APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

RAGHUNATH GANESH, (ORIGINAL DEFENDANT), APPELLANT, *v.* MULNA AMAD, RESPONDENT.*

1888. *February* 13.

Decree—Execution—Civil Procedure Code (Act XIV of 1882*), Sec.* 244*—Construction—Acts VIII of* 1859*, Sec.* 387*; XXIII of* 1861*, Sec.* 11.

The father of the defendant in 1853 obtained a decree against the father of the plaintiff and other persons for partition of village lands.

The decree directed that in effecting the partition certain *dhára* lands then occupied by the plaintiff's father were not to be included. Application for execution of that decree was made in 1861, but the execution proceedings remained pending until 1882. On the 12th December, 1882, the decree was executed, and the defendant (his father being then dead) was put into possession of the lands now in dispute as being part of the lands to which he was entitled under the decree. The plaintiff objected that these lands were not subject to partition under the decree, and he applied for an order that they should be delivered back to him. His application was rejected, and he thereupon brought the present suit to recover the lands from the defendant. The Court of first instance was of opinion that the question raised in the suit related to the execution of the decree made in 1853, and under section 244 of the Civil Procedure Code Act XIV of 1882 could not be raised again by a separate suit. The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree. On appeal by the defendant to the High Court,

Held, reversing the decree of the lower Appellate Court, that the plaintiff's suit should be dismissed. The question whether the *dhára* lands received by the defendant in execution of the decree of 1853, were included in that decree, was a question relating to the execution of the decree within the meaning of section 244 of the Civil Procedure Code Act XIV of 1882, which barred a separate suit.

THIS was a second appeal from a decision of G. McCorkell, Assistant Judge of Ratnágiri.

The plaintiff was a *mulna* and the defendant a *khot* of the village of Dabhil, in the Ratnágiri District. Both were entitled to certain shares in the village land. In 1851 the father of the defendant sued the father of the plaintiff and others for partition of the village, and in 1853 obtained, on appeal, a decree in terms of an agreement made between him and the other parties to the suit. One of the terms of the agreement provided that the *dhára* lands of the Mulnas were not to be

* Second Appeal, No. 713 of 1885.

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included in the partition, and the decree recited that "the plaintiff recognizes the right of the Mulnas; accordingly, whatever *dhára* lands may be with them, will remain in their occupation."

In 1861 the defendant's father applied for execution of this decree, but the matter remained pending till 1882. On the 12th December, 1882, (the defendant's father being then dead), possession of the lands now in dispute was given to the defendant as being part of the land to which his father was entitled under the decree. The plaintiff objected that these lands were not included in the decree, and he applied for an order that they should be delivered back to him. His application was rejected on the 31st March, 1883.

The plaintiff then brought this suit to recover the land from the defendant.

The Court of first instance was of opinion that the question between the parties was a question relating to the execution of the decree made in 1853, and as such could not, under section 244 of the Civil Procedure Code (XIV of 1882), be determined by a separate suit. The plaintiff's suit was, therefore, dismissed.

The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree with the following remarks:—

"The Subordinate Judge thinks that these execution proceedings are bound by Act VIII of 1859 as amended by Act XXIII of 1861, and that, therefore, the plaintiff's action is barred by section 244 of Act XIV of 1882. Under the Acts which were in force in 1853, I do not consider that the present plaintiffs' suit would have been barred, and, therefore, the latter portion of section 387, Act VIII of 1859, saves the plaintiff's right to institute the present suit. Again, I cannot accept that the language of the decree left any question of *dhára* lands to be determined at the time of execution. It speaks of the *dhára* land of the Mulnas as something clearly and definitely determined * * * *. The defficulty has arisen solely from the delay in the execution proceedings."

The defendant preferred a second appeal to the High Court.

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Dáji Ábáji Kharé for the appellant:—This is a question in execution of a decree, and as such cannot be raised in a separate suit. The Court executing the decree must decide it—section 244 of the Civil Procedure Codes of 1877 and 1882; *Muttuvelu Pillai* v. *Vythilinga Pillai*[1]; *Jagendro Náráin Koonwár* v. *Ránee Surno Moyee*[2].

