

The Subordinate Judge's opinion was in the negative.

Shantaram Narayan, (Government Pleader), for the plaintiff contended that the Court invested with Small Cause Court powers under Act XIV of 1869 had no power to entertain a claim by way of set-off beyond its pecuniary jurisdiction.

Narayan Ganesh Chandavarkar contra.

OPINION.

SARGENT, C. J.—We agree with the Subordinate Judge that he is precluded by s. 33 of Act IX of 1887 from entertaining the counter claim which is beyond the pecuniary limit of his Small Cause Court jurisdiction.

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APPELLATE CIVIL.

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

BAPU KHANDU (*Original Defendant No. 2*), Appellant v. BAJI JIVAJI (*Original Plaintiff*) AND OTHERS (*Original Defendants 3 and 4*), Respondents. * [1st October, 1889.]

Jurisdiction—Act XVI of 1838, s. 1, cl. 2—Mamlatdar's Court a Revenue Court within contemplation of Reg. XVII of 1827—Construction—Optimus legis interpret consuetudo, maxim. application of—Landlord and tenant.

On the 13th December, 1863, prior to the passing of the Mamlatdar's Act III of 1876, one Bhavanji sued defendants Nos. 1 and 2 in a Mamlatdar's Court for the purpose of restraining them from disturbing him in the possession and enjoyment of the lands in dispute. On the 17th January, 1864, the Mamlatdar made an order to that effect against the said defendants, who omitted to sue to set aside that order. In 1866, Bhavanji being then dead, his widow (defendant No. 3) executed in favour of the plaintiff a *miraspatra* in respect of the lands in dispute, which was also ratified by her adopted son (defendant No. 4). In 1871 the plaintiff sued to recover possession of the lands. Defendants Nos. 1 and 2 contended (*inter alia*) that the lands were their private property and had never been in the possession of Bhavanji or his widow. The suit went up to the High Court,

[373] and was remanded for the determination of the issues, *viz.*, (1) whether Bhavanji had at the time of his death such a title to the lands as would have entitled him to make a *mirasi* lease thereof, and (2) whether there was any valid adoption of defendant No. 4 by defendant No. 3. On remand the Court of first instance found on the issues in the affirmative, being of opinion that defendant No. 3 was in possession at the time the *miraspatra* was executed to the plaintiff. The defendants appealed, and the Subordinate Judge, A.P., confirmed the lower Court's decree. He treated the Mamlatdar's order as one made under the Mamlatdar's Act, and, as such, binding conclusively on the defendants, as it had not been set aside within three years from its date. On appeal to the High Court:

Held, that the Subordinate Judge with appellate powers was wrong in treating the Mamlatdar's order as passed under the Mamlatdar's Act. The order was one of a Revenue Court under s. 1, cl. 2, of Act XVI of 1838.

It was contended that the Mamlatdar could not make such an order under Act XVI of 1838.

Held, that, although the Collector's Court was the only Revenue Court contemplated by Reg. XVII of 1827, since the passing of Act XVI of 1838 the Mamlatdar's Court was always regarded as a Revenue Court empowered to deal with a

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claim to possession, and that in construing that Act the maxim *optimus legis interpretis consuetudo* might be properly applied. The order in question was against the appellant, and under s. 7 of Act XIV of 1859 a suit by the appellant to recover the property would be barred on the 17th January 1867, and as that suit was not brought, the defendants could not assert a title other than what their actual possession might afford them. The Subordinate Judge having found that defendant No. 3 was in possession in 1866 when she granted the *miraspatra*, the appellant could not have acquired any title by possession before the plaintiff's suit in 1871.

THIS was a second appeal from a decision of Rao Bahadur Ganpatrav Amrit Mankar, First Class Subordinate Judge, A.P. at Satara.

In 1871 the plaintiff brought this suit against the defendants to recover possession of certain lands. He alleged that the lands had originally belonged to one Bhavanji, and that on the death of Bhavanji, his widow Lalitabai, (defendant No. 3), in 1866 granted to him (plaintiff) a perpetual lease (*miraspatra*) of them, which was ratified by her adopted son Shivaji, (defendant No. 4).

