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[721] Under these circumstances I must refuse the defendant leave to appear and urge this claim; but in so doing I do not deprive him of all opportunity of obtaining redress for the wrongs which he alleges he has suffered, for he is still at liberty, if so advised, to file a suit against the plaintiff for abuse of the process of the Court.

Attorneys for plaintiffs:—Messrs. *Roughton and Byrne.*
Attorneys for defendants:—Messrs. *Framji and Moos.*

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APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

SHRI DHUNDIRAJ GANESH DEV AND OTHERS (*Original Plaintiffs*), *Appellants v.* GANESH (*Original Defendant*), *Respondent.**
[13th November, 1893.]

Compromise—Set-off—Equitable defence—Suit by trustees to eject a trespasser from trust property—Civil Procedure Code (Act XIV of 1882), s. 539.

Dharnidhar was the manager of a religious endowment called the Chinchvad *Sansthan*. On his death in 1852, disputes arose betwen Chinto and Ganesh regarding the management of the *sansthan*, each claiming to be the heir and successor of Dharnidhar. After a long litigation they entered into a compromise in 1881, by which a portion of the *sansthan* property, consisting of certain *inam* villages, lands, and *varshasans*, were assigned to Ganesh, and Chinto was left in charge of the rest of the *sansthan* property, together with all the rights, privileges, and *manpans* enjoyed by the hereditary trustee of the endowment. In 1886 by a decree made in a suit called the "Charity suit," Chinto was removed from his office, and the plaintiffs were appointed trustees in his place. In 1889 the plaintiffs filed the present suit to set aside the compromise of 1881, and recover back the *sansthan* property assigned to Ganesh under that compromise. Ganesh pleaded, by way of set-off or equitable defence, that if the plaintiffs were at liberty to set aside the compromise, they were bound to restore to him in lieu of the trust property assigned to him under the compromise certain private property belonging to his adoptive father which he had given up.

Held, that Ganesh could not claim—as a set-off or as an equitable defence—to recover from the plaintiffs the private property in question, there being nothing in the compromise to show that there was any exchange of private property for trust property.

Held, also, that the suit did not fall under s. 539 of the Code of Civil Procedure (Act XIV of 1882).

[R., 20 B. 250 (253); 24 B. 170 (181)=1 Bom. L.R. 649; 33 C. 789 (804)=10 C.W.N. 581; 2 C.L.J. 431 (439).]

[722] APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 417 of 1889.

This suit was filed by the trustees of a religious and charitable endowment, called the Chinchvad *Sansthan*, to recover certain property belonging to the *sansthan*.

The circumstances out of which it arose were as follows:—

In 1852 Shri Dharnidhar Dev, the manager of the Chinchvad *Sansthan*, died, leaving behind him three widows, Bayabai, Laxmibai, and Bahinabai.

On his death disputes arose regarding the management of the *sansthan*. There were two claimants to the management: (1) Ganesh, the defendant,

* Appeal, No. 88 of 1891.

who alleged himself to be the adopted son of the deceased, and (2) Bajaji Govind, who disputed the alleged adoption, and claimed to succeed as the senior male representative of the eldest branch of the deceased's family.

In 1863 Bajaji filed a suit against Laxmibai, one of the widows of the deceased Shri Dharnidhar Dev, to recover possession of the *sansthan* property. Pending the suit Bajaji died, and the suit was continued by his son Chinto, who on July, 1874, obtained a decree in his favour. In execution of this decree Chinto took possession of nearly all the property belonging to the *sansthan*.

Meanwhile in 1871, and during the pendency of the litigation between Chinto and Laxmibai, Ganesh (the present defendant) filed a suit against Chinto (No. 957 of 1871) to establish his status as the adopted son of Shri Dharnidhar Dev. This suit was decided in 1874 by the First Class Subordinate Judge of Poona in favour of Ganesh. Chinto appealed against this decision, and thereupon on the 20th July, 1874, Ganesh withdrew his suit under s. 97 of the Civil Procedure Code (Act VIII of 1859).

