

present case. Since, therefore, the accused is not a subject of Her Majesty, and has not by taking service under the British Government become a native subject of Her Majesty, it follows that section 188 of the Code of Criminal Procedure can have no application to the case, and does not confer jurisdiction upon a Court to try him, at any place in British India at which he may be found, for an offence he may have committed at any place beyond the limits of British India. I must hold, therefore, that the Magistrate at Ahmedabad had no jurisdiction to try the accused. I need not go into the further question as to whether the fact, that the services of the accused had been placed by the British Government at the disposal of the Native State in which the offence was committed, and that he was serving that State and not the British Government at the time of the commission of the alleged offence, would affect the jurisdiction. I concur in dismissing the appeal.

Their Lordships accordingly ordered the appeal lodged by Government to be dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Cundy.

SAKHARA'M (ORIGINAL DEFENDANT NO. 3), APPELLANT, v. SHRIPATI
AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1891.

April 1.

Mortgage—Redemption Suit—Possession of a defendant not as a mortgagee—Suit in ejectment—the Dekkhan Agriculturists' Relief Act (XVII of 1879), Section 3, Clause (2)—Appeal—Jurisdiction of the District Court.

In a redemption suit governed by the provisions of Chapter II of the Dekkhan Agriculturists' Relief Act (XVII of 1879), one of the defendants being sued merely as a person in possession,

Held, that the suit as against that defendant was one in ejectment.

A suit in ejectment is not governed by clause (2), section 3, of the Dekkhan Agriculturists' Relief Act, and an appeal against the decree in such suit lies to the District Court

* Second Appeal, No. 8 of 1890.

1891.

SAKHARÁM
v.
SHIRIPATI.

THIS was a second appeal from the decision of A. S. Moriarty, Assistant Judge of Sátára.

The facts of the case were as follows:—

The plaintiffs sued the three defendants, viz., Nana bin Ravji, (2) Kushiaba bin Ravji, and (3) Sakharám bin Bhivji, to recover possession of certain land, alleging that it had been mortgaged by their grandfather to the father of defendants Nos. 1 and 2, but that the mortgage-debt had been satisfied by the profits of the land. They stated that defendant No. 3 was joined in the suit because he was in possession of the land.

Defendants Nos. 1 and 2 admitted the mortgage.

Defendant No. 3 answered that the land in dispute had been sold at a Court-sale in or about the year 1869-70 as the property of one Govind Raghunath Kulkarni; that his (defendant's) father had purchased it at the Court-sale; that he had been in possession ever since, and that the claim was time-barred.

The Subordinate Judge (Ráo Sáheb R. G. Bhadbhade) tried the suit under the provisions of Chapter II of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and held that the purchase of defendant No. 3 was invalid as against the plaintiffs. He passed a decree for the plaintiffs.

Defendant No. 3 presented an application for revision to the Special Judge, who confirmed the decree of the Subordinate Judge.

Against the order of the Special Judge, defendant No. 3 presented an application to the High Court in its extraordinary jurisdiction under section 622 of the Civil Procedure Code (Act XIV of 1882), and the High Court rejected the application with (it seems) a verbal remark that if the Special Judge had no jurisdiction to entertain the defendant's application, the right course for him was to appeal to the District Court at Sátára.

Defendant No. 3, thereupon, presented an appeal to the District Court at Sátára, and the District Judge admitted the appeal on the defendant's making an affidavit that the High Court had ordered that he should appeal to the District Court. When the High Court's order rejecting the defendant's application under

the extraordinary jurisdiction was produced before the Assistant Judge, he found that there had been no such direction given by the High Court as was alleged by the defendant in his affidavit. The Assistant Judge, then, held that the appeal was inadmissible, and rejected it with costs.

The defendant then appealed to the High Court.

Manekshah Jehangirshah Tuleyarkhan for the appellant:—The lower Court was wrong in rejecting our appeal on the ground that it had no jurisdiction to entertain it under the Dekkhan Agriculturists' Relief Act. That Act does not apply to suits in ejectment. The present suit was no doubt a redemption suit so far as defendants Nos. 1 and 2 were concerned, and had it not been for the presence of defendant No. 3, the suit would have been governed by clause (2) of section 3 of the Dekkhan Agriculturists' Relief Act; but with respect to defendant No. 3 the suit was one in ejectment. He did not claim any interest in the property under the mortgage, but asserted his independent right as an auction-purchaser under a Court-sale held against a totally different person.

Ganesh Rámchandra Kirloshkar for the respondents.

TELANG, J. :—We think that having regard to the principle involved in *Govind Visaji Thakur v. Balkrishna Pindurang*⁽¹⁾ and other cases of that class, this suit, while undoubtedly a suit for redemption of mortgaged property as against the first and second defendants, must be treated merely as a suit in ejectment as against the third defendant. That defendant is expressly mentioned in the body of the plaint, and the third paragraph of the plaint contains the allegation upon which relief is prayed for as against him, namely, that he is in possession of the property. In that paragraph there is no allegation of any mortgage made in favour of the third defendant or relied upon by him. We cannot, therefore, see how as regards that defendant we can treat the suit as one for redemption.

In the case referred to by the District Judge—*Amrita v. Naru*⁽²⁾—there was an allegation by the plaintiffs that the defendants were mortgagees, and although that allegation

⁽¹⁾ P. J. for 1884, p. 308.

⁽²⁾ I. L. R., 13 Bom., 489.

1891.

SAKHARĀM
v.
SHRIPATI.

was denied by the defendants, the Court, following previous decisions, held that suit, in consequence of the allegation referred, to be a redemption suit. It will, however, be giving a wide, and as we think unwarranted, extension to the principle of those cases, to apply it in a case where there is not merely a denial by a defendant in the course of the trial of a mortgage alleged by the plaintiff, but where the plaintiff himself does not in his plaint even allege the existence of a mortgage.

Upon these grounds we are of opinion that clause (z) of section 3 of the Dekkhan Agriculturists' Relief Act does not apply to this case, and that the lower Appellate Court has jurisdiction to entertain the appeal which it has declined to admit. Whether the appellant can get over the difficulty of limitation or not we do not now express any opinion, as that point has not been considered by the Court below. We will at present only reverse the decree of that Court and remand the appeal to be dealt with according to law. Costs to abide the result.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1891.

April 8.

ABDUL RAHIM (ORIGINAL PLAINTIFF), APPELLANT, v. KIRPARA'M
DA'JI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), schedule II, articles 91, 92, 93—Suit for partition of joint property—Suit where the cancellation of a fraudulent instrument is ancillary to the main relief.

Articles 91, 92, and 93 of schedule II of the Limitation Act (XV of 1877) apply only to suits brought expressly to cancel, set aside, or declare the forgery of, an instrument; but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary and not necessary to the granting of such relief.

SECOND appeal from the decision of T. Hamilton, Acting District Judge of Surat, in Appeal No. 87 of 1887.

The plaintiff sued to recover his share by partition of certain property belonging to his grandmother Nurbibi:

* Second Appeal No. 820 of 1889.