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fact are erroneous, and exercises his discretion in setting aside the decree on that ground, we think it would be most inconvenient if this Court were to allow itself, in the exercise of its extraordinary jurisdiction, to interfere with that discretion, except under most exceptional circumstances. We must, therefore, reject the application.

*Application rejected.*

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APPELLATE CIVIL.

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

BAPU BIN MAHADAJI (*Original Defendant*), Appellant v.  
MAHADAJI VASUDEO (*Original Plaintiff*), Respondent.\*  
[21st June, 1893.]

*Landlord and tenant—Right of possession claimed by tenant against landlord—Mortgage by landlord—Possessory suit in the Mamlatdar's Court by the tenant against the mortgagor—Decree in favour of the tenant—Assignment of mortgage by mortgagee—Purchase of the equity of redemption by the assignee—Merger—Suit brought by the assignee to recover possession—Assignee bound by Mamlatdar's order against mortgagor—S. 15† of the Mamlatdar's Act (Bombay Act V of 1864)—S. 18‡ of the Mamlatdar's Act (Bombay Act III of 1876)—Art. 46, sch. II of the Limitation Act (IX of 1871).*

One Ramji Chikne, who was the owner of the land in dispute, mortgaged it to Baji in July, 1870. In October, 1876, Bapu, a tenant of the land, obtained an injunction against Ramji restraining him from interfering with his (Bapu's) possession, in a possessory suit which was filed in the Mamlatdar's Court in May, 1876. In July, 1877, Baji obtained a decree on his mortgage, and in execution he got possession of the property from Ramji (the mortgagor) in June, 1879. The plaintiff, who was the assignee of both Baji and Ramji (mortgagee and mortgagor), sued Bapu in ejectment in September, 1888. Both the lower Courts allowed the claim. On second appeal by Bapu, the plaintiff (*inter alia*) contended that [349] having taken an assignment of the mortgage from the mortgagee, he was not bound by the proceedings in the Mamlatdar's Court in 1876 against the mortgagor. But

*Held*, that when the plaintiff, having previously taken an assignment of Baji's mortgage, purchased the equity of redemption from Ramji, the mortgage was extinguished, there being no circumstance from which an intention could be presumed to keep it alive. The plaintiff could not stand in a better position than Ramji, and was bound by the proceedings in the Mamlatdar's Court,

\* Second Appeal No. 972 of 1891.

† Section 15 of the Mamlatdar's Act (Bombay Act V of 1864) :—

The party to whom the Mamlatdar shall give immediate possession, or whose existing possession he shall maintain, shall continue in possession until ejected by a decree of a Civil Court.

‡ Section 18 of the Mamlatdar's Act (Bombay Act III of 1876) :—

The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court.

Provided that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed, from recovering by a suit in the Civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use :

Provided further that in any subsequent suit or other proceeding in the ordinary Civil Court between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

notwithstanding that he had taken an assignment of Baji's mortgage. In those proceedings the defendant had claimed a right of permanent possession as against the Chikne family, and the effect of the Mamlatdar's order was to continue him in possession until ejected by the decree of a Civil Court. It was, therefore, incumbent upon Ramji to bring a suit within three years from the Mamlatdar's order, as provided by art. 46, sch. II of the Limitation Act (IX of 1871), and that not having been done, the plaintiff, who derived his title from Ramji, could not recover possession from the defendant.

*Held*, further, that ever since the proceedings in the Mamlatdar's Court commencing with the defendant's suit in May, 1876, the possession of the defendant, whatever may have been its nature originally, was distinctly adverse to Ramji and also to plaintiff, who as assignee might have taken possession at any time under the mortgage, and the present suit not having been brought until September, 1888 was barred by the Limitation Act (XV of 1877).

[R., 28 B. 601 = 6 Bom. L.R. 612 (621).]

THIS was a second appeal from the decision of the First Class Subordinate Judge of Satara with Appellate Powers.

Suit to recover possession of land.

The land in dispute originally belonged to a family named Chikne. On the 4th July, 1870, Ramji Chikne mortgaged it to Baji Moresghar Patankar. In May, 1876, Bapu bin Mahadaji, the present defendant, brought a possessory suit in the Mamlatdar's Court for an injunction restraining Ramji Chikne from interfering with his enjoyment and possession. The Mamlatdar found that though the land belonged to the defendants in that suit, still its possession was with the plaintiff, and he granted the injunction prayed for on the 9th October, 1876.

[350] He made the following observations in his judgment:—

“Moreover, the plaintiff has stated in his application (plaint) that the aforesaid land is under his *mirasi vahivat*; and the receipt, which is given in evidence, is recorded as Ex. 7. It bears the signatures of Bahirji bin Janoji Chikne, and in the beginning the plaintiff's name is entered as ‘To Bapu Mahadaji Patne.’ In that receipt, items have been entered four times, from which it is clear that the land is not plaintiff's *mirasi* land, but that it belongs to Chikne, and is with the plaintiff for cultivation. The plaintiff, therefore, on being questioned regarding the same, states as follows:—‘The land has not been held by me from the inamdar. There is no *khata* (account) in my name in the Government books. The defendant's father having let (the land) to my father (for) cultivation, the *vahivat* (management) is with me and I have been paying the assessment to them. I have stated in the application (plaint) that the *vahivat* (management) has been mine for over twelve years.’ He makes a statement to this effect in his answer Ex. 6.