In 1879, Ganesh filed a suit in *forma pauperis* against Chinto to recover possession of the *sansthan* property. His application for leave to sue as a pauper having been rejected by the Court of first instance, he appealed to the High Court.

In 1881, while this appeal was pending, both Ganesh and Chinto entered into a compromise under which certain *sansthan* [723] properties were to be made over to Ganesh, and in return Ganesh was to abandon all claim whatever in respect of the Chinchvad *Sansthan*. In pursuance of this compromise, Chinto assigned the specified properties to Ganesh.

In 1883 a suit was brought with the sanction of the Advocate-General, under s. 539 of the Code of Civil Procedure (Act XIV of 1882), for the removal of Chinto from the management of the *sansthan* on account of his misconduct as a trustee. In this suit the High Court ultimately passed a decree (1) ordering his removal from the office, and appointing a receiver to take charge of the property belonging to the *sansthan*.

In 1889 the receiver filed the present suit against Ganesh to recover possession of certain *sansthan* property, particularly the property which had been assigned to him by Chinto under the compromise of 1881. This suit was continued by the trustees of the *sansthan* who were appointed by the Court in 1890.

The defendant Ganesh pleaded (*inter alia*) that he was the adopted son of Shri Dharnidhar Dev and as such had a right to manage the property in dispute in accordance with the past practice of the *sansthan*. He further pleaded, by way of set-off or equitable defence, that the plaintiffs were not entitled to recover the trust property unless and until they restored to him the private property which had belonged to his deceased adoptive father.

The First Class Subordinate Judge held that the defendant was entitled to the set-off claimed. He was of opinion that the plaintiffs had improperly disputed the defendant's adoption and his right to the *privat* property of Dharnidhar Dev. He ordered that the plaintiffs should recover from the defendant certain specified properties on condition that they relinquished certain other property to him.

The decree was as follows:—

"I, therefore, award the plaintiffs' claim for Khar Narangi and Chinchavli, the *fad* at Narangi and the Alibag treasury allowance and a

(1) 15 B. 612.

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portion of Charholi, *on condition* that they (plaintiffs) do relinquish the *sansthan's* claim to Rs. 582-12-0 out of Banere and 2 chahurs and 9 bighas of land as described in the second *farkhat*, and to one-half of the self-acquisitions of Dharnidhar Dev, which consist of the villages [724] of Tandli, Gozegaon, Dewas, Baroda allowance, Chandrapur, Dasak, and the Nizam's grant, and on the further condition that they do deliver possession of so much of the said properties as might be in their hands or might hereafter fall into their hands. . . . . The plaintiffs have wrongly disputed the defendant's adoption and his right to the private property of Dharnidhar Dev. The defendant in his turn has wrongly contended that the *sansthan* is not a public charitable institution. I, therefore, order that parties do bear their own costs."

From this decision the plaintiffs preferred an appeal to the High Court.

Ganpat Sadashiv Rao, for appellants (plaintiffs).—The lower Court was wrong in passing a conditional decree. The defendant is not entitled to claim in this suit the private property belonging to his alleged adoptive father. His cross claim is in the nature of a set-off. The Court had no jurisdiction to entertain it. Under s. 111 of the Code of Civil Procedure (XIV of 1882) a set-off is allowed in those cases only in which there are cross claims for money. This is not a case of that kind. If it does not fall under s. 111 there is no other provision in the Code allowing a set-off of the kind claimed by the defendant.

[FULTON, J.—What is the effect of s. 216 of the Code of Civil Procedure? Its provisions apply whether a set-off is admissible under s. 111 or *otherwise*.]

