JUDGMENT.

SARGENT, C. J.—We agree with the lower Courts in their construction of s. 48 of Bombay Act II of 1884, the language of which is very different from that of s. 86 of Bombay Act VI of 1873. The words "in the case of any such action for damages" show clearly that it was contemplated that there might be actions of another description, to which the provisions in the former paragraph would be applicable. In other words, there is no reason for concluding, as was done in *Sorabji Nassarvanji Dundas* v. *The Justices of the Peace for the City of Bombay* (1) upon the language of the corresponding section of the former Act, that the section only contemplates "suits to recover monetary compensation for a wrongful act."

A suit in ejectment—not being a suit brought to recover damages "for an act done or intended to be done"—was excluded under that Act, but being an "action for an act done," that act being the dispossession by the defendant with a view to being restored to possession, must be held to fall under the provisions of the first paragraph of the section of the Act of 1884. We must, therefore, confirm the decree, with costs.

Decree confirmed.

---

18 B. 22.

[22] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

SWAMIRAO AND ANOTHER (*Original Defendants*), *Appellants v.* PADAPA BIN BHUJANGRAV (*Original Plaintiff*), *Respondent.**
[18th November, 1892.]

Watan—*Watandar—Mortgage of* watan *property—Adverse possession of* watan *property—Limitation—Succession—Entry of* watan *in name of trespasser—Effect of Gordon Settlement effected with trespasser.*

Bhujangrav Desai died in 1847, leaving his two widows Kalova and Ramova. The plaintiff Padapa was born to Ramova in 1848, *i.e.*, the year after his death. Bhujangrav Desai's *watan* had been attached by Government in 1844, but in 1848 or 1849 Government restored a small portion of it, entering it in the name of Kalova and refusing to recognise the infant Padapa. In 1865 the Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under "the Gordon Settlement" (2). In 1865 Kalova mortgaged two villages (part of the *watan*) to one Shrinivas (father of the defendants), who was the *watani karkun*, for Rs. 9,900, which had been advanced by him to Kalova while the *watan* was under sequestration. Possession was given to Shrinivas, and the village officers were directed to pay him the revenues. Subsequently Kalova repented of her bargain, and directed the village officers not to pay the revenues to Shrinivas He accordingly brought a suit against her for the revenues of 1869-70 and obtained a decree, in execution of which he sold the villages and bought them at the sale. In 1878, however, the Collector cancelled the sale under the Watan Act (III of 1874).

In 1873 Shrinivas obtained a further decree against Kalova for the revenue of two years (1870-72) and for possession as mortgagee. He got possession through the Court in 1875.

Kalova and Padapa, who had been on good terms, quarrelled, and on 16th March, 1872, Kalova adopted one Balapa as a son to her deceased husband

---

* Appeal No. 93 of 1889.

(1) 12 B.H.C.R. A. C. J. 250 (254).

(2) As to the nature of this settlement, see 15 B. 13.

1892
NOV. 18.
APPELLATE CIVIL.
18 B. 22.

Bhujangrav. In December, 1872, Padapa sued Kalova and Balapa, praying that he might be declared the son of Bhujangrav, and that the adoption of Balapa might be cancelled. In 1879 the High Court held that Padapa was the legitimate son of Bhujangrav, and that Balapa's adoption was invalid. The legitimacy of Padapa being thus established, the Collector, in 1878, entered the *watan* in his name. At that time and until 1880 Padapa and Shrinivas were on friendly terms, the two having joint possession of the mortgaged villages, Padapa being subsequently to October, 1878, the recognised occupant, and Shrinivas taking some, if not all, of the revenues of the two villages. In 1880 Shrinivas died, and his sons, the defendants, quarrelled with Padapa, who in 1881 obtained an order from the Collector directing the village officers to pay the revenues of the two villages to him and not to the defendants. This order was subsequently set aside, and thereupon Padapa in August, 1887, filed the present suit to have the mortgage executed by Kalova to [23] Shrinivas on 15th September, 1865, declared null and void, and to recover possession of the two villages. In the alternative, he prayed for redemption of the mortgage. The defendants pleaded (*inter alia*) that the villages were not *watan*; that they were entitled to the villages by reason of adverse possession; that the suit was barred by limitation, and that the plaintiff was estopped from disputing the mortgage, &c.

