

[APPELLATE CIVIL.]

*Before Mr. Justice West and Mr. Justice Pinhey.*1878.
July 17.LAND MORTGAGE BANK OF INDIA, LIMITED, APPLICANT, v.
VISHNU GOVIND PATANKAR, OPPONENT.**Mortgage—Decree—Sale—Right to emblements.*

On the 14th of July 1876, B obtained a decree against D, directing D to pay the amount advanced upon a mortgage of D's lands within six months from the date of decree, or, in default of payment, the lands to be sold, with liberty to B to bid at the sale. Default having been made, the lands were sold on the 21st of June 1877, and B became the purchaser. At the time of the sale the lands were in the occupation of D's tenants under an agreement to give to D a moiety of the crops. On the 11th December 1877 P, another judgment-creditor of D, attached the crops on those lands which had been cut and stored by D's tenants since the date of the sale.

Held that by the sale to B, all right, title, and interest of D, including his right to the moiety of the crops in the hands of his tenants, passed to B, and no residual right remained in D on which P's execution could operate, the crops not having been actually carried away and appropriated by D.

THIS was an application under the extraordinary civil jurisdiction, praying for a reversal of an order of Ráv Sáheb Mádhavráv Jánoji, Subordinate Judge of Kalyán.

The facts are as follows :—

In a suit between the Land Mortgage Bank of India, Limited, as plaintiffs and Rámchandra Govind Dátár as defendant the High Court, in its ordinary original civil jurisdiction, passed a decree on the 14th of July 1876, directing that certain lands in the district of Tháná, held to have been mortgaged by the defendant to the plaintiffs, should be sold by the Sheriff of Bombay at the expiration of six months from the date of the said decree in the event of default in payment of the amount of that decree. Liberty was given to the plaintiffs to bid at the sale. Default having been made, the lands were put up to sale, and the plaintiffs became the purchasers on the 21st of June 1877. On the 21st September following the High Court granted to the plaintiffs a certificate of their having become such purchasers. The plaintiffs allege that, in pursuance of their decree and certificate, possession was given of the lands to them on the 10th of October 1877 by Dátár. At and after this

* Application (Extraordinary Jurisdiction) No. 60 of 1878 under Reg. II. of 1877, sec. 5, cl. 2.

date part of the crops growing on the lands were cut, gathered, and stored by the tenants of Dátár at various places on the property, there being an agreement between Dátár and his tenants to give to the former a moiety of these crops. On the 11th of December 1877, Vishnu Govind Pátankar, another judgment-creditor of Dátár, attached the said crops under an attachment issued out of the Court of the Subordinate Judge of Kalyán. The Land Mortgage Bank applied to that Court to have the attachment removed, alleging that, since their sale and more especially their possession of the lands on the 10th of October 1877, they had become the owners of the lands together with the crops. The Subordinate Judge found, as a fact, that the Bank had not possession of the lands on that day, and rejecting their application confirmed Pátankar's attachment on the 5th of March 1878.

A rule *nisi* was granted on the 5th of May 1878 to show cause why the order of the Subordinate Judge should not be reversed or varied.

Pigot (*Lynch* with him) for the applicant.

Macpherson (*J. V. Athale* with him) for the opponent.

The arguments sufficiently appear from the following judgment of the Court delivered by

WEST, J. :—The contention of the applicant in this case is that, whether he had or had not acquired actual possession under his purchase of June 1877, the ownership of the land had, in fact, passed to him, and that being owner of the land he was owner of the landlord's moiety of the crop as it was cut, so that there was nothing of the mortgagor's (Dátár's) which could be attached by Pátankar in execution of his old money decree against Dátár. For the opponent it is said that Dátár, being allowed to remain in possession after the time limited for payment of the mortgage money and even after the sale, was justified in cultivating the land directly or by the mediation of his tenants; that he thus became entitled to the emblements, notwithstanding an intermediate sale followed even by his dispossession as to the land; and that the crops being thus his property, or so far as they were his property in the hands of the tenants, were subject to his creditor Pátankar's attachment.