I admit that s. 111 is not exhaustive. It does not take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. But even then, in the case of a set-off not falling within s. 111 of the Code, the cross claims must both be for money. Section 216 is clear on the point. It shows that where a set-off is allowed, the decree shall state what *amount* is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any *sum* that may appear to be due to either party. It is, therefore, perfectly clear that a set-off is admissible only when both the original claim and the counter-claim are for money and for money only. Here the claim is not for money. It may be urged that the defendant has what may be called an equitable right of set-off. But before an equitable set-off can be allowed, it must be shown that the claim of the plaintiff as well as that of the defendant arises out of one and the same transaction [725] or are so connected together as to make it inequitable that one party should succeed and the other be driven to a separate suit. This is the principle laid down by a series of decisions of all the Courts in India—*Kishorchand* v. *Madhowji* (1); *Bhagbat* v. *Bamdeb* (2); *G. Chisholm* v. *Gopal Chunder* (3); *Pragji Lal* v. *Maxwell* (4); *Niaz Gul Khan* v. *Durga Prasad* (5); *Brojendra Nath Das* v. *The Budge-Budge Jute Mill Company* (6); *Stephen Clark* v. *Ruthnavaloo* (7). Here there is no connection whatever between the plaintiffs' claim to the trust property in dispute and the defendant's claim to his private property. The defendant's counter

(1) 4 B. 407. (2) 11 C. 557. (3) 16 C. 716. (4) 7 A. 284.
(5) 15 A. 9. (6) 20 C. 527. (7) 2 M. H. C. R. 296.

claim is, therefore, unsustainable in the present suit. He should be referred to a separate suit. The conditional decree passed by the lower Court is, therefore, bad.

Macpherson (with him *Mahadev Bhaskar Choubal*), for the respondent (defendant).—Our claim is not in the nature of a set-off. It is a claim to an equitable restitution of property. We say, he who seeks equity must do equity. If the present trustees of the *sansthan* are at liberty to repudiate the compromise between Chinto and Ganesh, and treat it as a nullity, the parties must be restored to the *status quo ante*. The trustees cannot recover the trust property without restoring to the defendant his private property and all the rights that he gave up at the time of the compromise. Under s. 64 of the Indian Contract Act (IX of 1872) a party to a voidable contract may rescind it; but he is bound to restore any benefit that he may have received thereunder to the person from whom it was received. So, too, under the Transfer of Property Act (IV of 1882) a transferor under a voidable contract of sale is bound to restore the purchase-money on the rescision of the contract. See also Story's Equity Jurisprudence, s. 709. The defendant gave up considerable private property at the compromise; he is, in equity, entitled to get it back if the compromise is set aside. The compromise was in the nature of a family arrangement between two rival claimants to the management of the Chinchvad [726] *sansthan*. Both were engaged in litigation for a long series of years. That litigation was ultimately brought to an end by this compromise. It was, therefore, valid and binding on both. The compromise of a doubtful claim, if made *bona fide*, will be upheld even though the claim may not be well founded—*Trigge* v. *Lavallee* (1); *Miles* v. *New Zealand Alford Estate Co.* (2) Chinto could not have repudiated this compromise without restoring all the benefits he received under it. His successors in the trust have no better right than he had. We say, therefore, that the condition attached to the award of the plaintiffs' claim is perfectly just and equitable. We say further that the plaintiffs cannot sue to recover the trust property without the sanction of the Advocate-General, as provided under s. 539 of the Code of Civil Procedure. The suit should, therefore, be dismissed.

Ganpat Sadashiv Rao in reply.—The compromise between Chinto and Ganesh does not show that there was an exchange of *sansthan* property for private property belonging to Ganesh's family. The compromise relates solely and entirely to *sansthan* property. It purports to divide the *sansthan* property between the two claimants. But it makes no mention whatever of any private property belonging to Ganesh. What he gave up was his righs to the bulk of the *sansthan* property, and to all the rights and *manpans* of the chief ministrant at the shrine of Shri Mangal Murti. There was no dispute, at the time of the compromise, about the private property of Ganesh. That being so, there can be no restitution of private property. If Ganesh has any claim to it, he must be referred to a separate suit. But he cannot claim it in this suit by way of set-off. Then, as to the applicability of s. 539 of the Code of Civil Procedure, I submit that this case does not fall within its provisions. This is not a suit to remove a defaulting trustee from the management of a public charity. It is a suit brought by the trustees of a charity to recover trust property from the possession of a trespasser. In such a case the consent of the Advocate-General is not necessary—*Vishvanath Govind* v. *Rambhat* (3).