Shántárám Náráyan for the respondent:—If the proceedings in this suit are to be governed by the old Code Act VIII of 1859 a separate suit will lie under section 387 of that Code. The proceedings in execution of the decree of 1853 had commenced before Act XXIII of 1861 came into force, and Act XIV of 1870 repealed section 387 of Act VIII of 1859. Section 6 of the General Clauses Act I of 1868 saves the proceedings from being affected by the repealing Acts. The right of the plaintiff to bring a suit arose in 1882 only. It was a vested right, and could not be affected by section 11 of Act XXIII of 1861 and section 244 of Act X of 1877. An appeal is included in the words "proceedings commenced" used in section 6 of the General Clauses Act I of 1868—*Hurrosundari Dabi* v. *Bhojo Haridás*[3], and proceedings in execution ought also to be included. In *Chinto Joshi* v. *Krishnáji*[4] execution proceedings commenced under the former Code were held to be governed by that Code. Section 244 of Act XIV of 1882 applies only to proceedings begun after it came into force.

In this case the *darkhást* of 1861 was a pending proceeding when Act X of 1877 came into force, and the case cannot be governed by that Act. See section 3 of the Code.

Dáji Ábáji Kharé in reply:—The present suit having been brought in 1883 after the Code of 1882 had come into force, it must be governed by the provisions of that Code. The rule in section 6 of the General Clauses Act applies only to proceedings "commenced": see *Gurupadápá* v. *Virbhádrápá Irsangapa*[5]. A separate suit is a new proceeding, and there is no connexion

(1) 5 Mad. H. C. Rep., 185.
(2) 14 Calc. W. R. Civ. Rul., 39.
(3) I. L. R., 13 Calc., 86.
(4) I. L. R., 3 Bom., 214.
(5) I. L. R., 7 Bom., 459.

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between it and execution proceedings: see *Chinto Joshi* v. *Krishnáji*[1]. Section 3 of Act XIV of 1882 applies to procedure prior to decree, and does not bar the application of section 244. It saves only proceedings commenced and pending—*In the matter of the petition of Ratansi Kalianji*[2]. But a suit cannot be regarded as part of a pending proceeding. The plaint in a suit initiates a new proceeding, and a suit is subject to the law in force at the date of its institution.

JARDINE, J.:—The question whether the *dhára* lands received by defendant in execution of the decree were included in the decree, is a question relating to execution—*Muttuvelu Pillai* v. *Vythilinga Pillai* [3] and *Jogendro Náráin Koonwár* v. *Ránee Surno Moyee*[4]—under section 11 of Act XXIII of 1861, which section, if it stood alone, would bar a separate suit.

The saving provision of section 387 of Act VIII of 1859 was repealed by Act XIV of 1870. It deals with procedure only.

Seetion 3 of Act X of 1877 only saves "procedure *prior to decree*", and leaves procedure after decree to the uncontrolled operation of the bar reproduced in section 244.

Assuming that the "proceedings" in execution of the decree of 1853 had commenced before the 28th August, 1861, when Act XXIII of 1861 came into force, these "proceedings" would not be affected by the repeal in 1870. See section 6 of the General Clauses Act I of 1868.

But where is the authority for treating the fresh suit as a part of any such proceedings? None has been shown us.

That an appeal is to be regarded as a stage in a suit or judicial proceeding leading up to final disposal is settled by the decisions in *Ratanchand Shrichand* v. *Hanmantráv Shivbakas* [5]; *Thákur Prasád* v. *Ahsan Ali*[6]; *Runjit Singh* v. *Meherbán Koer* [7]. But a plaint is the mode of initiating what in the Acts of 1859, 1861, 1877, and 1882 is called a "separate suit," and the analogy

(1) I. L. R., 3 Bom., 214.
(2) I. L. R., 2 Bom., 148 at p. 165.
(3) 5 Mad. H. C. Rep., 185.
(4) 14 Calc. W. R. Civ. Rul., 39.
(5) 6 Bom. H. C. Rep., 166, A. C. J.
(6) I. L. R., 1 All., 668.
(7) I. L. R., 3 Calc., 662.