The Court of first instance decided the suit in favour of the plaintiff, but on appeal by the defendants the lower appellate Court reversed the lower Court's decree.

[374] The plaintiff preferred a special appeal to the High Court, which remanded the case for retrial and determination of the following issues:—

(1) "Whether Bhavanji had at the time of his death such a title or estate in the lands in dispute as would have enabled him to make a *mirasi* lease thereof.

(2). "Whether there was any valid adoption of Shivaji by Lalitabai."

At the retrial on remand, defendants Nos. 1 and 2 contended (*inter alia*) that the lands were their property, and had been in their possession; that they had never been in the possession of Lalitabai, (defendant No. 3); that she had no right to let them to the plaintiff, and that the suit was barred.

Defendants Nos. 3 and 4 admitted the execution of the *miraspatra*.

It appeared at the hearing that on the 13th of December, 1863, Bhavanji had brought a suit in the Court of the Mamlatdar of Dahivadi against defendants Nos. 1 and 2, to restrain them from disturbing him in the possession and enjoyment of the said lands; that on the 17th January, 1864, the Mamlatdar had passed an order in favour of Bhavanji; and that the defendants had never taken any proceedings to set that order aside.

In the course of the trial of the suit, the plaintiff put in the decision in suit No. 560 of 1881 of the file of the First Class Subordinate Judge of Satara. That suit had been filed by one Pandoji against Lalitabai. He alleged that he had been adopted by a junior co-widow of Lalitabai's, and he sued to have his adoption declared valid. In that suit, however, the validity of the adoption of Shivaji, (defendant No. 4), by Lalitabai, (defendant No. 3), was upheld as against Pandoji. The defendants objected to the admission, in evidence, of that decision, but their objection was disallowed. The Court of first instance found on both the issues in the affirmative and awarded the plaintiff's claim.

Defendants Nos. 1 and 2 appealed to the Subordinate Judge with appellate powers, who was of opinion that the Mamlatdar's order against them of the 17th January, 1864, not having been [375] set aside, and no proceedings for that purpose having been taken by them within three years

from its date, the defendants were precluded from asserting their title against Bhavanji or his heirs. He treated the order as one made under the Mamlatdar's Act (III of 1876), and confirmed the lower Court's decree in favour of the plaintiff.

Defendant No. 2 alone preferred a second appeal to the High Court.

Ghanasham Nilkanth Nadkarni, for the appellant:—The lower appellate Court was wrong in considering that the order of 17th January, 1864, passed against the appellant was one under the Mamlatdar's Act, for Act III of 1876 was not then in existence. The only Court that could deal with possessory suits was that of the Collector. A Mamlatdar had not the power, under Act XVI of 1838, to make an order which is given him under Act III of 1876. The order in question was, therefore, *ultra vires* and cannot bind the appellant. The appellant has never been out of possession, and independently of the order the respondent has not made out a title in Lalitabai to grant him a *miraspatra*. The decree in suit No. 560 of 1881 upholding Shivaji's adoption by Lalitabai should not have been admitted in evidence in the present suit, as it was not between the parties to this suit—*Ranchoddas v. Bapu Narhar* (1). My client has been in possession, and possession is title itself, before the plaintiff could defeat it.

Mahadev Chinnaji Apte, for the respondents:—The decree in suit No. 560 of 1881 was rightly admitted. It does not appear that its admission was disputed in the lower Courts. The order of the Mamlatdar, dated 1864, is binding as against the appellant. Though the Mamlatdar was not expressly empowered under Act XVI of 1838, yet, as a matter of fact, Mamlatdars did pass orders in possessory suits, and their orders were regarded as those of Revenue Courts—*Ramchandra v. Gunvantrav* (2). The order having, therefore, been that of a Revenue Court ought to have been set aside under s. 1, cl. 7 of Act XIV of 1859 within three years from its date, which the appellant has failed to do. At the [376] time of the execution of the *miraspatra*, Lalitabai has been found to have been in possession; so appellant cannot set up adverse possession.

