

APPELLATE CIVIL

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice
Nánábhái Haridás,*

1886.

February 4.

ANNA'JI APA'JI, PLAINTIFF, *v.* RA'MJI JIVA'JI DEFENDANT.*

*Decree—Civil Procedure Code (Act XIV of 1882), Sec. 230—Limitation Act
XV of 1877, Art. 179.*

On 15th February, 1872, the plaintiff obtained against the defendant a decree for possession upon his mortgage, and in attempting to take possession was obstructed by Náro, another mortgagee of the defendant, whereupon the plaintiff applied for removal of the obstruction, but his application was rejected on the ground that Náro was in possession as mortgagee, and that the plaintiff was not entitled to possession until Náro's mortgage was redeemed. The plaintiff did not apply for execution any further. In 1884 the defendant paid off Náro's mortgage, and on 27th August, 1885, the plaintiff presented an application for execution of his decree of 1872. On reference to the High Court,

Held, that the execution of the decree was barred, no application for execution having been made since 1873. The previous application for execution not having been made under section 230 of the Civil Procedure Code (Act XIV of 1882), the general law of limitation, as laid down in article 179 of Act XV of 1877, governed the case.

THIS was a reference by Ráv Sáheb Govind Vásudev Tullu, Joint Subordinate Judge of Poona, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff on 15th February, 1872, obtained a decree for taking possession of certain property, which was mortgaged to him, and for keeping it in his possession until he was paid off his mortgage debt, which amounted to Rs. 148-8-0. Before 9th April, 1873, the plaintiff applied for execution of the decree, and, on going with an officer of the Court to take possession of the property, he was obstructed by one Náro Dáji Karmarkar. The plaintiff then applied for removal of the obstruction caused by Náro Dáji; but his application was rejected on the ground that Náro Dáji] was in possession by right of mortgage, and that the plaintiff was not entitled to possession so long as Náro Dáji's mortgage lien was unredeemed. In 1884 the defendant paid off her mortgage debt due to Náro Dáji; and the plaintiff presented, on 27th August, 1885, an application for execution of the decree

* Civil Reference, No. 1 of 1886.

passed on 15th February, 1872. The plaintiff had not applied for execution of his decree at any time between 1873 and 27th August, 1885. It was contended by the plaintiff that twelve years ought to be counted from the year 1884, in which year the defendant redeemed his mortgage and received back possession of the land from Náo Dáji. But it was urged on behalf of the defendant that he was not a party to the application made on 9th April, 1873, and, therefore, could not be bound by any order passed in 1873 to which he was not a party.

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The questions referred for decision were :—

1. Whether the decree passed on the 15th February, 1872, was capable of execution, as twelve years had elapsed since the passing of it?
2. Whether the application for execution could be granted, as none was made at any time between the year 1873 and 27th August, 1885?

The opinion of the Joint Subordinate Judge at Poona on both points was in the affirmative.

There was no appearance for the parties.

SARGENT, C. J.—Section 230 of the Civil Procedure Code (Act XIV of 1882) does not apply, as it assumes that the previous application to execute the decree had been under the section itself. The general law of limitation as laid down in article 179 of Act XV of 1877 must, therefore, be applied to the case, and as it is admitted that no application was made since 1873, the execution of the decree is now barred. It is to be remarked that the plaintiff might have got over the difficulty of the first mortgage by redeeming it himself,