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of an appeal is inapplicable in the face of such language. There is no intrinsic unity between the execution proceedings and the separate suit. See *Chinto Joshi* v. *Krishnáji Nárayan*(1). The rule in section 6 of the General Clauses Act does not govern the remotest consequences, but only such a series of proceedings as group themselves naturally together—*Gurupadápá Basápá* v. *Virbhadrápá Irsangápá*(2).

The time at which, as alleged by plaintiff, he was entitled to bring the suit did not accrue till 1882. So section 11 of Act XXIII of 1861 and section 244 of Act X of 1877 did not bar any vested right—*Papa Sastrial* v. *Anuntarámá Sastrial*(3); *Kimbray* v. *Draper*(4).

The definite language of the Acts about procedure, namely, Act VIII of 1859, sec. 283, Act XXIII of 1861, sec. 11, and the two later Codes, sec. 244, appears to us to overrule the wide construction of section 6 of the General Clauses Act propounded by Mr. Shántárám. Two of these enactments are later than the General Clauses Act, which applies only to "proceedings commenced". There is nothing in these words to indicate an intention to confer a right to bring future suits of a sort which two earlier Acts had already barred. We think, therefore, we should follow the special enactments as regards "proceedings".

If the sections above quoted be regarded as mere procedure, the special enactments apply—*Wright* v. *Hale*(5); *Kimbray* v. *Draper*(6). Section 387 of Act VIII of 1859 applies in terms to procedure only, and it has not been contended that under the earlier law the fresh suit was contemplated as a part of the older proceeding in execution.

We think the view we have expressed is supported by the opinions of the Judges *In the matter of the petition of Ratansi Kaliánji*(7), and is consistent with the language of Act XIV of 1870. By treating a separate suit as a new proceeding, we con-

(1) I. L. R., 3 Bom., 214.

(2) I. L. R., 7 Bom., 459 at p. 463.

(3) I. L. R., 3 Mad., 98.

(4) 3 Q. B., 160.

(5) 30 L. J., Ex., 40.

(6) 3 Q. B., 166.

(7) I. L. R., 2 Bom., 148 at pp. 182, 203 and 218.

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strue the Codes as having prospective effect. With reference to some of the decisions quoted, we think this view of the matter will not work injustice. As pointed out by Mr. Kharé, the law allowed similar and suitable remedy while barring separate suit.

We, therefore, reverse the decree of the Assistant Judge, and restore that made by the Subordinate Judge dismissing the suit. Costs on the plaintiff throughout.

Decree reversed.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1888. *Febr ua ry*

FÁTMÁBÁI, (PLAINTIFF), *v.* AISHÁBÁI, (DEFENDANT).*

Res judicata—Suit by a woman for a share of property alleging herself to be A.'s widow—Prayer for declaration of her marriage to A.—Denial of her marriage to A. by defendant—Arbitration—Award of a certain sum in satisfaction of plaintiff's claim—Decree on award—No declaration as to her marriage—Subsequent suit by her as widow—Release—Civil Procedure Code (XIV of 1882), Sec. 13—Practice—Preliminary issue—Right to begin—Two counsel heard in argument of preliminary issue.

The plaintiff Fátmábái in this suit alleged that both she and the defendant had been the wives of one Háji Adam Háji Ismáil, a Cutchi Memon Mohmedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named Mariambái. Both plaintiff and defendant had since Háji Adam's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant Aishábái had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband. She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff Fátmábái and her daughter Mariambái filed a suit (No. 227 of 1882) against the present defendant Aishábái, claiming a share of the estate of her deceased husband Háji Adam. In that suit she alleged that she had been lawfully married to Háji Adam, and had ever since cohabited with him, and that her child Mariambái was his legitimate daughter; and she prayed *(inter alia)* for a declaration that she was the lawful wife and that Mariambái was the lawful daughter of Háji Adam. In the written statement filed by Aishábái in that suit she alleged that Fátmábái was not the lawful wife of Háji Adam, but only his kept mistress, and she denied that Fátmábái was entitled to share in his property.

*Suit No. 500 of 1887.