(1) 15 Moore's P. C. C. 270 (292). (2) 32 Ch. D. 266. (3) 15 B. 148.

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JUDGMENT.

[727] CANDY, J.—This suit was commenced in December, 1889, by the manager and receiver of the Chinchvad Devasthan appointed under the decree of the District Judge, Poona, in suit No. 2 of 1883 (known commonly as the Charity suit), and was continued by the trustees of the said *devasthan* appointed under the scheme drawn up by the High Court on 19th February, 1890, in appeal from and confirming the said decision of the District Judge (I. L. R., 15 Bom., 612). By cls. 18 and 19 of the said scheme the trustees are to institute suits and other proceedings and to continue and carry on such as have already been initiated by the present receiver on behalf of the *devasthan* for the purpose of recovering possession of the properties belonging to the *devasthan*, which have improperly gone into the possession and enjoyment of strangers, and the revenues of which are not applied for the purposes of the *devasthan*.

The circumstances under which the present suit was commenced are as follows:—Chinto Bajaji was the manager of the *devasthan*, and had succeeded in obtaining possession of nearly all the property appertaining thereto. One Genesh or Ganpat was a rival claimant to the *gadi*. He asserted that he had been adopted by a late manager, Dharnidhar, on his death-bed. This alleged adoption was, however, disputed. Suit No. 957 of 1871 had been filed by Ganesh against Chinto (and Venubai, widow of a son of Dharnidhar who had predeceased his father) for a declaration of his title as adopted son of Dharnidhar. On 3rd January, 1874, the Subordinate Judge decreed in his favour; but on Chinto appealing to the District Court, Ganesh on 20th July, 1874, withdrew his suit under s. 97 of Act VIII of 1859 without obtaining leave to bring a fresh suit. On 6th November, 1874, Ganesh applied to the District Court for permission to withdraw his previous withdrawal; but this was refused (28th November, 1874); and the High Court on 7th December, 1874, refused to interfere with this order.

In the meanwhile, Ganesh had brought a suit (No. 16 of 1873) in the Court of the Agent for Sardars against Laxmibai, widow of his alleged adoptive father, and on 10th January, 1874, he obtained a consent decree awarding him possession of the *devasthan* [728] property. On 31st July, 1874, Chinto also obtained a decree in the Court of the Agent for Sardars (No. 12 of 1873) against Laxmibai, awarding him possession of the *devasthan* property, and Chinto at once in August, 1874, executed that decree. So when Ganesh attemped execution of his decree, No. 16 of 1873, he was obstructed by Chinto. In June, 1878, Ganesh applied to the District Court for permission to bring a suit, in *forma pauperis*, against Chinto, on the ground that Chinto obstructed him in executing his decree, No. 16 of 1873. But he withdrew that application on Government reversing the decree of the Agent of Sardars (No. 12 of 1873). Subsequently, on Government restoring the decree of the Agent, Ganesh renewed his application (May, 1879), which was rejected by the District Court on 13th February, 1880.

Ganesh then appealed to the High Court, but subsequently withdrew his appeal, Chinto and he having made an amicable settlement dated 23rd July, 1881. This document No. 157 (73 in the Charity suit), after reciting the disputes between the parties, goes on to state that the following property "belonging to the *sansthan*" should be given to Ganesh:—

1. The whole of the village of Khar Naranji and half the village of Chinchavli. 2. The wada at Khar Narangi. 3. The nawa wada at

Chinchvad. 4. In order to pay off a mortgage on Khar Narangi and Chinchavli, Chinto was to pay Rs. 16,000 to Ganesh, and for that purpose was to pay him Rs. 500 annually, with interest, from the revenues of the village of Charholi. 5. Ganesh was to perform the worship of the deity of the temple of Moroya at Chinchvad; but all other rights of worship and *manpan* at Chinchvad, Moreshvar and Theur were to belong to Chinto. 6. Ganesh was within three months to give up peaceable possession to Chinto of the five shares in Tulapur belonging to the *sansthan*, which Ganesh had got entered in his name, and till this was done Ganesh was to pay Rs. 160 annually to Chinto, the same being deducted from the payments out of the revenues of Charholi above mentioned. 7. The *dasak* allowance, Rs. 20, received annually from the Haveli kacheri, was to be entered in Chinto's name, and received by him. 8. Ganesh on recovering **[729]** the village of Tandli, for which he had filed a suit, was to give the same into the possession of Chinto.