“Now the object of the defendants is to get the lands (into their possession), they having considered the same to be their own; but as the plaintiff thinking himself to have become the owner of the land according to law by reason of his being a tenant for many days would not give it up, they (the defendants) have caused obstruction and tried to recover possession of the land by getting their *vahivat* declared in a possessory suit. The case is simply this. However, it is indeed true that the original owners (of the land) must really be the defendants, and it is proved also by the admission of the plaintiff. It is clear from the receipt Ex. 7. (*i. e.*) from the receipt given to the plaintiff by Bahirji, the father of Krishna (Kusaji) Bahirji, the defendant No. 2, that the land belongs to the defendants as owners; but I did (do) not think it proper, on a consideration merely of

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their ownership, to say that the *vahivat* belonged to them. From the inquiry held, and from personal inspection of the land, and from the fact of labour, &c., having been bestowed thereon, the plaintiff's evidence seems to be true. (I) therefore (order that) the plaintiff should carry on the *vahivat* of the land and the trees mentioned in the [351] plaint, and that the defendants should not cause obstruction to the same. The land belongs to defendants as owners, and they should get their suit in respect of their ownership decided by a Civil Court."

On the 13th July, 1877, Baji Moreshvar obtained a decree on his mortgage empowering him to recover the mortgage-debt, or, on the failure of the mortgagor to pay the debt, to take possession of the property. In execution of this decree, Baji Moreshvar took possession of the land from Ramji Chikne on the 17th June, 1879.

In the year 1883, Mahadaji Vasudeo Karandikar, the present plaintiff, alleging himself to be the assignee of Baji Moreshvar's right as mortgagee and also of the equity of redemption of Ramji Chikne (the mortgagor), brought a suit to eject the present defendant on a specific act of trespass said to have been committed in the year 1882. The Court of first instance dismissed the suit on the ground (*inter alia*) that although the land once belonged to the Chiknes, they had lost their right by their omission to sue for possession within three years from the date of the Mamlatdar's above-mentioned order, and that the sale to the plaintiff of their equity of redemption having been made after their right was extinguished, had conferred no right on the plaintiff. On appeal the decree was confirmed.

In second appeal, the High Court doubted whether "the omission of Chikne to sue would have the precise effect which the lower Court has attributed to it; for when the defendant brought his suit in the Mamlatdar's Court, he sued merely as a tenant whose possession had been disturbed within the period of his tenancy, and it was as a tenant entitled to present possession that he obtained an injunction against Chikne." The High Court, however, did not decide the question, but confirmed the decree of the lower Court, and left it open to the plaintiff, if so advised, to seek his remedy against the defendant as his tenant. (See Printed Judgments for 1888, p. 6.)

The plaintiff accordingly in September, 1888, as assignee of the rights of the mortgagee Baji Moreshvar and of the equity of redemption of Ramji Chikne, brought the present suit against the [352] defendant to recover possession of the land and mesne profits, alleging that the defendant was merely a yearly tenant.

The defendant answered that the land did not belong to and was never in the possession and enjoyment of the Chiknes through whom the plaintiff claimed; that he (the defendant) did not hold it as yearly tenant from anybody; that it belonged to him and had been in his possession and enjoyment from the time of his ancestors; that on the 9th October, 1876, he had obtained against the Chiknes a decree in a possessory suit in respect of the land in dispute; that the alleged mortgage in favour of Baji Moreshvar was fictitious, and the decree obtained thereon was fraudulent; that the claim was time-barred, and that the suit was also barred by the decree in the suit of 1883, which the plaintiff had brought against him for possession of the land.

The Subordinate Judge found that the suit was not time-barred, nor was it barred either by the order of the Mamlatdar in the possessory suit of 1876, in which the defendant merely complained as a tenant whose possession had been disturbed, or by the decision in the suit of 1883,

and that the defendant having denied the Chiknes' title became liable to be ousted by the plaintiff, who derived his title through the Chiknes. He, therefore, allowed the claim.

On appeal by the defendant, the Court confirmed the decree, holding that the Chiknes' lease to the defendant was proved. The Court remarked: "Once a tenant always a tenant, and unless and until the relationship of tenancy is got rid of, defendant's possession cannot become adverse as against the landlords or their vendees, how long so ever his tenancy may continue and the tenancy dues have remained unpaid. Exhibit 23 contains a most distinct admission, on the defendant's part, that he accepted the lands in suit as the Chiknes' tenant and paid the rents to them as their tenant. His denial of tenure having for the first time occurred during the progress of original suit No. 37 of 1883, falls within the statutory period."

