1892.

KHUSRUPHAI NASARVA'NJI v. HORMASJSHA PHIROZSHA.

The decree of the District Judge is reversed and a decree passed in favour of the plaintiff in accordance with the above remarks. All costs on defendant.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Telang.

1892.
November 23.

GANPATRA'M JEBHAI (ORIGINAL PLAINTIFF), APPLICANT, *v.* RANCHHOD HARIBHAI (ORIGINAL DEFENDANT), OPPONENT.*

Mámlatdár's Act (Bombay Act III of 1876)—Suit in a Mámlatdár's Court—Procedure where one of several plaintiffs in such a suit dies and the right to sue does not survive to the surviving plaintiffs—Code of Civil Procedure (Act XIV of 1882), Chapter XXI—Its applicability to a suit in a Mámlatdár's Court—Practice—Procedure.

The Bombay Mámlatdár's Act (III of 1876) makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and Chapter XXI of the Code of Civil Procedure (Act XIV of 1882) cannot be held to apply to proceedings in a Mámlatdár's Court. Accordingly where a possessory suit was filed by two persons in a Mámlatdár's Court, and one of them died pending the suit, and it appeared that the right to sue did not survive to the surviving plaintiff alone,

Held that the Mámlatdár had no alternative but to dismiss the suit.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ganpatrám Jebhai and Adesang Himdás filed a suit in the Mámlatdár's Court to recover possession of certain property, and while the suit was pending Adesang died.

On Ganpatrám's application the case was adjourned for a fortnight to enable the heirs and legal representatives of the deceased plaintiff to be made parties to the suit.

As the deceased's heirs did not express their willingness to join as co-plaintiffs, the Mámlatdár rejected the plaint under section 13 of Act III of 1876, holding that in the absence of one of the plaintiffs the suit could not be proceeded with.

Thereupon the widow of the deceased Adesang applied to the Court, apparently under section 108 of the Code of Civil Proce-

* Application under Extraordinary Jurisdiction, No. 136 of 1892.

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dure (XIV of 1882) to have the suit restored to the file. The Mámlatdár rejected this application, holding that he could not entertain it.

Against this order the present application was made to the High Court under its revisional jurisdiction.

A rule *nisi* was issued, calling upon the opponent to show cause why the Mámlatdár's order should not be set aside.

Goverdhan Mádhavrám Tripati, for the opponent, showed cause:—The Mámlatdár's order is right. The Mámlatdár's Act (III of 1876) contains no provision for making the legal representatives of a deceased plaintiff a party to a suit. Nor is there any provision in that Act for restoring a suit to the file after it was dismissed for default. The provisions of the Civil Procedure Code relating to both these points do not apply. Bombay Act III of 1876 lays down a special procedure. And there is nothing in the Act to show that the Code of Civil Procedure is intended to govern cases for which the special procedure makes no provision—*Kásam Sáheb* v. *Máruti*[1].

Gokuldás Kahandás Párikh for the applicant, in support of the rule:—It would be hard on a suitor in a Mámlatdár's Court if it were held that, on the death of a sole plaintiff or of one of several plaintiffs, the suit cannot be continued by the heirs of the deceased, merely because there is no specific provision in the Mámlatdár's Act for entering the names of the deceased's heirs on the record. In such a case the ordinary procedure laid down in Act XIV of 1882 ought to apply. Section 647 of the Code of Civil Procedure makes the provisions of the Code applicable to all judicial proceedings in any civil Court. And as the Mámlatdár's Court is a civil Court, Chapter XXI of the Code is applicable to suits in the Mámlatdár's Court. The Mámlatdár was, therefore, wrong in dismissing the suit on the death of one of the plaintiffs in this case.

FULTON, J.:—The purpose of the Mámlatdár's Act, as pointed out in the case of *Basápa* v. *Lakshmápa* [2], being "temporary only and chiefly to provide for the cultivation of the land and to

(1) I. L. R., 13 Bom., 552. (2) P. J. for 1877, p. 58.

prevent breaches of the peace until the civil Court should determine the rights of the disputants," the procedure provided was of a very summary character. The Act makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and we are not prepared to say that Chapter XXI of the Civil Procedure Code is applicable. To hold that this chapter is applicable, and that the heir to a deceased party has a right to intervene at any time within six months from the date of such party's death, would introduce an element of delay, which would be inconsistent with the summary nature of the Act. In *Kásam Sáheb* v. *Máruti*[1], the High Court held that section 328 and the following sections of the Civil Procedure Code were not applicable to proceedings under the Mámlatdár's Act, and the reasoning on which the decision was based seems to us to hold good equally in the case of Chapter XXI. Our attention was called to the case of *Nánú Bayáji* v. *Pándurang Vásudev*[2], in which the remarks of another Division Bench appeared to lead to the conclusion that section 332 of the Code could be resorted to in such proceedings, but the point was not really before the Court for decision.

It may be urged that it is very anomalous that, after a suit has been duly instituted, no provision should exist for its continuance on the death of one of the parties; but it must be remembered that the object of Bombay Act III of 1876, as stated in the preamble, was to consolidate and amend the law relating to the powers and procedure of Mámlatdárs' Courts, and that unless we were to hold that the Legislature had, in the sections of the Act itself, failed to carry out its purpose of consolidating the law relating to the procedure of Mámlatdárs' Courts we could not accede to the argument that it was intended that the prescribed procedure should be supplemented on a variety of points by procedure borrowed from the Code. There is, however, no reason to impute to the Legislature any such failure of purpose. The main object in view being speedy and merely temporary relief it was probably thought inexpedient to make any provision for the continuance of a suit on the death of one of the

(1) I. L. R., 13 Bom., 552. (2) I. L. R., 9 Bom., 97.

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parties; inasmuch as to force an heir to intervene immediately on the occurrence of a death before he had had sufficient opportunity of ascertaining the extent of his rights might lead to permanent injustice, while to allow him six months to consider his position would defeat that object by protracting the proceedings. Although the sudden termination of a suit before the Mámlatdár consequent on the death of one of the parties might cause inconvenience to the surviving party, still that inconvenience would be merely of a temporary nature, inasmuch as it would remain open either to him or to the heirs to seek relief at any time in the ordinary civil Courts.

Under these circumstances we think that, so far as the second plaintiff's case was concerned, the Mámlatdár had no alternative but to dismiss it on his death.

As regards the first plaintiff, the Mámlatdár ought, no doubt, to have given his reasons for holding that the right of suit did not survive to him alone. But as it appears that the claim was one in which he did not allege a right to sole possession, and as it has not been suggested that the second plaintiff's interest passed entirely to him by survivorship, it is obvious that he was not competent to carry on the suit alone, and that, therefore, the Mámlatdár was right in dismissing it.

For the above reasons, we consider that this rule must be discharged with costs.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Bayley and Mr. Justice Farran.

1890. *December* 22.

RANCHORDA'SS AMTHA'BHA'I, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MA'NEKLA'L GORDHANDA'SS, (ORIGINAL DEFENDANT), RESPONDENT.*

Encroachment—Injunction—Highway—Place dedicated by owner of land for convenience of occupiers of adjoining houses—User of such open space—Covenant or grant presumed—Easement—Right of way—Landlord and tenant—Variance between pleading and evidence—Practice—Procedure.

The plaintiff and defendant occupied houses situated in the same lane and opposite each other. Close to both houses was an open space in which a cross had

* Suit No. 93 of 1888. Appeal No. 677.