Except as regards the properties above mentioned, Ganesh was to abandon all claim whatever in respect of the Chinchvad *sansthan*.

Chinto thus remained manager unmolested; but in 1883 the "Charity suit" was commenced under s. 539 of the Civil Procedure Code, and Chinto was eventually removed from his office.

The receiver of the *sansthan* then brought the present suit against Ganesh to recover the following properties as belonging to the *sansthan*, and, therefore, wrongfully in possession of any one other than the manager, *viz.*:—

1. The villages of Khar Narangi, and, 2, Chinchavli; 3, the wada at Khar Narangi; 4, an allowance paid from the Alibag treasury; 5, the portion of the revenues of Charholi, as shown in the settlement above noted; 6, the new wada at Chinchvad; 7, the five shares of Tulapur; 8, the wadi (garden or irrigated land) at Naigaum.

The Subordinate Judge awarded the claims numbered 1 to 5, and as defendant made no appeal and paid no stamps on cross-objections, it was impossible for us to hear any arguments of counsel against the award of item No. 5. He did not dispute the award of items Nos. 1 to 4.

It remains then to consider the items 6, 7 and 8 which the Subordinate Judge did not award to plaintiffs, and against the rejection of which items plaintiffs have filed this appeal, No. 88 of 1891. During the course of the argument, Mr. Rav for plaintiffs abandoned the claim as regards the item No. 8. Therefore the only items remaining for consideration are Nos. 6 and 7. The Subordinate Judge would have awarded these to the plaintiffs, had he considered them to be *sansthan* property; but he held that they were the private property of the late manager, Dharnidhar, and, therefore, the trustees could not claim to recover possession of the same. No doubt, if they are not *sansthan* property, the trustees have no concern with them: **[730]** but we think that it is clear that one at least of these items has for many years been treated as *sansthan* property.

[The Court then examined the evidence and found that property No. 6 above mentioned was not private property, but belonged to the *devasthan*, and that the plaintiffs (trustees) should recover it. As to No. 7, the Court found that it was private property and that the plaintiffs were not entitled to it. The Court then continued:—]

So far we have treated of the items disallowed by the Subordinate Judge. Leaving aside for the present the question of mesne profits,

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which the plaintiffs also claimed, but which the Subordinate Judge disallowed, and against the rejection of which plaintiffs have appealed, we come now to the condition attached by the Subordinate Judge to his award of the various items of *devasthan* property to the plaintiffs. That condition is that the plaintiffs do relinquish the *sansthan's* claim to the *private* property of Dharnidhar II, *viz*:—(*a*) Half share of the village of Banere ; (*b*) two chahurs, nine bighas of land as described in Ex. 288 [it was admitted in argument that this should be half a chahur nine bighas] ; (*c*) half the self-acquisitions of Dharnidhar II, *viz*. :—(1) The village of Tandli ; (2) the Gozegaon allowance ; (3) the Dewas allowance ; (4) the Baroda allowance ; (5) the Chandrapur allowance ; (6) the Dassak allowance; (7) the Nizam's grant.