Held (1), on the evidence, that the property in question was part of a *desai watan* and as such was held on service tenure.

(2) That the property in question was subject to the rule which was in force in 1865 when the mortgage to Shrinivas was executed, *viz.*, that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar* who mortgages it.

(3) That the plaintiff having been declared to be the legitimate son of Bhujangrav he was, from the date of his birth in 1848, the rightful *watandar*, and Kalova, unless she was manager acting on his behalf, was a trespasser. The fact that Government had entered the *watan* in her name, and that the "Gordon Settlement" was effected with her, would not make her *watandar* as long as Bhujangrav's son (the plaintiff) was alive.

(4) That if Kalova was a mere trespasser, then the plaintiff's right to recover the lands free from incumbrance, on the ground that he was the *watandar*, had been lost by limitation, and the property had become Kalova's by adverse possession. The plaintiff, however, as her step-son, was heir. The mortgage was proved and was binding on him as heir, and as such he had a right to redeem it.

[**Rev.**, 24 B. 556 (**P C.**)=27 I. A. 86=7 Sar. P. C.J. 710=4 C.W.N. 517=2 Bom. L. R. 548; **D.**, 1 O. C. 174 (176).]

FIRST appeal from the decision of Thomas Moore, First Class Subordinate Judge of Sholapur.

One Bhujangrav Desai, who owned service *watan* property in the Sholapur District, died on the 27th September, 1847, leaving two widows Kalova and Ramova. In the year 1844 the *watan* had been attached by the Government, because he declined to produce his *sanad* relating to the *watan* before the Inam Committee. After his death, *viz.*, on the 15th September, 1848, Ramova, one of the two widows, gave birth to the plaintiff Padapa.

During the year 1848-49 the Government restored a portion of the *watan* to the other widow Kalova, and placed the remaining *watan* property under sequestration, which continued until 1865. In the meanwhile, Ramova presented a petition to the Government on behalf of her minor son (the plaintiff), but on the 15th February, 1849, the Government rejected her petition and decided that Kalova should be allowed to retain possession of the *watan*.

[24] On the 15th May, 1850, Ramova applied on behalf of her son for permission to sue in *forma pauperis*, but the application was rejected on the 8th June, 1850, being opposed by Kalova, who disputed the son's rights as Bhujangrav's heir.

On the 9th May, 1864, the Government confirmed Kalova's right, and in 1865 restored the rest of the *watan* to her under the terms of the

1892
NOV. 18.

APPELLATE CIVIL.

18 B. 22.

Gordon Settlement (1), without any objection on the part of either Ramova or Padapa.

On the 15th September, 1865, Kalova mortgaged two villages, Areshankar and Wadwadgi (part of Bhujangrav's service *watan*), to the defendant Shrinivas, who was the *watani karkun*, for Rs. 9,900. Possession was given to the mortgagee, and the village authorities were also desired by Kalova on the 25th September to recognise him as mortgagee in possession, and he received the revenues. On the 15th April, 1869, Kalova executed a second mortgage of the same property to Shrinivas for Rs. 3,000. The mortgagee continued in possession for a time, but in that same year (1869-70), Kalova directed the village officers to stop paying revenue to the mortgagee, and recovered it herself. The mortgagee Shrinivas thereupon filed suit No. 203 of 1870 and got a decree for possession and for the revenues of 1869-70. Kalova appealed, and the decree was confirmed in appeal (No. 121 of 1871). As Kalova did not satisfy the decree, Shrinivas sold the two villages in execution and bought them himself at the sale. The sale, however, was set aside by the Collector. In the meanwhile, Shrinivas had to file another suit (No. 59 of 1873) against Kalova to recover the revenues of the years 1870-71, 1871-72 and for possession. He got a decree and obtained possession of the villages through the Court in 1875.