The defendant preferred a second appeal.

*Manekshah J. Taleyarkhan*, for the appellant (defendant):—We contend that the suit is time-barred on two grounds. First, the [353] Mamlatdar's decree in our favour was passed in the year 1876. The respondent's assignor, Ramji Chikne, who was one of the defendants in that suit, took no steps within the statutory period, that is, within three years, to cancel that decree, and the right to do so is now barred. In order that an aggrieved party should get relief, he must bring a suit within three years from the date of the Mamlatdar's decree; and if that be not done, the Mamlatdar's order concludes him and his assignee also. Secondly, we say that if we paid rent to the Chiknes at all, it must have been prior to 1876. There is nothing to show that we paid them rent afterwards. Non-payment of rent for more than twelve years, coupled with the fact that we have been asserting our right since the Mamlatdar's decision in 1876, supports our plea of adverse possession.

*Mahadeo Chimnaji Apte*, for the respondent (plaintiff):—The appellant was examined as a witness in the possessory suit, and he distinctly admitted that he was a tenant, and claimed to hold the land as *mirasdar* because he was in possession for a long time on payment of rent. The tenancy being thus admitted, his possession cannot be adverse either to the Chiknes or to the plaintiff as their assignee unless and until some overt act on his part denying our title is proved. We seek to recover possession in our twofold capacity: first, as the assignee of the mortgagee Baji Moreshtar, and, secondly, as the assignee of the mortgagor Ramji Chikne. Even supposing that our claim as the assignee of the mortgagor is barred under the Mamlatdar's Act (Bombay Act V of 1864), still our claim as the assignee of the mortgagee cannot be affected by the Mamlatdar's decree, which was subsequent to the mortgage. The decree was passed against the mortgagor, and, therefore, it cannot bind the mortgagee.

[SARGENT, C. J.—You are the assignee of both the mortgagor and mortgagee; therefore your right as mortgagee has become merged in that of the mortgagor, unless you show that there was an intention to keep the mortgage alive. See *Lomba Gomaji v. Vishvanath Amrit* (1).]

[354] We submit that there is nothing in the present case to show that there was no intention to keep alive the mortgage. The purchase of the equity of redemption by the mortgagee does not operate to extinguish the mortgage—*Vinayak Balvant v. Dhundiraj* (2). The doctrine of merger is a doctrine of English law, and is not applicable to India.

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The present Mamlatdar's Act (Bombay Act III of 1876) is not applicable to this case. The case is governed by Bombay Act V of 1864, which did not lay down any period of limitation. The Limitation Act then in force was Act IX of 1871, and the language of art. 46, sch. II, of that Act was different from that of art. 47 of the present Act (XV of 1877).

## JUDGMENT.

SARGENT, C. J.—It has been contended by Mr. Apte that the plaintiff having taken an assignment of Baji's mortgage was not bound by the proceedings in the Mamlatdar's Court, the effect of which is the important question in this case. It appears, however, that the plaintiff subsequently purchased the equity of redemption of the Chikne family, and there being no circumstance from which an intention can be presumed to keep the mortgage alive, it must be regarded as extinguished—*Lomba Gomaji v. Vishwanath Amrit* (1).

The plaintiff cannot, therefore, in our opinion, stand in a better position than the Chikne family, and it, therefore, becomes necessary to consider what was the effect of the proceedings in the Mamlatdar's Court. The Mamlatdar's judgment shows that the defendant, whilst admitting that the land in question had been let by the plaintiff's father to his father, claimed by long possession, whatever the exact nature of his title may be, to have acquired at any rate a right of permanent possession of which the Chikne family could not deprive him; and the effect of the Mamlatdar's order was to maintain the defendant in possession (directing the Chikne family not to obstruct his possession) within the meaning of s. 15 of the Mamlatdar's Act V of 1864, and so to continue him in possession until ejected by a decree of the Civil Court. Such, we think, was the effect of that section having regard to the several sections of the Act, although [355] it is made clearer by the language of s. 18 of the Act of 1876. It was, therefore, incumbent on the Chikne family, who claimed to treat him as a tenant-at-will, to bring a civil suit within three years as provided by cl. 46 of the Limitation Act of 1871, and that not having been done, the plaintiff, who derives his title as owner from that family, cannot now recover possession from the defendant, whatever may be the precise nature of defendant's title to the possession.

But we think that the defendant must also succeed under the Act of Limitations. Ever since the proceedings in the Mamlatdar's Court commencing with the defendant's suit in May, 1876, the possession of the defendant, whatever may have been its nature originally, is shown, from what has been above stated, to have been distinctly adverse to the present claim as against the Chikne family, and also as against the mortgagee who might have taken possession at any time under the mortgage. As the present suit to obtain possession was not instituted till September, 1888, it is barred by the Statute.

On both these grounds, therefore, we think that the decree of the Court below must be reversed, and the plaintiff's claim be dismissed, with costs throughout on the plaintiff.

*Decree reversed—Claim dismissed.*