

1891.

SHIDU
v.
GANESH
NARAYAN.

Subordinate Judge, A. P., in thinking that, by analogy with the decisions under the several Small Cause Courts' Acts, the suit, as brought, is one properly falling under clause (x) of section 3 (3) of the Dekkhan Agriculturists' Relief Act, 1879, and that no appeal lies to the District Court from the decree of the Subordinate Judge who decided the suit.

Order accordingly.

APPELLATE CIVIL.

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

VENKATRA'MA'NA RA'MBHAT AND OTHERS, (PLAINTIFFS)
v. TIMAPPA DEVA'PPA, (DEFENDANT).*

891.

April 30.

Lunacy—Defendant a lunatic but not adjudicated a lunatic—Code of Civil Procedure (Act XIV of 1882), Secs. 443 and 463—Act XXXV of 1858—Practice—Procedure—Appointment of a guardian ad litem by the Court.

Although section 443 of the Code of Civil Procedure (Act XIV of 1882) read with section 463 does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind, except where he has been adjudged to be of unsound mind under Act XXXV of 1858; still upon general principles and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds, on inquiry, that he is of unsound mind so as to be unfit to defend the suit.

THIS was a reference made by Ráo Sáheb N. B. Muzumdár, Subordinate Judge of Kumta in the Kánara District, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

The reference was as follows:—

“Original Suit No. 516 of 1887 was dismissed for the plaintiffs' default on 8th October 1889. Miscellaneous application, No. 109 of 1889, was then brought by the plaintiffs under section 103 of the Civil Procedure Code, praying that the suit might be re-admitted to the file. Notice of this application was sent to the defendant and he appeared. But he does not seem to be of sound mind. At any rate he is not able to understand the proceedings. That the man does not feign lunacy, but has been in the same state for some years, appears from the deposition of the Government pleader of this Court.

* Civil Reference, No. 4 of 1881.

"The man was represented by a pleader in the suit, but that pleader is dead, and he is not represented now by any other pleader.

"In *Uma Sundari v. Ramji*⁽¹⁾, it was held that a person of unsound mind, though not declared to be so under Act XXXV of 1858, may appear either in person or by a pleader. But the person concerned in that case was not a principal party.

"The man in the present case is an only defendant and is sued as the manager of his family.

"Section 463 of the Civil Procedure Code applies only to persons adjudged to be of unsound mind under Act XXXV of 1858, and it has been held that no guardian for the suit can be appointed for an unadjudicated lunatic—*Tukaram v. Vithal*.⁽²⁾

"The inquiry into lunacy and the appointment of a guardian under Act XXXV of 1858 can be made only by the District Court.

"Under these circumstances and in view of section 117 of the Civil Procedure Code, it is impossible to proceed with the case. The Collector of the district was communicated with through the District Court, but he does not consider it necessary to take any steps under Act XXXV of 1858, as the man possess no property at present. The Suit No. 515 of 1857 was brought by the plaintiffs to recover from defendant possession and rent of certain lands alleged to have been leased to the defendant some years ago. But the Collector finds that defendant no longer possesses those lands.

"In my opinion the only course now open is either to move the legislature to amend section 463 of the Civil Procedure Code and enable the Court to appoint a guardian *ad litem*, or to request again the Collector or the Government pleader to apply to the District Court under section 3 of Act XXXV of 1858. For it would be unjust to pass an order or decree against a defendant without hearing him or, if he is not able to understand the proceedings, his guardian."

There was no appearance for the parties in the High Court.

(1) I. L. R., 7 Calc., 242.

(2) I. L. R., 13 Bom., 656.

1891.

VENKATRA-
MA'NA
RAMBHAT
P.
TIMAPPA
DEVAPPA.

1891.
 VENEKATRA-
 MANA
 RA'MBHAT
 v.
 TIMAPPA
 DEVA'PPA.

SARGENT, C. J.:—Although section 443 of the Code of Civil Procedure (XIV of 1882) read with section 463; does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind except in the case where he has been adjudged to be of unsound mind under Act XXXV of 1858, we think that, upon general principles, and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds, on inquiry, that he is of unsound mind so as to be unfit to defend the suit (Daniell Ch. Pr., Vol. I, page 182).

Order accordingly.

APPELLATE CIVIL.

1891.
 April 30.

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

DASHARATHA AND ANOTHER, (PLAINTIFFS) v. NYAHA'LCHAND
 (DEFENDANT).*

Adverse possession—Mortgage—Possession obtained by mortgagee from Mámlatdár—Non-payment of assessment by mortgagor—Payment by mortgagee—Land Revenue Code (Bombay) Act V of 1879; Secs. 56, 57, 153.

In a suit for redémption of land mortgaged to the defendant in 1870 the defendant pleaded adverse possession. In 1876 he had obtained a decree for sale which he had not executed. In 1877 the Mámlatdár being about to sell the land for arrears of assessment the defendant paid the amount and was thereupon put into possession by the Mámlatdár. He had retained possession ever since and had continued to pay the assessment.

Held, that the plaintiff was entitled to redeem. It did not appear that the land had been declared to be forfeited by the Collector under sections 56(1),

* Civil Reference, No. 2 of 1891.

(1) Section 56.—“Arrears of land revenue due on account of land by any landholder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors in title, or in any wise subsisting as against such occupant or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.”