From the time of the mortgage of 1865 Kalova, Ramova and Padapa had been on good terms; but in the year 1872 differences arose between Kalova and Padapa. On the 16th March, 1872, Kalova adopted one Balapa as son to Bhujangrav. Padapa in consequence on the 4th December, 1872, filed a suit against Balapa and Kalova praying that he might be declared to be the son of the deceased Bhujangrav and the adoption of Balapa **[25]** by Kalova be set aside. The suit came up to the High Court (see I.L.R., 1 Bom. 248), and after remand was finally decided by that Court on the 21st January, 1879, in favour of Padapa. In November, 1877, while the above proceedings were pending, Kalova died. In 1878, the suit being decided by the lower Courts in Padapa's favour after the remand by the High Court, the Collector entered the *watan* in his name.

Shrinivas, the mortgagee, died in the year 1880, and after his death, his elder son, the first defendant Swamirao, applied to the Collector to transfer the two mortgaged villages to his name. The Collector rejected the application on the 4th April, 1881, and directed the village officers to pay the revenue of the two villages to Padapa. Swamirao appealed to the Revenue Commissioner, who in February, 1886, passed an order directing that the revenue of the two villages should be given to Swamirao until Padapa obtained a decree of a competent Court to the contrary. Against this order Padapa appealed to the Government, which confirmed it on the 7th January, 1887. Thereupon, Padapa filed the present suit on the 16th August, 1887, for a declaration that the mortgage-deed executed by Kalova to Shrinivas on the 15th September, 1865, was null and void, and to recover possession of the two villages, and, in the alternative, for the redemption of the mortgage.

The defendants Swamirao and Devrao, the sons of Shrinivas, replied (*inter alia*) that the villages in dispute did not appertain to the service *watan* of Bhujangrav, but had been conferred on him for his maintenance; that the cause of action (if any) had accrued to the plaintiff in the year 1850, when Ramova's application to sue in *forma pauperis* was rejected in

(1) As to the nature of this settlement see 15 B. 13.

1892
NOV. 18.
APPELLATE CIVIL.
18 B. 22.

consequence of the opposition of Kalova; that the claim was barred by defendant's adverse possession for about twenty-five years and by Kalova's adverse possession for about forty years; that the claim was also barred by reason of the plaintiff having failed to bring the suit within one year from the date at which he attained majority; that they (the defendants) had thus become the owners of the village; that if their ownership were not held to be established, they were willing to allow the plaintiff to redeem on payment of Rs. 66,000 on account of the mortgage; that the mortgage-deed executed [26] by Kalova in the year 1865 was valid, and that the money had been advanced to pay off debts, and to defray the expenses incurred in getting the *watan* released from attachment; that, after Bhujangrav's death, the *watan* was managed by Kalova as owner, and that the plaintiff was bound by her acts; that her possession of the estate was adverse to the plaintiffs, and that, besides the mortgage-bond for Rs. 9,900, there was another mortgage-bond of Rs. 3,000 executed by Kalova on the 15th April, 1869, stipulating to pay both the amounts at once: therefore, unless the debt of Rs. 3,000 was paid, the plaintiff was not entitled to redeem the mortgage of Rs. 9,900.

The Subordinate Judge found (1) that the mortgage of Rs. 9,900 relied on by the defendants was not proved; (2) that the mortgage-debt was not proved to have been contracted by Kalova for lawful and necessary purposes: (3) that the property mortgaged was *watan*, and was not liable for the debt, and that the plaintiff's cause of action arose in the month of February, 1886, when the Revenue Commissioner's rdero was passed. He, therefore, allowed the claim.

The defendants appealed.