[The Court then stated the evidence and held as to items (*c*), (1) to (7) inclusive that they belonged to the *devasthan*. As to items (*a*) and (*b*), there was a difficulty arising from the fact that the manager of the *devasthan* had never made any distinction between the portion which he enjoyed as private property and those managed by him for the *devasthan*. The Court then continued :—

But it is unnecessary to consider this difficulty further. For, we are of opinion that plaintiffs have rightly appealed against the condition attached by the Subordinate Judge to his award. It is not such an equitable defence as can be raised by the defendant in the present suit. This is apparent when we consider the position of the parties. Chinto was the manager of the [731] *sansthan* ; he had succeeded in obtaining recognition from Government and possession of all or nearly all the *sansthan* property. Ganesh was a rival claimant, who had indeed obtained a decree against Chinto establishing his position as adopted son of Dharnidhar, but who on appeal made by Chinto was persuaded to entirely withdraw his claim. Under the compromise or settlement of July, 1881, Ganesh relinquished all claim to be manager of the *sansthan* in favour of Chinto, and was content to take in satisfaction of all claims certain items of "*sansthan* property." For the sake of argument it may be assumed that Chinto, were he still the manager of the *sansthan*, would be unable to repudiate the compromise, and would be bound to act up to its terms. Possibly the compromise would raise an equity between Chinto and Ganesh. But here the plaintiffs are the trustees appointed by the Court after ordering the removal of Chinto, the defaulting trustee. Chinto must be regarded as dead. His successors in the trust claim to recover part of the trust property. Chinto's act in buying of a rival claimant cannot be regarded as a proper and reasonable exercise of his office as trustee. His proceeding was not for the benefit of the trust. On the contrary, if Ganesh was really Dharnidhar's adopted son, Chinto had no authority to act ; and if Ganesh was not Dharnidhar's adopted son, then Chinto had no right to alienate trust property to him. We adopt with full concurrence the language of the late Mr. Justice Telang, who, when referring to this compromise wrote (I. L. R., 15 Bom., 637) :—"When Chintaman Bajaji parted with these two villages (Khar Narangi and Chinchavli) in favour of Ganesh Dharnidhar Dev, he was apparently acting as full owner of the villages, and not as trustee of them on behalf of the Chinchvad *sansthan*. He was certainly not professing to act as trustee, and at least impliedly he was repudiating the trust. Any estoppel, then, binding upon him in consequence of that act, would be binding, not on the succeeding trustee, who says Chintaman Bajaji was not full owner,

but on Chintaman Bajaji's legal representatives in his personal capacity." Accordingly the High Court upheld the objections of the trustee-respondents in that case, and refused to consider the settlement of 1881 as binding upon Chinto's successors in office. How, then, [732] can Ganesh in a suit for ejectment from trust properties plead that the trustees must relinquish all claim of the *sansthan* to the half share of Banere and the ½ chahur 9 bighas, and deliver the same into his (Ganesh's) possession?

It was contended by the learned counsel for Ganesh that this was not a counter-claim or set-off, but an equitable defence; and this apparently was the view taken by the Subordinate Judge, who seems to have regarded the settlement of 1881 as an exchange of properties, Ganesh giving up the *private* property of Dharnidhar, to which he was entitled as Dharnidhar's adopted son, and in exchange receiving part of the *sansthan* property. But we are of opinion that this view is directly contradicted by the language of the compromise, in which, the adoption not being admitted, there is not a word about the *private* estate of the late Dharnidhar, or about any exchange being effected. If Ganesh is really the legally adopted son of the late Dharnidhar, and if it is open to him now to establish that status, he must do so in a separate suit against the trustees. But he cannot raise this plea as an equitable defence in this suit, in which the trustees seek to eject him from the properties of which he obtained possession under the compromise with the late manager, the very basis of that compromise being that he abandoned his claim to be manager on the strength of his alleged adoption by Dharnidhar, Chinto's action was *ultra vires* in putting Ganesh in possession of *sansthan* property. Chinto's successors are bound to contest that action, and to recover for the benefit of the *sansthan* property belonging to the trust. If plaintiffs are entitled to eject defendant from *sansthan* property, then it is difficult to understand how defendant can claim, as a set-off or as an equitable defence, to recover possession from the plaintiffs of those portions of property which the plaintiffs hold as *sansthan* property, but which defendant says are Dharnidhar's private property, and to which defendant says he is entitled as Dharnidhar's son. For, as shown above, the trustees are not Chinto's representatives, but hold by an entirely independent title, Chinto having been removed from his office. For these reasons we are of opinion that the conditions attached by the Subordinate Judge to his award of the properties to the plaintiffs must be set aside.

