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of fraud was that plaintiff had lost the title-deed (*sanad*), and so allowed the document to go into the possession of the mortgagor. This, on the very authority relied on by Mr. Kalabhai, *Northern Counties of England Fire Insurance Company v. Whipp* (1), would not postpone the plaintiff's prior title.

The Madras authorities quoted by the Subordinate Judge are clearly not applicable in this Presidency. In *Shan Maun Mull v. Madras Building Company* (2), where the authorities are all reviewed, the judgment of the Court proceeds (p. 277) on the assumption that the subsequent mortgagee had no notice of the prior mortgage, and then it is shown that in Madras Presidency it has not yet been held that registration is notice, while in Bombay the contrary is the rule. The Full Bench decision of this Court given so long ago as 1880 in *Lakshmandas v. Dasrat* (3) must of course govern the present case, and thus there is no reason for questioning the District Judge's decision. The present appeal should be dismissed.

Appeal dismissed.

18 B. 449.

[449] APPELLATE CIVIL.

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

NATHEKHA VALAD BHEKHANKHA (*Applicant*) v. ABDUL ALLI,
*Opponent.** [19th August, 1893.]

Mamlatdars' Act Bombay Act (III of 1876), s. 15, cl. (a) sub-cl. (1) and sub-cl. (2)† ; s. 18‡—Possessory suit—Execution of decree—Actual possession—Execution of decree against a third party—Want of jurisdiction—Exercise of the extraordinary jurisdiction discretionary.

A third party cannot be ousted from possession of property in the execution of a decree for possession made by a Mamlatdar against a defendant under Bombay

* Application No. 175 of 1892 under extraordinary jurisdiction.

† Mamlatdars' Act, s. 15, cl. (a), sub-cl. (1), sub-cl. (2)—

15. On the day appointed, the Mamlatdar shall proceed to hear all the evidence that is then and there before him and try the following issues, viz. :—

(a) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use :—

(1) Whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed.

(2) Whether the defendant is in possession at the time of the suit and if so whether he obtained possession otherwise than by due course of law.

‡ Mamlatdar's Act, s. 18—

18. 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 Courts 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.

(1) L. R. 26 Ch. D. p. 482 ; see especially p. 494.

(2) 15 M. 268.

(3) 6 B. 168.

Act III of 1876, and it is beyond the power of Government by Resolution to give a Mamlatdar authority to oust a third party.

A. obtained an order in a Mamlatdar's Court against G. for possession of a house, and in execution N., who was found in possession of the house and who was reported by the village officers as holding possession for G., was evicted by order of the Mamlatdar. N. then applied to the High Court.

Held, that the Mamlatdar's order was, strictly speaking, beyond his authority, but that as N.'s petition to the High Court contained no distinct denial that he was [450] occupying merely on behalf of the defendant, the High Court would not interfere in its extraordinary jurisdiction.

[F., 21 B. 775 ; R., 23 B. 761 (768) ; D., 26 M. 176 (178) = 12 M. L. J. 264.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of the Mamlatdar of Bhusaval.

One Abdul Alli filed a possessory suit on a rent-note against Gulab in the Mamlatdar's Court and obtained a decree. When the patil and kulkarni of the village proceeded to execute the decree they found that the land was in the possession of one Nathekha (the opponent), who was not a party to the suit. They made a report to the Mamlatdar that Nathekha was in possession on behalf of the defendant Gulab. The Mamlatdar, thereupon, passed an order that Nathekha should forthwith give up possession. His order was as follows :—

"But even if Nathekha be living there, the plaintiff must get possession according to the order made (for the same). You should, therefore, take steps to make over possession of the same as soon as you receive the order. If Nathekha does not vacate the house, and make over the same by persuasion, he should be forced to vacate the same."

The Mamlatdar's order was apparently based on a Government Resolution No. 1673, dated the 11th March, 1882, from which the following is an extract :—

"The decision of the Mamlatdar is good, not only against the defendant, but the whole world ; and as the village officers are bound, under s. 17 of Bombay Act III of 1876, to give effect to the Mamlatdar's decision by putting the plaintiff in possession, any resistance or obstruction on the part of any person will render such person liable to punishment under the Indian Penal Code."

Nathekha being evicted in pursuance of the order of the Mamlatdar, he applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon the plaintiff Abdul Alli to show cause why the Mamlatdar's order for possession should not be set aside, contending that the Mamlatdar's decree could not be executed against him, as he was not a party to it, and that the Mamlatdar had no jurisdiction to pass the order.

[451] *Balkrishna N. Bhajekar* appeared to show cause for the opponent (Abdul Alli) :—The ruling in *Kasam Saheb v. Maruti* (1) is a conclusive authority in our favour. The applicant's remedy is a suit in a civil Court and not an application under the extraordinary jurisdiction—*Govinda Babaji v. Naiku Joti* (2). If the applicant is right, a judgment-debtor can always upset a Mamlatdar's decree by alleging that some other person is in possession. The Mamlatdar's order does not debar the applicant from bringing a regular suit.

Govardhanram M. Tripathi, contra, for the petitioner (Nathekha).

(1) 13 B. 552.

(2) 10 B. 78.

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JUDGMENT.

SARGENT, C. J.—In this case the Mamlatdar passed a decree in favour of the opponent directing possession to be given to him by one Gulab. The patil kulkarni having reported that in proceeding to execute the decree he found that the applicant Nathekba had been occupying the place on behalf of the defendant Gulab, the Mamlatdar ordered that if the applicant "did not vacate the place and make over the place by persuasion, he should be forced to vacate the same." The applicant complains of this order as being beyond the jurisdiction of the Mamlatdar.

The Division Court in *Kasam Saheb v. Maruti* (1) remarks that "The Mamlatdars' Act does not seem to contemplate the case of a third party being ousted in the execution of an order for possession, for such order is only made on finding that the defendant himself is in possession." We agree in this view of the Act. It is to be remarked that the language in cl. (a), (sub-cl. 1) of s. 15 of the Act with respect to the "plaintiff's possession" differs materially from that used in sub-cl. (2) with regard to "defendant's possession," which standing alone, without any additional words to enlarge its meaning, must be understood as "actual" possession. Moreover, s. 18 shows that the only person who is contemplated as being affected by the Mamlatdar's giving possession to the plaintiff is the person against whom the decree is passed. This view of the Act may lead to a practical difficulty in the working of [452] it which it would be perhaps advisable to remove by legislation, but which is quite beyond the power of a Government Resolution to remedy, as was apparently attempted to be done by Resolution No. 1673 of 11th March, 1882. We think, therefore, that the Mamlatdar's order was, strictly speaking, beyond his authority, as the exercise of our extraordinary jurisdiction is one of discretion, and as the applicant's petition contains no distinct denial that he was occupying merely on behalf of Gulab, we must refuse to interfere in the matter. The applicant is not without his remedy by suit. See *Kasam Saheb v. Maruti* (1).

Rule discharged with costs.

18 B. 452.

APPELLATE CIVIL.

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

YELLAWA AND OTHERS (*Original Defendants*), *Appellants v.*
BHIMANGAVDA (*Original Plaintiff*), *Respondent.**

[21st August, 1893.]

Hindu law—Widow—Maintenance—Suit by heir to recover family property from widow—Provision for widow.

The Court will not allow the heir to recover family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her.

Jamnabai v. Raychand (2) followed.

[R., 29 A.W.N. (1900) 135 (136); 11 C.P.L.R. 43 (44).]

* Second Appeal No. 142 of 1892.

(1) 13 B. 552.

(2) P. J. (1883), p. 48.