

Mr. Shivshankar urges that a representative cannot be called forward now when more than sixty days have elapsed from the sale; but section 313 does not prescribe that the notice is to be served before the application, and schedule II, article 172 of Act XV of 1877 only requires that the application shall be made, not that the notice shall be served, within sixty days from the sale.

We must set aside the proceedings, and direct that the investigation be made anew after notice to the representative of Sharifu Bibi.

Costs to abide the event.

Proceedings set aside.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

FAKI ISMAIL (DEFENDANT), APPLICANT, v. UMABAI BIVALKAR
(PLAINTIFF), OPPONENT.*

*Mamlatdar—Jurisdiction—Removal of earth from field—Profit of land—
Bombay Act III of 1876, Sec. 4, Cl. 2.*

The removal of earth from a field is a taking of a portion of the substance, not merely of a profit, of the land; and the mamlatdar has no jurisdiction, under section 4 of Bombay Act III of 1876, to entertain an application for an injunction to restrain the defendant from obstructing the plaintiff in the exercise of her right to take earth from the defendant's land.

THIS was an application, under the extraordinary jurisdiction of the High Court, for the reversal of the order of Rav Saheb Dinkar Trimbak, Mamlatdar of Panvel.

The plaintiff alleged that she had the right to take earth from the defendant's neighbouring field for the purpose of repairing her own embankment, and that she had always exercised such right till obstructed by the defendant, and prayed for an injunction, under clause 2, section 4 of Bombay Act III of 1876, restraining the defendant from interfering with her in the exercise of her right. The defendant contended that the mamlatdar had no jurisdiction to entertain the suit. The mamlatdar overruled the contention, and on the merits directed that an injunction, such as the plaintiff prayed for, should issue. The defendant, therefore, applied to the High Court.

* Extraordinary Application, No. 101 of 1882.

1883

BALA KADAR
v.
GULAM
MOHIDIN.

1883
July 11.

1883

FAKI ISMAIL

UMBAI
BIVALKAR.

Farran and Hon. Rav Saheb V. N. *Mandlik*, Government
Pleader, for the applicant.

Branson and *Ghanasham Nilkanth Nadkarni* for the opponent.

WEST, J.—There are certain productions of the soil of an estate which, by the Roman law, were regarded as of the character of fruits or profits, though not falling within the ordinary comprehension of these words. Such were the minerals and stones obtained from pits and quarries—see Digest, Lib. VII, 13, *De Verb. Sign.*, 77. Under the modern law, however, Lord Cairns, in a Scotch case, said: “What we call a mineral lease is really, when properly considered, a sale, out and out, of a portion of the land”—*Gowan v. Christie*(1). See also *Wilkinson v. Haygarth*(2). Similarly, we think that the removal of earth from a rice field is distinctly a taking of a portion of the substance, not merely of a profit, of the land. In the present case, the owner of the fields was undoubtedly in possession until the servants of Umabai came to take away earth for her embankment. He prevented this, and thus retained possession of the whole property, of part of which Umabai’s people had sought to dispossess him. There had thus been only an attempt, well or ill founded; at dispossession, not an actual dispossession. The person asserting the right was not dispossessed, on her own showing, of anything, only prevented from taking it as she had a right to do. On such a complaint a mamlatdar has not jurisdiction.

The second clause of section 4 of the Mamlatdars’ Act is intended to guard against disturbances of the possession which the first clause protects as possession. There was no jurisdiction under that clause.

We, therefore, set aside the order made by the mamlatdar with costs.

Order set aside.

(1) L. R., 2 H. L. (Sc.), at p. 284.

(2) 16 L. J. Q. B., 103.