[733] As to the further arguments urged by the learned counsel for defendant-respondent, that the *devasthan* properties are private and not public *devasthan*, and that the present suit should have been brought under s. 539, Civil Procedure Code, we are of opinion that the arguments are invalid. It is idle now, in the face of the decisions of this Court reported at I.L.R., 15 Bom., 612 and 625, to contend that the Chinchvad *sansthan* is not a *public devasthan*. It is true that Ganesh is not in one sense a "stranger," as he is apart from his alleged adoption a member of the Dev family, and by the compromise with Chinto he was permitted to perform the worship at Moroya's temple at Chinchvad; but as a person who is not manager, he is a stranger and trespasser in possession of *sansthan* properties. The trustees, therefore, are clearly entitled to eject him.

It only remains to consider the question of mesne profits. Though, as just remarked, defendant must be regarded as a trespasser, due regard must be paid to the fact that the compromise by which defendant obtained possession of the *sansthan* properties was sanctioned, if not

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brought about, by Mr. Kanitkar and Mr. Gadgil, the former being one of the present trustees, the latter being the gentleman who was subsequently the manager and receiver appointed by the District Court. There can be no doubt that at the time the arrangement was thought to be the best for all concerned. Under these circumstances we do not think it would be right to interfere with the Subordinate Judge's decision refusing to award mesne profits.

We amend the decree of the Subordinate Judge by awarding to the plaintiffs the new wada at Chinchvad, and by striking out the conditions attached by the Subordinate Judge to his award of the properties, possession of which he gave to plaintiffs.

Under the circumstances under which this litigation was commenced, we think that the most equitable order will be to let the plaintiffs recover their costs from the estate, and direct that defendant bear his own costs throughout.

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[734] APPELLATE CIVIL.

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

NAVALCHAND NEMCHAND (*Original Plaintiff*), *Applicant v.* AMICHAND TALAKCHAND AND ANOTHER (*Original Defendants*), *Opponents.** [14th November, 1893.]

Mamlatdar—Jurisdiction—Decree in possessory suit in Mamlatdar's Court—Execution of decree stayed by proceedings in Subordinate Judge's Court—Suit in Subordinate Judge's Court ultimately dismissed—Subsequent application to Mamlatdar for execution of decree in possessory suit—Jurisdiction of Mamlatdar to grant order for execution—Limitation—Deduction of time spent on proceedings in second suit—Limitation Act (XV of 1877), s. 14.

A Mamlatdar having in a possessory suit passed a decree awarding possession of certain land to the applicant, the opponents instituted a suit in the Court of the First Class Subordinate Judge for a declaration that the land in question was their property, and for an injunction to restrain the applicant from obstructing them in the enjoyment of their rights. Owing to this suit, the Subordinate Judge stayed execution of the Mamlatdar's decree. The opponents' suit was subsequently dismissed by the Subordinate Judge, whose decree was ultimately confirmed by the High Court in second appeal. The applicant then applied to the Mamlatdar for the execution of his decree in the possessory suit. The Mamlatdar rejected the application, on the ground that the decree of the High Court in the civil suit prevented him from executing his decree.

Held, that the applicant was entitled to obtain from the Mamlatdar an order for the execution of his decree unless it was barred by limitation. It was not barred, inasmuch as in computing the period of limitation allowance was to be made for the time during which the decree remained in abeyance by reason of the proceedings in the other suit. Section 14 of the Limitation Act (XV of 1877) applies to proceedings in execution (*Hira Lall* v. *Budri Dass*) (1).

[**Diss.**, 7 Ind. Cas. 886 (889); **F.**, 24 Ind. Cas. 195=27 M.L.J. 25.]

APPLICATION made under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, XIV of 1882) to set aside the order of the Mamlatdar of Chorasi in possessory suit No. 57 of 1884 dated 17th December, 1892.

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* Application No. 57 of 1893 under extraordinary jurisdiction.

(1) 7 I.A. 167.