# ORIGINAL CIVIL.

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

1887.
*July* 2, 8, 15.

PURMA'NANDDA'S JIWANDA'S, (APPLICANT), APPELLANT, *v.* VALLABDA'S WA'LLJI, (OPPONENT), RESPONDENT.*

*Civil Procedure Code (Act XIV of 1882), Sec. 232—Transfer of decree by operation of law—Representative of original decree-holder—Civil Procedure Code (Act XIV of 1882), Sec. 244—Right to appeal against order refusing execution—Civil Procedure Code (Act XIV of 1882), Sec. 258—Uncertified payments effectual to prevent limitation—Registration Act III of 1877, Sec. 17—Instrument—Decrees admissible in evidence without registration.*

R. died in May, 1859, leaving his property to his executors in trust for the appellant, Purmánanddás, and he directed that the property should be assigned by them to the appellant as soon as he came of age. In August, 1868, the executors filed this suit against Luckmidás Khimji as manager of certain landed property belonging to the Hallái Bháttiá caste, and known as *Mahájan Wadi*, to recover certain loans made by them as executors to him as manager of the said *wádi*. On the 11th May, 1870, while this suit was pending, the executors assigned all the property of their testator to the appellant, Purmánanddás. By the deed of assignment they assigned to him *(inter alia)* "all moveable property, debts, claims, and things in action whatsoever vested in them as such executors." No steps were taken, subsequently to this assignment, to make the assignee, Purmánanddás, a party to the suit, which proceeded without amendment. On the 23rd January, 1873, a decree was passed for the plaintiffs on the record for Rs. 31,272-13-5, and it was declared that the said sum should be a first charge on the rents and income of the said *wádi*. Subsequently to this decree, Luckmidás Khimji opened an account in the name of the appellant, Purmánanddás, and from time to time made payments to him on account of the decree. The last of these payments was made on the 19th November, 1884. None of these payments were certified to the Court. In 1885 the respondent, Vallabdás Wállji, was appointed to the office of manager of the Hallái Bháttia caste in the place of Luckmidás Khimji, the original defendant in the suit. On the 4th January, 1886, his attorneys wrote to the appellant's attorneys offering to pay the appellant the balance due to him under the decree. Subsequently, however, he refused to make any payment to the appellant, whereupon the appellant applied for execution of the decree against him as manager of the said *wádi*. He claimed to be a transferee of the decree under section 232 of the Civil Procedure Code (Act XIV of 1882). His application was refused by the Judge in chambers.

On appeal, *held* that the decree was admissible, although not registered.

*Held*, that the appellant was a transferee of the decree within the meaning of section 232 of the Civil Procedure Code (Act XIV of 1882). The decree had been transferred to him "by operation of law." As such, he was entitled to sue out execution, and was to be regarded as the representative of the original decree.

* Suit No. 1881 of 1868 (*Luckmidás Dámji and Others* v. *Luckmidás Khimji*).

holder within the meaning of clause (c) of section 244 of the Civil Procedure Code (Act XIV of 1882), and had a right of appeal against the order of the Judge in chambers refusing execution.

*Held*, also, (*following Fakir Chand Bose* v. *Madan Mohan Ghose*(1)) that the payments made to the appellant on account of the decree, although not certified to the Court under section 258 of the Civil Procedure Code (Act XIV of 1882), were effectual to prevent the appellant's application for execution from being barred by limitation. It would, however, be necessary for the appellant to certify these payments.

APPEAL from an order in chamber made by Scott, J., on the 7th December, 1886, refusing an application made by the appellant for execution of the decree passed in Suit No. 881 of 1868 on the 23rd January, 1873, in respect of the balance still remaining due under it.

The original plaintiffs in this suit were Luckmidás Dámji and others; the original defendant was one Luckmidás Khimji. The original plaintiffs were the executors of the will of one Ranchordás Cánji, who died in May, 1859, leaving a large amount of property to his executors in trust for his nephew, the appellant Purmánanddás Jiwandás. By his will he directed that all his property should be assigned by the said trustees to the appellant as soon as he came of age.

On the 15th August, 1868, the said executors filed this suit against Luckmidás Khimji as manager of certain landed property belonging to the Hallái Bhátiá caste, and known as *Mahájan Wádi*, to recover certain loans made by them, as executors, to him as manager of the said *wádi*. On the 11th May, 1870, while this suit was still pending, the said executors assigned all the property of their testator to the appellant, Purmánanddás Jiwandás. By the deed of assignment then executed, they assigned to him *(inter alia)* "all moveable property debts, claims, and things in action whatsoever vested in them as such executors."