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No case has been cited to us in which the ordinary rule as to emblements has been applied to the case of a mortgagor retaining possession after the time had expired which had been allowed to him for payment of the sum due on account of the mortgage. His position, being that of a person acquainted with the imperfection of his title, and one entirely of his own choosing, seems to us to fall under quite a different principle from that of the tenant-at-will cultivating on a reasonable expectation of reaping what he has sown, or of a holder whose right is put an end to by a wholly uncertain event. If, therefore, possession was acquired under his execution purchase by the applicant, there was, we think, no residual right left to Dátár on which Pátankar's execution could operate.

The Subordinate Judge has proceeded, however, on the ground that the applicant had not, in fact, acquired possession. It is now stated that the lands were in part cultivated by Dátár himself; but the averment in the applicant's affidavit, that they were wholly let to tenants, is supported by the language of the Subordinate Judge, and has not been contradicted by any counter averment. We must take it, therefore, as a fact that the lands were occupied by tenants, who appear to have held on terms of giving to Dátár one moiety of the crops. This right vested in Dátár, it was contended, was separable from his ownership of the land; but, though it may be conceived of as separate, it was, in our opinion, distinctly a part of Dátár's right, title, and interest which were sold in execution. Rights subsist only as between persons, and a relation between a landlord and tenant is a right in the land, to which it relates, vested in him who may benefit by it. The applicant had, therefore, acquired the right to one-half of the crops by his purchase. But it is said by the Subordinate Judge he had left this right, by not taking possession, in the enjoyment of Dátár; and, notwithstanding any personal obligations subsisting between them, Dátár became possessor of a moiety of the crops at the moment of their severance with an ownership that would enable him to sell them, and, therefore, enabled his creditor to seize them.

As to this, it appears to us that while the crops were in the hands of the tenants they were held subject to a lien for the rent or share due to the landlord Dátár. But this lien, arising entirely from

his position towards the tenants in relation to the land, was a part of his right, title, and interest in the land which had passed by his purchase to the applicant, and could be asserted by him so long as the crops had not been carried away, or come into the possession of purchasers for value from the tenants or from Dátár. Dátár, though tenants without notice might have been exonerated by delivery of the landlord's share to him, was not really owner of the crops, as they had not been taken away by him, and an appropriation in the fullest sense was necessary to make them, or a moiety of them, his, in spite of the right, as against him, vested in the Land Mortgage Bank. The Bank having, in virtue of its proprietorship, succeeded to the lien before it had ceased to be a lien, had not done any thing which by deceiving or misleading Pátankar had given him a right to take the property as if it had really been that of Dátár.

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We must, therefore, set aside the order of the Subordinate Judge, and direct the removal of Pátankar's attachment, with all costs on opponent.

Rule made absolute.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

V. K. GUJAR (ORIGINAL PLAINTIFF), APPELLANT, v. V. D. BARVE (ORIGINAL DEFENDANT), RESPONDENT.*

July 23.

Limitation Act (IX. of 1871), Schedule II, Article 158—Application for restitution by a person dispossessed—Mode of computing period of limitation.

In calculating the period of limitation prescribed in schedule II of Act IX. of 1871 for applications as well as for suits and appeals, the day on which the order or decree appealed against was made, should be excluded.

Consequently, where a person, having been dispossessed of property held by him under a mortgage on the 14th of December 1875, applied on the 14th of January 1876 for restitution, the 13th having been a Court holiday, it was held that his application was within the limitation of thirty days prescribed by article 158, schedule II of Act IX. of 1871.

THIS was an appeal from the decision of H. J. Parsons, Acting Judge of Ratnágiri, confirming the order of the Second Class Subordinate Judge of Chiplun.

* Second Appeal No. 141 of 1878.