P. M. Mehta (with *Shamrao Vitthal*), for the appellants (defendants):—The property in dispute is not service *watan*, as is shown by the original *sanad* dated 1762. It is, therefore, alienable like any other property. Even admitting that the property is service *watan*, still the service being commuted, and the summary settlement being made applicable, it has lost its characteristics of inalienability—*Radhabai* v. *Anantrav* (1); *Vishwanath* v. *Bagubai* (2).

The lower Court was wrong in holding that the mortgage of Rs. 9,900 was not proved. There is abundant evidence in the case to prove it. (Evidence referred to.)

The plaintiff has never until now repudiated the mortgage, although there have been several judicial proceedings in connexion with it. He cannot repudiate it now.

Further we say the suit is barred by limitation. The plaintiff claims as the son of Bhujangrav. Therefore, his right came into [27] existence in 1848, when he was born. The possession of his step-mother Kalova was from the beginning adverse to him, because she claimed to hold the property as that of the deceased Bhujangrav and not as that of the plaintiff whose legitimacy she denied. Again, in the year 1850, when Ramova applied to sue in *forma pauperis* on behalf of the plaintiff, Kalova disputed his right as heir of Bhujangrav. Kalova's possession, therefore, has been adverse, at least from the year 1850, with respect to that portion of the *watan* property which was then already restored to her. The plaintiff attained his majority, according to Hindu law, in the year 1864, and, giving him the benefit of three years under the Limitation Act, his right to sue became barred in the year 1867. The defendants claim to be in

(1) 9 B. 198. (2) P. J. 1890, p. 28.

possession under Kalova, and her possession having been adverse, our possession has also been adverse from the date of the first mortgage in 1865—Mitra on Limitation, p. 133; *Madhava* v. *Narayana* (1).

Jardine (with *Ghanasham*) *N. Nadkarni*), for the respondent:—The *sanad* granted in the year 1886 and the other documentary evidence in the case show that the property is both service and *deshmukhi watan*. No holder can alienate *watan* property beyond his lifetime—*Apaji* v. *Keshav Shamrav* (2).

As to the mortgage, no evidence of consideration has been given, nor has any necessity for contracting the debt been proved. Admitting the mortgage to be valid, it would be good only during the lifetime of Kalova, the mortgagor, the property being *watan*. It would not bind succeeding holders—West and Buhler, p. 101.

The plaintiff's claim is not barred by limitation. Kalova's possession cannot be said to be adverse, because she being the elder of the two widows naturally held the property as manager. The plaintiff's legitimacy having been judicially established. Kalova cannot be held to have retained possession in her own right. But even if her possession was adverse, the plaintiff's claim would not be barred, because after her death he was entitled to succeed as the nearest heir of Bhujangrav, if not as adopted son.

[28] *P. M. Mehta*, in reply.—In the former suit the Court held Padapa to be a legitimate son, and that being so his right to succeed to the estate of Bhujangrav accrued to him at his birth. The possession of his step-mother Kalova was, therefore, adverse to him. He being in existence she could not legally hold the property as Bhujangrav's widow. She could do so only as trespasser. If she acquired it as trespasser, it was her *stridhan*. It was not a widow's estate to which she succeeded, because she was not the widow of a childless Hindu. Moreover, she had been all along asserting her right to the property, which she need not have done if she had been the widow of a childless Hindu, for in that case it must have been acknowledged. The title which she acquired was not that of a Hindu widow; she got it by the operation of the Limitation Act—*Babu* v. *Bhikaji* (3). On her death the plaintiff, as her step-son, succeeded, if there are no other heirs, to her property, but subject to all the liabilities created by her and, therefore, subject to the defendants' mortgage.

As to estoppel, we say that as Padapa stood by and allowed the property to be charged with money, the property must pay the charge. Kalova's death does not destroy the charge, which was a mortgage and not a charge for her life.

JUDGMENT.

CANDY, J.—Some of the facts of this case are to be found in *Kalova* v. *Padapa* (4).