No steps were taken, subsequently to this assignment, to make the assignee, Purmánanddás, a party to the suit. The suit proceeded without amendment, and on the 23rd January, 1873, a decree was passed for the plaintiffs for the sum of Rs. 31,272-13-5,

(1) 4 Beng. L. R. (F. B. Rul.), 130.

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and it was declared that the said amount was to be a first charge on the rents and income of the said *Mahájan Wádi*.

In 1876 the defendant, Luckmidás Khimji, as manager of the *wádi*, opened an account in the name of the appellant, Purmánanddás, and from time to time made payments to him on account of the decree passed in 1873. The last of such payments was made to the appellant on the 19th November, 1884. None of these payments were certified to the Court.

In 1885, Luckmidás Khimji, the original defendant in the suit, vacated the office of manager of the Hallái Bháttia caste, and the respondent, Vallabdás Wallji, was appointed in his place. Subsequently to his appointment, certain correspondence took place between him and the appellant with reference to the claim of the latter under the decree. On the 4th January, 1886, the respondent's attorneys wrote a letter to the appellant's attorneys containing the following passage:—

"Our client has got the *Mahájan mehtá* to make up the accounts, and it is found that the balance due to your client under the decree for principal and interest is Rs. 15,708-13-0, which our client is ready and willing and hereby offers to pay."

Subsequently the respondent refused to make any further payment to Purmánanddás, whereupon the latter applied for execution of the decree against the respondent as manager of the said *wádi*. His application was refused by the Judge in chamber, on the ground that the decree, not having been registered, did not bind the property in the hands of the respondent, as present manager of the caste.

Purmánanddás appealed.

*Lang* and *Telang* for the appellant:—Decrees do not, under the present Registration Act (III of 1877), need registration: see also Acts VIII of 1871 and XX of 1866.

Payments have been made on account of this decree so late as 1884, and, therefore, execution is not barred by limitation: see article 180 of Schedule II of Act XV of 1877. It may be contended, on the authority of *Haji Abdul Rahimán* v. *Khojá Kháki Aruth*[1], that as these payments have not been

(1) I. L. R., 11 Bom., 6.

certified, they cannot have any effect. That decision does not apply where it is sought to make use of such payments as an answer to the plea of limitation—*Fakirchand Bose* v. *Madan Mohan Ghose*[1]; *Bhubeneswari Debi* v. *Dinánáth Sandyal*[2].

*Macpherson*, (Acting Advocate General), and *Jardine* for the respondents:—No appeal lies against the order made in this case. The application made by the appellant for execution must be taken to be an application under section 232 of the Civil Procedure Code (Act XIV of 1882). Section 588 does not give an appeal against an order made under section 232. The appellant was not a party to the suit, nor is he a representative of a party and, therefore, section 244 does not apply—*Sobhá Bibee* v. *Mirzá Sakhámut Alí*[3]; *Abidunnissa Khatoon* v. *Amirunnissa Khatoon* [4].

We contend that execution of this decree is barred. The payments made have not been certified, and we rely on *Háji Abdul Rahimán* v. *Khoja Kháki Aruth*[5].

[SARGENT, C.J.—If necessary may not the payments be certified now?]

At all events they are not at present certified. Further, we say that the payments cannot operate to revive a decree that is dead. Sections 19 and 20 of the Limitation Act apply: see the provisions of section 4.

The appellant has no right to apply for execution. He is not a transferee within the meaning of section 232 of the Civil Procedure Code (Act XIV of 1882). The decree has not come to him "by assignment in writing or by operation of law." The assignment of the property to the appellant was not an assignment of the decree, and the words "operation of law" apply only to cases of death or insolvency, &c.

*Telang* in reply:—The case of *Háji Abdul Rahimán* v. *Khojá Kháki Aruth*[6] does not affect this case. That was a case, not of mere payment on account, but of a fresh contract for which there was no consideration. Farran, J., by his reference

(1) 4 Beng. L. R., (F. B. Rul.), p. 130.
(2) 2 Beng. L. R. (A. C. J.), 320.
(3) I. L. R., 3 Calc., 371.
(4) I. L. R., 2 Calc., 327.
(5) I. L. R., 11 Bom., 6.

