

APPELLATE CIVIL.

Before Mr. Justice Melrill and Mr. Justice Pinhey.

1878
December 16.

JOHARMAL (ORIGINAL PLAINTIFF), APPELLANT, v. THE MUNICIPALITY OF AHMEDNAGAR (ORIGINAL DEFENDANTS) RESPONDENTS. *

Bombay Act VI of 1873, Section 86—Suit against Municipality—Limitation Act IX of 1871, Schedule II, Articles 43, 113.

Section 6 of Bombay Act VI of 1873 is not applicable to suits in the nature of actions of ejectment, but only to suits for damages.

The limitation of three years provided in clause 43, Schedule II, of the Limitation Act IX of 1871, applies only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation is twelve years, as provided by clause 143.

THIS was an appeal from the decision of N. Daniell, Judge of the District Court of Ahmednagar, in Original Suit No. 2 of 1877, dated the 27th July, 1878.

The plaintiff Joharmal instituted this suit against the Municipality of Ahmednagar to establish his right to a certain piece of ground. He alleged in the plaint that an old terrace had formerly existed on the ground; that he had lately reconstructed it; that the municipal authorities had caused the structure to be removed. He, therefore, sued for a declaration of his right to the ground, and claimed Rs. 25 as damages. The plaint was filed in January, 1877.

The defendants answered (*inter alia*) that the ground did not belong to the plaintiff, but formed part of the public road; that the plaintiff had built the terrace without authority from the defendants, and that, therefore, they were justified in removing it.

The District Judge raised the issues, whether the ground in dispute belonged to the plaintiff, and whether the suit was barred under section 86 of Bombay Act VI of 1873.

The following findings on the evidence were recorded by the District Judge:—That the plaintiff built the terrace in 1875 without the sanction of the defendants; that he had received a notice from them, dated the 14th July, 1875, ordering him to

* Appeal No. 35 of 1878 from original decree.

1873

 JOHARMAL
 v.
 THE MUNICIPALITY OF
 AHMED-
 NAGAR.

remove the structure, but that he did not remove it; that the defendants pulled it down about the close of the year; that in 1876 the plaintiff petitioned the defendants for leave to rebuild it, but they rejected his petition on the 15th August, 1876; that, on the 2nd September following, he served them with a notice to the effect that he would sue them if they did not give him leave to rebuild the terrace; that on the 9th September they informed him that their former order could not be altered or reversed.

On the above facts the District Judge rejected the plaintiff's suit, holding that his cause of action accrued on the 15th August, 1876, and that it was barred under section 86 of Bombay Act VI of 1873, as it was not brought within three months from that date.

The plaintiff appealed to the High Court.

Shivshankar Govindram for the appellant.—The District Judge misunderstood the nature of the suit, in holding it to be time-barred under Bombay Act VI of 1873, section 86. He cited *Sorabji Nassarvanji v. The Justices of the Peace for the City of Bombay* (1).

The Hon. Rao Sahib *V. N. Mandlik* for the respondent.

MELVILL, J.—The plaintiff in this Court does not deny that his suit, in so far as it relates to damages, is barred by section 86 of Bombay Act VI of 1873; but he contends that, in so far as he sues to establish his right to immoveable property, the above section does not apply; and in support of this contention he relies on the decision in *Sorabji Nassarvanji v. The Justices of the Peace for the City of Bombay* (1). That decision was passed with reference to section 240 of Bombay Act II of 1865, the provisions of which are very similar to those of section 86 of Bombay Act VI of 1873; and it was then held that the limitation of three months applies only to suits against the municipality for damages, and not to suits in the nature of actions of ejection. We concur in that decision, and, for the reasons stated in it, we are of opinion that section 86 of Bombay Act VI of 1873 is not applicable to the present suit, in so far as the plaintiff sues to establish his right

(1) 12 Bom. H. C. Rep., 250.

1873

JOHARMAL
v.
THE MUNICIPALITY OF
AHMED-
NAGAR.

to the land in dispute. The defendants' pleader refers us to article 43, Schedule II of Act IX of 1871 as requiring a suit "for trespass upon immoveable property" to be brought within three years from the date of the trespass. But we think that that provision has reference only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation provided by article 143 is twelve years. For these reasons we hold that the suit, so far as it seeks to establish the plaintiff's right to the piece of ground in dispute, is not time-barred, and we, therefore, reverse the decree of the Court below, and remand the case for trial on its merits. As the plaintiff has in this Court abandoned his original ground of contention, and has succeeded upon a plea which he did not put forward in the Court below, we direct that the parties bear their own costs of this appeal.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

PURSHOTAM SIDHESWAR, APPLICANT, v. DHONDU AMRIT
DANWATE, ATTACHING CREDITOR.*

Jurisdiction—Attachment.

One Dhondu applied to the Subordinate Court of Sasvad for the attachment and sale of certain immoveable property in execution of a money decree, under which the sum of Rs. 1,317-4 9 was due to him from his judgment-debtor. On the attachment of the property the applicant presented a petition to the Court to the effect that he (applicant) had a mortgage lien on the property for Rs. 10,368, and that it might be sold subject to his lien and possession as mortgagee. The Subordinate Judge raised the question whether he had jurisdiction to entertain the application and inquire into the merits of the alleged mortgage. He was of opinion that he had, and referred the question for the opinion of the High Court, which concurred in his opinion and answered the question in the affirmative.

THIS case was referred for the opinion of the High Court by Rao Saheb R. S. Tipnis, Subordinate Judge (Second Class) of Sasvad, in the district of Poona. The following are the facts of the case :—

* Civil Reference, No. 22 of 1880.

1880
October 5.