Bhujangrav Desai died on 27th September, 1847, leaving two widows, Kalova and Ramova. In the following year Padapa was born to Ramova. Bhujangrav's *desai watan* had been attached in 1844, because he would not show his *sanad*. In 1848 or 1849 Government restored a small portion of the *watan*, but entered it in the name of Kalova, refusing to recognize the infant Padapa. Ramova, on behalf of Padapa, made attempts to sue Kalova to establish the legitimacy of the infant, but the

(1) 9 M. 244. (2) 15 B. 13. (3) 14 B. 317. (4) 1 B. 248.

1892 NOV. 18. APPELLATE CIVIL. 18 B. 22.

case did not then come to trial. It seems that subsequently Kalova and Ramova must have become friends, for they apparently lived together with Padapa.

In 1865 Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under the "Gordon's Settlement."

[29] On 15th September, 1865, Kalova mortgaged the two villages of Areshankar and Wadwadgi (part of the above-mentioned *watan*) to one Shrinivas, who was the *watani karkun*, the consideration recited in the bond being a sum of Rs. 9,900, the balance of an account of all the sums advanced to Kalova by Shrinivas from time to time while the *watan* was under sequestration. Possession of the village was given to Shrinivas, the village officers being directed to pay him the revenues.

Padapa was not a party to the mortgage (he was then about seventeen); but it appears that he was then on good terms with Kalova and living with her. All went well for a few years, till Kalova repented of her bargain, and directed the village officers not to pay the revenues to Shrinivas. Thereupon Shrinivas filed suit No. 203 of 1870 against Kalova to recover the revenues for 1869-70; and the Subordinate Judge held (27th October, 1871) that the mortgage-bond was proved and was for consideration, and that Shrinivas had obtained possession of the two villages under the bond; and he decreed that Kalova should pay Rs. 995-9-3 for the revenues of the year 1869-70. As Kalova did not pay this sum, Shrinivas in execution bought the villages, but in 1878 the Collector cancelled the sale under the Watan Act (III of 1874). In the meanwhile, Shrinivas had been forced to file another suit against Kalova (No. 59 of 1873) for the revenues of two more years (1870-71, 1871-72), and for restoration to possession as mortgagee. He obtained a decree on 5th June, 1873, and obtained possession of the villages through the Court in 1875.

To return to Kalova and Padapa. They had been on good terms, but having quarrelled because Padapa did not marry Kalova's niece, Kalova, on 16th March, 1872, adopted one Balapa as a son to her deceased husband Bhujangrav. On 4th December, 1872, Padapa filed suit No. 1299 of 1872 against Kalova and Balapa, and prayed that he might be declared the son of the deceased Bhujangrav, and the adoption of Balapa by Kalova be set aside. The Subordinate Judge held that the claim was barred under Act XIV of 1859, s. 1, cl. 16, and s. 11; but, in appeal, the Assistant Judge held that the suit was not barred, and this view was upheld, in second appeal, by the High **[30]** Court in *Kalova* v. *Padapa* (1), and the case was remanded for determination of the questions whether Padapa was the son of Bhujangrav, and, if so, as to the validity of the adoption of Balapa. The Subordinate Judge, on remand, found that Padapa was the legitimate son of Bhujangrav, and that the adoption of Balapa was not valid. Kalova and Balapa both appealed, but the Assistant Judge on 31st July, 1878, confirmed the decree of the Subordinate Judge. Kalova had died in November, 1877, but Balapa made a second appeal to the High Court, which, on 21st January, 1879, confirmed the Assistant Judge's decree (no written judgment).