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to the case of *Fakirchand Bose* v. *Madan Mohan Ghose*(1) (a p. 34 of report) seems to imply that uncertified payments may be regarded in order to take the case out of the Limitation Act; and Sargent, C.J., (at p. 13) says that in some cases the Courts will recognize such uncertified payments. The cases of *Fakirchand Bose* v. *Madan Mohan Ghose*(1) and *Bhubeneswari Debi* v. *Dinánáth Sandyal* (2) are still applicable The small verbal difference between the section upon which these cases were decided and section 258 of the present Civil Procedure Code are not material to the present case. The Court here is the "Court executing the decree." If it be necessary to certify the payments, the affidavits before the Court may be taken as now certifying them to the Court. If a certificate in some special form be requisite, the Court can make an order in this appeal subject to our putting in the necessary certificate.

It has been argued, by reference to section 4 of the Limitation Act, that sections 19 and 20 of that Act control article 180. We contend that sections 19 and 20 do not apply to cases coming within article 180. The latter is the more specific rule, and must prevail. If sections 19 and 20 were intended to apply to article 180, the words in that article as to payments and acknowledgments would be unnecessary. Further, section 20 deals with payments for principal and interest. Such payments are not made under a decree. The payments made are made in satisfaction in part or in whole, and are made into Court. Such payments are clearly not contemplated by section 20. It is evident that payments and acknowledgments made on account of decrees are only dealt with by article 180.

If, then, the decree is still alive, the next point is whether the appellant is entitled to sue out execution. We contend that he can, under section 232 of the Civil Procedure Code. Although the assignment to him was prior to the passing of the decree, yet the effect of it, in equity, was to transfer the decree to him; therefore it may be said he got the decree by assignment in writing. At all events, he took it by operation of law, for the words of the assignment pass the chose in action and the security for it in equity. The assignment having been made, the

(1) 4 Beng. L. R., (F. B. Rul.), p. 130. (2) 2 Beng. L. R. (A. C. J.). 320.

trustees were trustees of the decree for the appellant. The judgment-debtor admittedly opened an account in the appellant's name in the life-time of the trustees, and made payments to him. There is, therefore, a transfer by operation of law, or, if not such in strictness, there was at least such a transfer as the respondent (the judgment-debtor) is estopped from disputing.

As to our right to appeal. It is clear that, if the appellant is a transferee under section 232, he is entitled to appeal. Under section 244 he is a "representative." The section does not say "legal representative." The cases of *Sobha Bibee* v. *Mirza Sakhamut Ali*[1] and *Abidunnissa Khatoon* v. *Amirunissa Khatoon*[2] do not apply. In those cases there was a dispute between competing claimants as to who was entitled, and the Court held that a question of that kind could not be decided in such a proceeding.

SARGENT, C.J.:—This is an appeal from an order refusing execution of a decree passed in 1873 in favour of the plaintiffs, Luckmidás Dámji and others, in a suit brought by them in 1868 against Luckmidás Khimji as manager of certain caste property known as *Mahájan Wádi*. The first question is whether the applicant, Purmánanddás Jiwandás, is entitled to sue out execution of that decree. He is not one of the plaintiffs on the record; but he claims to be a transferee of the decree under section 232 of the Civil Procedure Code (Act XIV of 1882), and, as such, he applies for execution.

It appears that the plaintiffs in this suit were trustees of the property of one Ranchordás Cánji, who died in the year 1859, having by his will left all his property to them as trustees for the applicant, Purmánanddás, with directions that it should be assigned to him as soon as he came of age. This assignment was made by the trustees to Purmánanddás in the most general terms in 1870 after the suit was filed and while it was still pending. By the deed of assignment the trustees transfer to Purmánanddás "all moveable property, debts, claims, and things in action whatsoever vested in them," which would include the claim which was the subject-matter of the then pending suit; and the effect of this assignment was, in equity, to vest in Purmánanddás

(1) I. L. R., 3 Calc., 371. (2) I. L. R., 2 Calc., 327.

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the whole interest in the decree which was afterwards obtained. But it has been suggested that Purmánanddás is not a transferee of the decree under section 232 of the Civil Procedure Code, because the decree has not been transferred to him "by assignment in writing or by operation of law;" and that, therefore, he is not entitled to apply for execution. There is no doubt that, in a Court of equity, in England the decree would be regarded as assigned to Purmánanddás, and he would be allowed to proceed in execution in the name of the assignors. Here there is no distinction between "law" and "equity," and by the expression "by operation of law" must be understood the operation of law as administered in these Courts. We think under the circumstances that we must hold that this decree has been transferred to Purmánanddás "by operation of law." In the present case the decree has been transferred by an assignment in writing as construed in these Courts. The appellant is, therefore, entitled to sue out execution, and must be regarded as the representative of the original decree-holders within the meaning of clause (c) of section 244 of the Civil Procedure Code. The case in Calcutta, to which we have been referred, (*Sobha Bibee* v. *Mirza Sakhamut*[1]), was a case decided under the old Civil Procedure Code upon a section not precisely the same as the section of the present Code. It will be observed that section 11 of Act XXIII of 1861 did not provide for questions arising in execution between the representatives of the original parties to the suit,—an omission which is supplied in section 244 of the present Code.

