1885.

MAHOMED SAYAD PHAKI v. NAVROJI BÁLÁBHÁI.

of the Limitation Act XV of 1877. That article, however, applies only to compensation for tortious acts independent of contract. Whereas here, if the first defendant is to be made liable to make compensation, it must be on the ground that, under the circumstances, he is bound by the contract of sale, as was the case in *Frámji Besanji Dustur* v. *Hormasji Pestonji Frámji*(1), where the judgment-creditor was held responsible to the purchaser for the description in the proclamation. As three years had not elapsed since the confirmation of the sale when the present suit was brought, it was not, viewed as one for compensation, barred; but the claim for compensation cannot, we think, be sustained. The property offered for sale was, we think, sufficiently identified by the description as "Survey No. 294, Pot No. 3, containing 24¾ *gunthás*," and the boundaries, so far as they were inaccurate on the north and west, may be properly regarded as "*falsa demonstratio.*" Moreover, it is impossible to suppose that the plaintiff, who lived close by the lots in question and actually purchased the lot, Survey No. 294, Pot No. 4, described in the proclamation by the same boundaries as Pot No. 3 in another name on the following day, was not aware that the boundaries included the two lots when he purchased on 17th November, 1877. We must, therefore, confirm the decree, with costs.

Decree confirmed.

(1) I. L. R., 2 Bom., 258.

APPELLATE CIVIL.

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

1885. *July* 9.

KISANDAS BUDHMAL, PLAINTIFF, *v.* P. HALPIN, DEFENDANT.*

Jurisdiction—Suit against a soldier—Army Act (Stat. 44 and 45 Vic., cap. 58) of 1881, Sec. 144, Proviso—Execution.

A suit for recovery of a debt will lie in a Civil Court against a soldier in Her Majesty's service up to judgment, under proviso to section 144 of the Army Act (Stat. 44 and 45 Vic., cap. 58), however small may be the amount of the debt. The question, whether the defendant is a soldier or not, arises only when the plaintiff seeks to execute his decree.

* Civil Reference, No. 15 of 1885.

1885.

KISANDÁS BUDHMAL v. P. HALPIN.

THIS was a reference by Ráv Bahádur M. G. Ránade, Judge of the Court of Small Causes at Poona, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference for the purposes of the report was stated as follows :—

"In this case the suit was brought for the recovery of money due on a *khátá* account, and the sum claimed is Rs. 75. The defendant was described in the plaint as Mr. P. Halpin, Sub-Conductor, Ordnance Department. Defendant pleaded that he was a soldier of Her Majesty's Regular Forces, and that, as such, no Civil Court had any jurisdiction to issue process against him, as the debt claimed did not exceed £30. Defendant further, on being examined as a witness on his own behalf, stated that he was a probationary sub-conductor, and not an officer; that he was subject to military law; that he got no civil allowance; that Government provided him with clothing and residence; and that, though detached from the Royal Artillery Regiment, on the strength of which his name was borne, he was still a soldier, and could not leave the service when he desired to do so. Defendant cited section 144 of the Army Act, of 1881, in support of the exemption claimed by him, and section 190 to show that, though sub-conductor, he was entitled to claim the exemption allowed to soldiers.

"The plaintiff, on the other hand, contended that, being sub-conductor, the defendant was not a soldier under section 190, and, further, that the exemption under section 144 did not bar the jurisdiction of the Court in regard to the suit, but only prevented the execution of the decree by the arrest of defendant's person. In support of this contention, plaintiff's pleader cited *Marwády Beejárájoo* v. *Haynes*[1], and *M. A. Cohen* v. *McCarthy*[2].

"Under the circumstances stated above, while I am inclined to decide both the points in defendant's favour, I feel at the same time a reasonable doubt as to the correctness of my own views in regard to the interpretation to be placed upon the provisions of the Army Act.

(1) 6 Mad. H. C. Rep., 83. (2) 14 Calc. W. R., 231, Civ. Rul.

1885.

KISANDÁS BUDHMAL v. P. HALPIN.

"Accordingly at the desire of both parties I refer the following points for the opinion of the High Court:—

"1st.—Whether the defendant is or is not a soldier, within the terms of section 190?

"2nd.—Whether, as such soldier, a suit for less than £30 can be entertained against him in this Court?"

There was no appearance for the parties.

SARGENT, C. J.—The proviso to section 144 of the Army Act of 1881 makes it clear that a suit will lie against a soldier in Her Majesty's service up to judgment, however small may be the amount of the debt. The question, whether the defendant is a soldier or not, will only arise when the plaintiff seeks to execute the decree he may obtain; and as his position may then be different from what it is at present, it would be premature to discuss it.

APPELLATE CIVIL.

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

1885. *July* 30.

BHIKA'JI RA'MCHANDRA, DECEASED, BY HIS MINOR SON, NARSINH, (ORIGINAL PLAINTIFF), APPELLANT, *v.* PURSHOTAM AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), *Secs.* 366 *and* 2—*Abatement, order of—Appeal from such order—Legal representative of a deceased, omission to apply by, within sixty days—Procedure—Limitation.*

An order made under section 366 of the Civil Procedure Code (Act XIV of 1882) that a suit do abate, being virtually a decree within the meaning of section 2, is appealable.

The appellant's father having died during the pendency of an appeal lodged by him, a notice was served upon the appellant's two adult brothers; but they having failed to apply within sixty days, the appellant, who was a minor, applied several months afterwards to be put on the record in his deceased father's place as his legal representative, which was done. The Assistant Judge, who heard the appeal, was of opinion that, in consequence of the omission on the part of the brothers of the appellant to apply, the appeal abated, and he passed an order accordingly.

Held, that the application having been made by the minor son within the time limited by law, the order of abatement made by the Judge was wrong. Although

* Appeal No. 355 of 1885.