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18 B. 46.

THIS was an application under the extraordinary jurisdiction of the High Court, (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb Rangnath Narayan, Mamlatdar of the taluka of Kopergaon in the Ahmednagar District.

The plaintiff by his mukhtyar Shankar Vaman Kulkarni brought a summary suit under the Mamlatdars' Act (Bombay Act [47] III of 1876) against the defendants for an injunction directing the defendants not to obstruct the plaintiff's possession of the lands in dispute. It was stated in the plaint that the plaintiff was in possession of the lands through his tenant.

The Mamlatdar passed a decree for the plaintiff as prayed for.

The defendants applied to the High Court and obtained a rule *nisi* to set aside the order.

Gangaram B. Rele, for the applicants.—The opponent (plaintiff) being in possession through his tenant, no obstruction was caused to him. In a suit for injunction under the Mamlatdars' Act the person in actual possession must bring the suit. The obstruction must be to physical possession and not constructive possession as that of a landlord. The present suit being brought by the landlord, the Mamlatdar had no jurisdiction to entertain it—*Desai Malabhai v. Keshavbhai* (1).

Mahadev Chimnaji Apte, for the opponent.

JUDGMENT.

SARGENT, C.J.—The decision in *Desai Malabhai v. Keshavbhai* (1), in which we concur, shows that there must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of s. 4 of the Mamlatdars' Act, and, therefore, that the plaintiff, who was only in possession by his tenant *Gangaram*, could not sue in the present case.

We must, therefore, make the rule absolute and reverse the decree of the Mamlatdar. Applicants to have their costs of this application.

Decree reversed.

18 B. 48.

[48] APPELLATE CIVIL.

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

VIRCHAND LALCHAND (Original Plaintiff), Appellant v. KUMAJI AND ANOTHER (Original Defendants), Respondents.* [23rd December, 1892.]

Vendor and purchaser—Unpaid purchase-money, suit by vendor to recover—Evidence—Registration of bonds given for purchase-money—Limitation—Limitation Act (XV of 1877), sch. II, art. 132.

The defendants purchased land from the plaintiff, and gave bonds for the purchase-money. These bonds were not registered and were, therefore, not admissible in evidence.

Held, that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money.

* Second Appeal No. 860 of 1891.

(1) 12 B. 419.

Unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it falls under art. 132, sch. II of the Limitation Act (XV of 1877).

[Diss., 21 M. 141 (142) ; F., 21 A. 454 ; 22 B. 846 ; 9 O.C. 284 (285).]

SECOND appeal from the decision of Dr. A. D. Pollen, District Judge of Poona.

The plaintiff in execution of a decree bought certain land belonging to the defendants and entered into possession. He subsequently agreed to re-sell it to the defendants for Rs. 240. The defendants accordingly executed to him six instalment bonds for Rs. 40 each, and re-took possession of the land. The bonds contained a condition that, if default was made in any instalment, the land should revert to the plaintiff. The defendants made default, and in 1885 the plaintiff sued (No. 239 of 1885) to recover the land, on the ground of the breach of the conditions of the sale. In that suit he failed, as the bonds were held to be inadmissible in evidence for want of registration. The High Court, however, in second appeal, allowed him to withdraw the suit and to bring a fresh suit for the unpaid purchase-money. The plaintiff accordingly now sued to recover the said purchase-money. He prayed, in the alternative, that the land should be restored to him.

The defendants pleaded that the present suit was barred by the previous suit and by limitation.

[49] The Subordinate Judge dismissed the suit. He held that the claim for possession could not be made, inasmuch as the permission given to the plaintiff by the High Court was only to sue for the unpaid purchase-money, and that in other respects the present suit, although brought within twelve years of the date of sale, was barred by limitation under arts. 66, 111, 115 of sch. II of the Limitation Act (XV of 1877), and by s. 72 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the defendants being agriculturists.

On appeal, the District Judge confirmed the decree of the lower Court. In giving judgment he said :—

“The lands originally belonged to defendants, but had been purchased by plaintiff at a Court sale. The bonds contained a condition that, if default was made of any instalment, the land should revert to plaintiff. He alleged that default had been made, and he instituted a suit, No. 239 of 1885, to recover the lands. Technically the suit was one to enforce reconveyance of the lands to him for breach of conditions of the sale. The lower Court and the first appellate Court held that the bonds containing the conditions were inadmissible in evidence for want of registration, and rejected the claim. In second appeal the High Court allowed the plaintiff to withdraw his suit and both appeals, with permission to bring a fresh suit for the unpaid purchase-money. The only suit, therefore, that he can now bring is one for the unpaid purchase-money. Therefore, his present alternative claim for possession of the land, which is, in effect, a renewal of his previous suit, is not maintainable: and, if it were maintainable, the same question of registration would arise again. The claim for the unpaid purchase-money is admittedly made more than six years after the alleged default; and it is, therefore, time-barred, if art. 111 of the Limitation Schedule be held to apply. This is the only article that, in my opinion, applies to the case. It is argued that art. 132 might apply. Plaintiff might indeed urge, on a fair construction of the bonds, that they gave a special charge upon the land for the purchase-money; but here again the question

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of registration would come in, and that point has been virtually decided by the previous litigation, and cannot be re-opened."

[50] *Mahadeo Chimnaji Apte*, for the appellant.—We seek to recover the unpaid purchase-money from the land itself. Unpaid purchase-money being a charge upon the property, the claim to recover it is governed by art. 132, sch. II of the Limitation Act (XV of 1877) and not by art. 111 of the same schedule, which would have applied if we had sought to make the respondents personally liable.

We do not rely upon the bonds for the recovery of the money. It is the charge upon the property that we seek to enforce.

There was no appearance for the respondents.

JUDGMENT.

SARGENT, C. J.—The vendor was under no necessity, as the District Judge would appear to think, to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money. It is a well-established rule of an English Court of Equity, and which is equally applicable to the circumstances of this country, that the unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it would, therefore, fall under art. 132 of the Limitation Act (XV of 1877).

The present suit, which the Subordinate Judge has found was within twelve years of the defendants going into possession, is, therefore, in time, and the decree must be reversed, and the case sent back for disposal having regard to the above remarks. Costs to follow the result.

Decree reversed.

18 B. 51.

[51] APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

CHINTO (*Original Plaintiff*), *Appellant v. JANKI AND OTHERS*
(*Original Defendants*), *Respondents*.* [23rd December, 1892.]

Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when good also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II, art. 144.

Land was mortgaged with possession to A, the father-in-law of defendant No. 1, in 1828. In 1856 A was ousted from possession by B, a trespasser (defendant No. 2), who subsequently held the land and dealt with it as his own for forty years. The mortgagor sued both A and B for redemption. In appeal, it was contended by B that his possession had been adverse not merely to A (the mortgagee), but also to the plaintiff (the mortgagor), and that the suit was barred by limitation. The plaintiff contended that B's possession was not adverse to him, because he as mortgagor had no right to possession during the term of the mortgage.

Held, that the suit fell under art. 144 of sch. 2 of the Limitation Act (XV of 1877), and that it lay upon B to prove that his possession for twelve years prior to the suit was adverse to the plaintiff (the mortgagor). There may be a possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. In such a case a suit by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee

* Second Appeal No. 215 of 1891.