Ghanasham Nilkanth Nadkarni in reply:—The jurisdiction of Mamlatdars under Act III of 1876 is altogether a new creation. Under earlier Acts the Mamlatdars had never any such jurisdiction. The order not having been made under Act XVI of 1838, there was no necessity for the appellant to sue to set it aside. It is as good as no order, and has, therefore, no binding effect as against the appellant.

JUDGMENT.

SARGENT, C. J.—The Subordinate Judge, A. P., is mistaken in supposing that the order of the Mamlatdar was made under the Mamlatdar's Courts Act. It was made on the 17th January, 1864, before that Act came into force, and therefore, must have been made under Act XVI of 1838, presumably under s. 1, cl. 2, which enables the Revenue Courts to give possession to a party dispossessed. It was said by Mr Ghanasham that the Mamlatdar could not make an order under that Act. It appears, however, from the remarks of West, J., in *Ramchandra v. Gunvantrav* (2), that although the Collector's Court was the only Revenue Court contemplated by Reg. XVII of 1827, nevertheless, after the passing of the Act of 1838,

(1) 10 B 489.

(2) Printed Judgments for 1878, p. 269.

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the Mamlatdar's Court was always regarded as a Revenue Court empowered to deal with a claim to possession, and the maxim *optimus legis interpretis consuetudo* may well be now applied in construing such an Act.

The order in question was against the appellant, and by s. 1, cl. 7 of Act XIV of 1859 a suit to recover the property would be barred after three years from the date of the order,—that is, on 17th January, 1867, and as that suit was not brought, the defendants cannot, we think, now assert a title other than what their actual possession may afford them. This was decided as regards an order under s. 246 of the Code of Civil Procedure of 1859 in *Nilo Pandurang v. Ram Patloji* (1), and is, in our opinion, equally applicable to an order under s. 1, cl. 2 of the Act of 1838. That order was conclusive as to [377] the successful party's right to possession "until he was ejected by a decree of the adalat," and after three years had elapsed should be held to "preclude the appellant from asserting his title", as was held by the Allahabad High Court with respect to an order under s. 246 of the Code Civil Procedure of 1859 in the Full Bench decision in *Badri Parsad v. Muhammad Yusuf* (2). The Subordinate Judge has found that Lalitabai was in possession in 1866 when she granted the *miraspatra*, and, therefore, appellant could not have acquired any title by possession before this suit was instituted in 1871.

It has, however, been urged upon us that the Subordinate Judge was wrong, having regard to *Ranchoddas Krishnadas v. Bapu Narhar* (3), in admitting the decision in suit No. 560 of 1881 as evidence of Shivaji's title. On the other hand, it was contended by Mr. Apte that the remand order having directed that Pandoji should be made a party, the judgment was admissible. It is not necessary to decide this question, as the admission of the decree was not objected to in the Court of first instance, nor indeed an appeal, except on the ground that it was not final, and the objection cannot be taken now in second appeal. We must, therefore, confirm the decree of the Court below, with costs on appellant.

Decree confirmed.

14 B. 377.

APPELLATE CIVIL.

Before Mr. Justice Jadine and Mr. Justice Candy.

BULAKHI GANU SHET (*Original Plaintiff*), Appellant v.
TUKARAMBHAT BIN MOTIRAMBHAT AND OTHERS
(*Original Defendants*), Respondents.* [7th October, 1889.]

Mortgage—Hypothecation bond containing a power of sale in case of default—Construction—Limitation Act (XV of 1877), art. 147—Suit by a mortgagee to recover the mortgage-debt from mortgaged property and from mortgagor personally—Limitation.

Where certain land was given as security for repayment of a loan under an instalment bond which contained an express provision for sale of the property in case of default, it was

[378] Held that the bond was a mortgage-bond, and that art. 147 of the Limitation Act (XV of 1877) applied to a suit to recover the instalments due under the bond by sale of the mortgaged property.

* Second Appeal, No. 266 of 1888.

(1) 9 B. 35.

(2) 1. A. 381.

(3) 10 B. 439.