Padapa having established his legitimacy, and Kalova being dead, the Collector in 1878 entered the *watan* in his name. At that time it is evident that Padapa and Shrinivas were fast friends: in fact, it was

(1) 1 B. 248.

mainly owing to the aid and deposition of Shrinivas that Padapa established his legitimacy. As to the possession of the two mortgaged villages, it appears that Kalova had put up one Gopaldas to obstruct the execution of the decree of 1873 (mentioned above). This obstruction was removed, and Shrinivas sued Gopaldas for the revenues of 1873-74 and 1874-75. This case was finally decided by the High Court in appeal No. 22 of 1879 (26th January, 1880). It appears also that tenants were set up antagonistic to the tenants of the mortgagee, and several suits ensued (see Exs. 155, 158, 159, 160, 173, 174, 175). But it is evident that throughout these proceedings Padapa and Shrinivas were acting in concert. In 1879 Padapa himself stated (Ex. 116) that possession had been with Shrinivas as mortgagee. In short, there seems to have been a joint possession of Shrinivas and Padapa, the latter since October, 1878, being the recognized occupant, the former taking some, if not all, of the revenues of the two mortgaged villages. In 1879 Shrinivas deposed (Ex. 18) that there were no differences between himself and Padapa as regards the '*vahivat*'; and this is borne out by the letters (Exs. 36 to 39), which apparently relate to 1878-79. But in 1880 Shrinivas died, and his sons, Swamirao and Devrao (hereafter called the defendants), soon fell out with [31] Padapa, who in 1881 obtained an order from the Collector, directing the village officers to pay the revenues of the two villages to him and not to the defendants. In March, 1886, defendants obtained an order of the Revenue Commissioner (Mr. A. Crawford), setting aside the Collector's order as illegal, and directing that officer to issue orders to the village officers to pay the revenues to defendants "until Padapa brings a decree of a competent Court to the contrary." Padapa appealed to Government, but Government (without stating reasons) confirmed the order of the Revenue Commissioner on 7th January, 1887.

Accordingly, on 16th August, 1887, Padapa filed the present suit to have it declared that the bond, executed by Kalova to Shrinivas on 15th September, 1865, was null and void, and for possession of the two villages; and, in the alternative, for redemption of the mortgage.

First, as to the nature of the property: Mr. Mehta contended that it was originally non-service *watan*; but there is a mass of evidence showing that it is part of a *desai watan* and, as such, of course it was held on a service tenure.

Next it was contended that by the application of a summary settlement and commutation of service the property became alienable like the ordinary landed property of the district. This contention is likewise bad. "Lands held for service" could never be settled under Bombay Act II of 1863 (the Summary Settlement Act which applies to the southern districts of the Bombay Presidency whence the present case comes), such lands being expressly excepted from the operation of the Act. It was for this reason that Government carried out what is termed the "Gordon Settlement," to which legal effect was subsequently given by s. 15 of Bombay Act III of 1874. The report and appendices of Mr. Gordon's Committee on the Sholapur District, (Areshankar and Wadwadgi were formerly in the Mangoli Taluka, Sholapur District), which we have perused, show that, whatever may have been the case in other districts, the settlement made with the district hereditary officers of Sholapur was not intended to convert the *watan* lands into the private property of the *watandars*, with the necessary incident [32] of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of service, remained intact. It was a four-annas "*judi*,"

1892
NOV. 18.
APPELLATE CIVIL.
18 B. 22.

and there was no extra *nazarana* levied for the conversion of the *watan* into private property. (See also Colonel Etheridge's mention of the Gordon Settlement in Sholapur, p. 41, Government Selection, N. S., No. CXXXII). Apparently no *sanad* was issued to Kalova in accordance with the terms of the settlement; but if any *sanad* was issued to her, there is no reason to suppose that it materially differed from that which was subsequently issued to Padapa (Ex. 50), and which is the same as the form of *sanad* issued to district hereditary officers in the Southern Maratha Country. (See p. 142 of General Rules in force in the Revenue Department under the Government of Bombay.) There is nothing in this *sanad* to take the property out of the well-established rule (which was in force in 1865 when the mortgage to Shrinivas was executed), that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar*-mortgagor. (See *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa* (1). The Commissioner, Mr. Crawford, thought that the *sanad* made a distinction between alienation by way of sale and alienation by way of mortgage, and that as the alienation to Shrinivas was of the latter description, the mortgagee (if unredeemed) could not be ejected as long as there was a male holder of the *watan* in existence. But there is no warrant for any such distinction, which is not to be found in the *sanad* or in the cases which establish the principle above quoted.

