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PER CURIAM:—The Judge has found that the articles in question were ordinary and necessary apparel taken from the body of the respondent. It has been contended that because such articles are not exempted by Section 205, the appellant is entitled to have them attached; but when we look to Section 273, and find that in case of arrest a debtor who wishes to obtain his discharge is not compelled to give up his necessary wearing apparel, it would, we think, be contrary to reason to suppose that it was the intention of the Legislature under Sec. 205, which is merely descriptive of the character of the property to be attached, to compel the last rag upon his person to be given up. And this might be the effect if we were to hold that necessary wearing apparel is liable to attachment.

Order confirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 146 of 1872.

August 1.

KRISHNA'JI NA'RA'YAN.....*Appellant.*

GOVIND BHA'SKAR and others .....*Respondents.*

Hindu law—Mortgagee without possession—Suit to recover land—Mámlatdár's order against mortgagor—Judgment not inter partes—*Bombay Act V. of* 1864.

In order that a Hindu mortgagee may successfully maintain an action of ejectment against third persons wrongfully in possession of the mortgaged property, it is not necessary that such mortgagee should have been put in possession by his mortgagor. He can bring his action based upon the title of his mortgagor, if the mortgagor had a good title to the land, and was in possession of it within twelve years before the suit was brought.

A mortgagee is not affected by a Mámlatdár's order, made under Bombay Act V. 1864, on the application of the mortgagor for possession subsequent to the date of the mortgage.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Ratnagiri, in Appeal No. 279 of 1870, reversing the decree of Mádhavráv Shesgir, 2nd Class Subordinate Judge at Goohagur.

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Krishnáji brought the suit to recover possession from the defendants of certain "Agar" (land), and to obtain the removal of a house and a hut that were built on it. He alleged in the plaint that the property had been mortgaged to him by one Bagambhat under a deed of mortgage, dated 29th July 1863, and that he (Krishnáji) had been forcibly dispossessed by the defendants on the 1st August 1865.

The defences chiefly relied upon were (I) that the plaintiff had never been in actual possession of the property under his mortgage, and (II) that the suit was barred, not having been brought within three years from the date of a Mámlatdár's order, made on the 20th November 1865, under Bombay Act V. of 1864 on the application of the said Bagambhat. The order awarded possession to the defendants, and it was contended that as it bound the mortgagor Bagambhat, it also bound the plaintiff who was Bagambhat's mortgagee.

The Subordinate Judge held that the suit was not barred by limitation, as the Mámlatdár's award did not bind the plaintiff, he being no party to it. He also held that the property in dispute had been in the exclusive possession of Bagambhat and his mortgagee (Krishnáji) prior to the date of the dispossession by the defendants, and made a decree in favor of the plaintiff.

On appeal, the Subordinate Judge's decree was reversed on the ground that the Mámlatdár's order bound the plaintiff as Bagambhat's mortgagee and that, therefore, the suit was time-barred, not having been instituted within three years from the date of that order. The following were the reasons given by the Assistant Judge for his decision :—

"The points are (1) Is the claim barred by limitation ? (2) Is respondent's title proved ? * * * With regard to the first and second points, it is alleged by the respondent that the owner, Bagambhat, mortgaged the land to him in 1863, and put him in possession. Now it is not sufficient in this suit for the respondent to prove Bagambhat's title and the mortgage from him to himself, but he must prove that he was actually put in possession, otherwise

he cannot bring an action of ejectment like this. Now, I can find no evidence at all which proves this important point. * * * I cannot hold that the respondent has proved that he ever was in possession of this land, and, therefore, as, until he has got possession from his mortgagor, his title cannot be said to be perfected, he cannot bring this suit successfully. With reference to the remark of the Subordinate Judge on the point of limitation that the plaintiff, not being a party to the revenue award (41) is not affected by it, it appears that Bagambhat applied for possession against the appellants amongst others, and on the 20th November 1865 it was decided that the defendants were in possession, and had been so for six months and more previously. This shows that the respondent was not in possession. More than three years have elapsed from the date of that order to the date of this suit. I am very strongly of opinion that the respondent is bound by that decision. His mortgagor is bound by it clearly, and as far as he is concerned, the land is lost as the order cannot be set aside. It would be, I think, far from right that the mortgagee should have more rights than the mortgagor, and the effect would be that a man by mortgaging his land would be able to override altogether this rule of limitation. * * * I hold that the order of the Revenue Court is binding on the respondent, since though not a party to it, he is a representative, or privy of a party."

The special appeal was argued before SARGENT, Acting C.J., and MELVILL, J. on the 1st August 1872.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Bhairavnáth Mangesh, for the respondent.

PER CURIAM :—The Assistant Judge was wrong in holding that the plaintiff could not bring his action, unless he had been actually in possession under his mortgage. If the mortgagor had been in possession within 12 years, and the mortgage gave the mortgagee the right to be put into possession, the mortgagee would be entitled to bring his action based

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upon the title of his mortgagor, nor would he be affected by the circumstance of the mortgagor having subsequently made a fruitless attempt to recover possession on dispossession by the defendants, in the Mámlatdár's Court, and neglected to bring his suit within 3 years. The Court has found that the mortgagor has been in possession within 12 years; the action is, therefore, clearly not barred. The decree must, therefore, be reversed, and the case remanded to be tried on its merits, having regard to the above observations, respecting the mortgagee's title.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

August 8.

Special Appeal No. 570 *of* 1871.

MUHAMMAD YA'KUB .....*Appellant.*
MUHAMMAD ISMAIL and others .....*Respondents.*

Khoti land—Suit by Khot against cultivator—Onus of proof.

In a suit by a Kabuláyatdár Khot for rent from cultivators holding land in a Khoti village, the *onus* does not lie on the plaintiff to prove the land to be Khoti; but the holder of land in a Khoti estate must prove that he is exempted from paying rent according to the custom of the country.

SP. APP. No. 485 of 1868 followed.

THIS was a special appeal by the plaintiff from the decision of H. J. Parsons, Assistant Judge at Rutnágiri, in Appeal No. 61 of 1869, reversing the decreee of the Subordinate Judge of Dapuli.

Muhammad Yákub sued to recover rent for the year 1862-63 as a Kabuláyatdár Khot and alleged that the defendants were cultivators of some *thikáns* (fields) on a fixed rent.

For the defence, it was pleaded that the plaintiff must have first brought his suit to establish his right as a Khot, as alleged by him, before filing any action for rent.