the property in dispute to Bháichand, the deceased father of the plaintiffs, under a mortgage bond, stipulating, among other things, that, if the debt were not paid off at the expiration of seven years from the date of the mortgage, the same might be realized by the sale of the property.

The first defendant having failed to pay the debt, Govind, (plaintiff No. 1), the eldest of the three sons of the deceased Bháichand, instituted the present suit on the 2nd January, 1883, as manager of the family. The third defendant insisted upon the other two brothers being joined as co-plaintiffs, and, accordingly, they were joined on the 1st March, 1883.

The Subordinate Judge, who tried the suit, rejected plaintiffs' suit with the following remarks:—"It has been admitted that the cause of action in this suit accrued on the 1st of January, 1871. Shankar and Parsu have joined in this suit on the 1st of March, 1883. Their claim is, therefore, clearly barred under section 22 and article 132, Schedule II of the Limitation Act XV of 1877. Shankar, Parsu and Govind are members of an undivided Hindu family, and they are all owners of the debt, the subject of this suit. Govind alone is not, therefore, competent to sue. The claim of Shankar and Parsu is barred by the law of limitation. Following the decision of the Honourable

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the High Court in the case of *Kálidás Kevaldás v. Nathu Bhagván*<sup>(1)</sup>, I reject the claim of the plaintiffs."

The plaintiffs appealed, and the lower Appellate Court confirmed the Subordinate Judge's decree.

The plaintiffs preferred a second appeal to the High Court.

*Máhddev Chinnáji A'pte* for the appellants:—The plaintiffs' suit is governed by article 147 of the Limitation Act XV of 1877, and is, therefore, not barred. See *Máhábleshwarbhat v. Ratnábái*<sup>(2)</sup>. Article 132 applies to suits for enforcement of money charged upon immoveable property. Article 147 specifically provides for realization of mortgage debt by sale of mortgaged property. An express power is given to sell the property at the expiration of seven years from the date of mortgage, and the plaintiffs, therefore, have sixty years from that date within which to sue.

*Shivshankar Govindrám* for respondents.

SARGENT, C. J.:—This is a suit under a mortgage bond, dated 1st January, 1864, to have the mortgage debt realized by sale of the mortgaged property. The suit was originally instituted by the eldest of the three sons of the deceased mortgagee, who was a Hindu, as manager of the undivided family. The defendant No. 3 insisted on his right to have the other two brothers joined as co-plaintiffs, and this was done on 1st March, 1883. Both the lower Courts have found, on the authority of *Kálidás Kevaldás v. Nathu Bhagván*<sup>(1)</sup>, that the suit was not complete till the younger sons were placed on the record, and that, under section 22 and article 132, Schedule II of Limitation Act XV of 1877, it was then too late.

Assuming that the defendant No. 3 was right in his contention that the suit was not complete until the other brothers were made co-plaintiffs, the Court was wrong, we think, in applying article 132 of the Statute of 1877 to the question of limitation. Under the Limitation Act IX of 1871 a suit by the mortgagee to realize his mortgage claim by sale of the mortgaged premises would have fallen under article 132 of that Act, corresponding

(1) I. L. R., 7 Bom., 217.

(2) Printed Judgments for 1884, p. 20.

with the same article of the Act of 1877. A special article, No. 147, however, has been introduced into the latter Act, which provides for suits by a mortgagee for foreclosure and sale, and places them, as regards limitation, on the same footing as suits by the mortgagor for redemption had already been placed by article 148 of the Act of 1871. Such suits, therefore, since the passing of the Act of 1877, must be regarded as falling under that article. By the instrument sued on, the property in question was mortgaged to the plaintiffs' father with an implied, if not express, power to sell the same in the event of the mortgage debt not being paid at the expiration of seven years, and the period of limitation was, therefore, sixty years from the 1st January, 1871. The suit was, therefore, not barred, and the decrees of the Courts below must be reversed, and the case sent back for trial on the merits. Costs to follow the result.

*Decree reversed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Birdwood and Mr. Justice Jardine.*

QUEEN-EMPRESS v. KÁMÁLÍÁ AND ANOTHER.\*

*Evidence Act (I of 1872), Secs. 25, 26, 27—Confessions made to a Police Officer.*

The accused were charged with theft of some *javári*. During the police investigation they admitted before the police that they had taken the grain and concealed it in a jar, which they forthwith produced. The identity of the *javári* recovered with that stolen was not proved to the satisfaction of the trying Magistrate except by these admissions, and upon these admissions they were convicted of theft.

*Held*, that as the prisoners themselves produced the *javári*, it was by their own act, and not from any information given by them, that the discovery took place. Section 27 of the Evidence Act, therefore, did not apply; and though the fact of the production of the property might be proved, the accompanying confession made to the police was inadmissible in evidence.

*Empress v. Pancham*(<sup>1</sup>) and *Queen Empress v. Bábu Láli*(<sup>2</sup>) followed.

THE accused Kámáliá and Bhikiá were charged with having dishonestly removed *javári* from the threshing floor of one Rávji

\* Criminal Review, No. 75 of 1886.

(<sup>1</sup>) I. L. R., 4 All., 198.

(<sup>2</sup>) I. L. R., 6 All., 509.

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