Prima facie, then, Padapa, if the successor to Kalova, is entitled to recover the *watan* lands free from any mortgage executed by his predecessor. This was the ground stated by the Subordinate Judge, who said "as no mortgage or alienation of a *watan* beyond the lifetime of the incumbent would be valid, the property is not liable for any debt, even if proved, after Kalova's death." But here we are met by the fact that Kalova was not the rightful incumbent of the *watan*, and Padapa is not her successor. Padapa has been declared by the Courts to be the [33] legitimate son of Bhujangrav. It follows, therefore, that from the date of his birth in 1848 he was the *watandar*, and Kalova, unless she was the manager acting on his behalf, was a mere trespasser. The fact that Government entered the *watan* in the name of Kalova, and that the "Gordon Settlement" was effected with her, would not make her the *watandar* as long as Bhujangrav's son was alive. If she was a mere trespasser, then his right to recover the lands free from any incumbrance, on the ground that he is the *watandar*, has been lost by statute.

It is unnecessary to enquire whether the mortgage may not be regarded as effected on behalf of Padapa, who was in 1865, and still is, the *watandar*. But we may remark that there is good reason for supposing that in 1865 Padapa (who was then of age) was living with Kalova, was cognizant of the mortgage, allowed Kalova to represent the estate, and acquiesced in the transaction. Certainly, it is clear that from 1877 (when Kalova died) to 1881, (when Padapa quarrelled with defendants), Padapa adopted the mortgage. He admitted the status of Shrinivas as mortgagee, and Shrinivas equally admitted the status of Padapa as representative of the mortgagor.

But, apart from these considerations, regarding Kalova as a mere trespasser, Mr. Mehta for defendants admitted that Kalova or Kalova's heir was fully competent to redeem the mortgage. He also admitted that

(1) 5 B. 435.

Kalova's heir was her step-son, the plaintiff Padapa. Assuming, as defendants contended, that Kalova fully represented the estate and purported to deal with the property as her own, and that the title of the rightful *watandar* was lost by limitation, in this case it so happens that the rightful *watandar* is Kalova's heir, and, therefore, his claim to redeem in the latter capacity cannot be resisted.

The Subordinate Judge found that the mortgage-bond was not proved, and that it was without consideration. But as to execution there can be no doubt: the plaint recites the fact. And as to consideration, it is evident that there was no fraud or collusion between Kalova and Shrinivas in the suit of 1870 (mentioned above); so even if Padapa could claim to be the successor of Kalova in the *watan* he would be bound by the [34] decision in that suit (see *Radhabai* v. *Anantrav* (1)). Of course if the bond was executed for the benefit of the estate, and Padapa adopted and acquiesced in the mortgage transaction, he cannot now plead want of consideration. Nor can he do so as heir of Kalova, being bound by the finding against her that the mortgage was for good consideration.

It only remains, therefore, to take the account.

Mr. Mehta abandoned the claim for Rs. 19,995 as recited in the 27th paragraph of the written statement.

With regard to the mortgage-bond for Rs. 3,000 recited in the 26th paragraph of the written statement, the Subordinate Judge framed an issue (the fourth) and recorded a finding "in the affirmative," noting that "the question whether the mortgagor has a right to redeem the present mortgage irrespective of the separate mortgage for Rs. 3,000 will be considered after the fifth issue has been disposed of." The point seems to have subsequently escaped the notice of the Subordinate Judge, for it was not further considered by him. The eighth paragraph of the memo. of appeal to this Court is that "the lower Court did not allow the defendants sufficient opportunity to prove the second mortgage of 1869 for Rs. 3,000." But counsel did not press the point or show in any way that defendants had not the fullest opportunity of proving the bond for Rs. 3,000. Under these circumstances, we cannot now allow that bond to be proved.