The application was refused on the ground that the decree was an instrument which created an interest in immoveable property, and could not be given in evidence for want of registration. Provision was made for the registration of such a decree by the Court, which passed it, by section 42 of Act XX of 1866, but that section was not re-enacted in Act VIII of 1871. If, therefore, it required registration under the latter Act, it could only be as an "executed instrument" under section 17, a description which is scarcely applicable to a decree. Moreover, it is to be remarked that section 32 deals only with the presentation of a "copy" of

(1) I. L. R., 3 Calc., 371.

a decree, the optional registration of which is expressly provided for by section 18 of the Act. Upon the true construction of the Act of 1871 read in connection with Act XX of 1866, such a decree, we are strongly inclined to think, did not fall within section 17. But in any view of that Act, Act III of 1877, which is now in force, expressly excludes such decrees, whether passed before or after the Act, from the operation of compulsory registration, and the decree is, therefore, now admissible in evidence.

The next point for determination is whether the execution of this decree is barred. Article 180 of Schedule II of the Limitation Act XV of 1877 allows the enforcement of a decree within twelve years from the time at which some payment has been made, or some acknowledgment of the right thereto has been given in writing. Nothing, however, is said in that article as to when such payments must be made, or acknowledgments given, and so the question arises whether that article is not controlled by the provisions of section 19 of the Act; that is, whether such payments or acknowledgments must not be made before the expiration of the prescribed period of twelve years. We, however, need not now decide that question; for, in this case, payments have admittedly been made within the prescribed period.

But it is argued that no effect can be given to them by this Court inasmuch as they have not been certified as required by section 258 of the Civil Procedure Code. We think, however, that on this point we ought to follow the case of *Fakirchand Bose* v. *Madan Mohan Ghose*[1]. That, no doubt, is a case which was decided under the old Code (Act VIII of 1859); but it is a distinct decision of a Full Bench of the Calcutta Court presided over by Sir Barnes Peacock, that a judgment-creditor seeking to enforce his decree may avail himself of uncertified payments made by the judgment-debtor as an answer to a plea of limitation, and we are not aware that it has ever been questioned—nor has any change been introduced into the present Civil Procedure Code which militates against the grounds of the decision. We must, therefore, hold that effect may be given to the payments which have been admittedly made to the applicant for the purpose of evading the plea of the limitation,

(1) 4 Beng. L. R., 130, (F. B. Rul.)

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and that, consequently, his present application is not barred. It will, however, be necessary for him to certify those payments to the Court as was directed in the above case.

We reverse the order appealed from, and direct that, upon the applicant certifying the payments that have been made, he be allowed to execute the decree.

*Order reversed.*

Attorneys for the appellant:—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorneys for the respondents:—*Thákurdás and Dharamsi.*

## APPELLATE CIVIL.

*Before Mr. Justice West and Mr. Justice Birdwood.*

1887. *March* 1.

TRIMBAKPURI GURU SITALPURI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGA'BA'I AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Hindu law—Gosávi—Succession to the estate of a gosávi in the Deccan—A gosávi's right to nominate his successor by a written instrument.*

A *guru* in the Deccan has a right to nominate his successor from amongst his *chelás* (disciples) by a written declaration.

SECOND appeal from the decree of E. M. H. Fulton, Acting District Judge of Násik, in Appeal No. 115 of 1884.

The *devasthán* of Sitágumphá at Násik was founded by a *gosávi* named Lakshumanpuri. The management of this *devasthán* and the property appurtenant to it had descended from *guru* to *chelá* in succession until it came into the hands of one Sitalpuri, who appointed his brother Trimbakpuri, the plaintiff, as his *chelá* or disciple. A few years afterwards, having begotten a son, Sitalpuri took him also as a *chelá*. On the 26th May, 1882, Sitalpuri executed a document, purporting to be a will, by which he declared "his natural son Bahiravpuri Guru Sitalpuri" to be his sole heir and successor to the *devasthán* property. Sitalpuri died on the 12th June 1885. On the fourteenth day after his death a feast was given to the *gosávis*, and they all signed a *panchnámá* declaring the plaintiff to be *chelá* and successor to the *gádi*. The widows of Sitalpuri refused to sign the *panch-*

* Second Appeal, No. 270 of 1885.