As regards the debt due on the bond for Rs. 9,900, we think that, as stated in the plaint, the plaintiff must be taken as having enjoyed possession of the villages from the date of the Collector's order (4th April, 1881) till January, 1887. For that period he must pay simple interest at 12 per cent., the rate recited in the bond. For the remaining period defendants must be taken to have been in possession, and, according to the stipulation in the bond, their receipts of the rents or profits are in lieu of interest. If obstruction was offered to their full enjoyment of the rents and profits, the mortgagee had his remedy, a remedy which he availed himself of in previous years as shown by the suits which he filed. That matter cannot now be gone into.

[35] It must be understood that this decree does not deal with the property recited in the 29th paragraph of the written statement. No issue was framed in regard to that point.

We amend the decree of the Subordinate Judge, by allowing the plaintiff to redeem the villages of Areshankar and Wadwadgi on paying, within six months from this date, the sum of Rs. 9,900 with 12 per cent.

(1) 9 B. 198.

1892
NOV. 18.

APPEL-
LATE
CIVIL.

simple interest on the said sum of Rs. 9,900 from 4th April, 1881, to 7th January, 1887, and, in default of payment, his mortgage will be foreclosed.

Defendants must have the costs of this appeal. Each party to pay his own costs in the Court below.

Decree amended.

18 B. 22.

18 B. 35.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MOTILAL KASHIBHAI (*Original Plaintiff*), *Applicant v.* NANA *alias* LANGDA MUKUND PATIL (*Original Defendant No.* 2), *Opponent.**
[25th November, 1892.]

Civil Procedure Code (Act XIV of 1882), *s.* 622—*Application and purpose of the section —Revision.*

An application under s. 622 of the Civil Procedure Code (Act XIV of 1882) cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 591, which provides that they may be made a ground of objection in the appeal against final decree.

The purpose with which s. 622 was framed was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court where there would otherwise be no remedy.

[F., 30 M. 230=17 M.L.J. 79=2 M.L.T. 88; 19 A.W.N. 210 (211); 4 Ind. Cas. 878=12 O.C. 405 (411); 25 Ind. Cas. 191=16 M.L.T. 101; Appl., 11 O.C. 238 (239); 1 S.L.R. 120; R., 34 A. 592=10 A.L.J. 130=16 Ind. Cas. 1; 14 P.R. 1904 =140 P.L.R. 1904; 22 P.L.R. 1900; 2 S.L.R. 22 (23).]

THIS was an application under the extraordinary jurisdiction of the Court, under s. 622 of the Civil Procedure Code (XIV of 1882), against an interlocutory order passed by Rao Saheb Prabhakar Vitthal Gupte, Second Class Subordinate Judge of Bassein.

Plaintiff Motilal Kashibhai brought a suit against (1) Raghunath Patil, (2) Nana, and (3) Botmaria, to recover possession of a house. On the day of fixing issues Nana alone appeared, and after the settlement of issues the hearing was adjourned till the 1st [36] December, 1891, on Nana's application to enable him to instruct a pleader. On the day so fixed for hearing, all the defendants being absent, the Court passed a decree for the plaintiff. On the 6th December, 1891, Nana and Botmaria applied to the Court to set aside the decree and restore the suit to the file, stating that they had been prevented by accident from attending the Court on the day fixed. The Court, thereupon, issued notice to the plaintiff to show cause why the decree should not be set aside and the suit restored to the file for rehearing, and, after having heard both the sides, passed an order setting aside the decree and directing the suit to be proceeded with only so far as Nana was concerned. The decree with respect to the other two defendants was allowed to stand, because Raghunath had not appeared at all, and Botmaria had not appeared on the day on which the issues were settled.

Against the order setting aside the decree with respect to Nana, the plaintiff applied to the High Court, and obtained a rule *nisi*, to set aside the order under s. 622 of the Civil Procedure Code (XIV of 1882).

* Application under Extraordinary Jurisdiction, No. 142 of 1892.