

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900.
July 6.

PURUSHOTTAM DAYARAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 3 AND 4), APPELLANTS, *v.* CHATARGIR GURU ARJUNGIR (ORIGINAL PLAINTIFF), RESPONDENT.*

Mámlatdárs' Courts Act (Bom. Act III of 1876), Sec. 13⁽¹⁾—Limitation Act (XV of 1877), Sch. II, Art. 47—Possessory suit—Mámlatdár's Court.

In a possessory suit instituted in a Mámlatdár's Court neither the plaintiff nor the defendant appeared at the hearing. The case was, therefore, disposed of by the Mámlatdár under the first part of section 13 of the Mámlatdárs' Courts Act (Bombay Act III of 1876).

Held, that the order of the Mámlatdár was an order rejecting the plaint.

A regular suit for possession having been brought in a Civil Court more than three years after the above order of the Mámlatdár,

Held that the suit was time-barred under article 47, Schedule II of the Limitation Act (XV of 1877).

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Dhúlia with appellate powers, confirming the decree of Ráo Sáheb S. B. Upasani, Subordinate Judge of Bhusával.

The plaintiff brought this suit in the year 1897 to recover possession of certain lands, alleging that his *guru* (preceptor) had purchased them from one Ganu Hanmanta and had let them to one Devsing Bhivsan for cultivation, and that, after the expi-

* Second Appeal, No. 57 of 1900.

(1) Section 13 of the Mámlatdárs' Courts Act (Bom. Act III of 1876):—

13. If the plaintiff fails to attend with his proofs, or omits to adopt measures to procure the attendance of his witnesses on the day and at the place appointed, the Mámlatdár shall reject the plaint with costs.

If the defendant fails to attend, and the Mámlatdár is satisfied from the evidence before him that the notice has been duly served on the defendant, and in sufficient time to enable the defendant to appear and answer on the day fixed in the notice, he shall proceed to hear the plaint *ex parte*.

Provided that if either party satisfy the Mámlatdár at any time within 15 days from the date of the plaint being thus rejected, or of such *ex-parte* decision, that he was prevented by some unavoidable circumstance from being present, or from procuring the attendance of his witnesses, it shall be lawful for the Mámlatdár to re-hear the case, a notice in the form of Schedule B being issued, at the applicant's expense, to the opposite party.

ration of the term of the tenancy, Devsing, instead of vacating the lands in plaintiff's favour, allowed the defendants to take possession of them; that the defendants were thus in wrongful possession, and though they had been required to vacate the lands on the 1st June, 1897, they had refused to do so.

The defendant No. 1, Ganu Hanmanta, did not appear.

Defendant No. 2 pleaded that the lands in suit did not belong to the vendor of the plaintiff's *guru* and had never been in his or the plaintiff's possession, and that they really belonged to Purushottam and Ambaram Dayaram, from whom he held as their tenant.

Defendants Nos. 3 and 4 pleaded that the plaintiff had filed a possessory suit against Devsing Bhivsan in the Mámlatdár's Court; that the said suit having been dismissed by the Mámlatdár on the 16th May, 1893, the present suit, which was not filed within three years from the date of the Mámlatdár's order, was barred by limitation; that the lands in suit belonged to Devsing Bhivsan, from whom they had been purchased by the defendants on the 17th February, 1894, and that they (the defendants) had been in possession as owners since the purchase.

The Subordinate Judge found (*inter alia*) that the suit was not time-barred, not being governed by article 47, Schedule II of the Limitation Act, inasmuch as the possessory suit was struck off the file by the Mámlatdár owing to the absence of both the parties on the day of hearing, and that the lands in suit belonged to the plaintiff. He, therefore, allowed the claim.

On appeal by the defendants the Judge confirmed the decree.

Defendants Nos. 3 and 4 preferred a second appeal.

H. C. Coyaji, for the appellants (defendants Nos. 3 and 4):—The plaintiff's suit in the Mámlatdár's Court was Suit No. 13 of 1893. In that suit the plaintiff's claim was rejected. As the present suit was not brought within three years from the date of the Mámlatdár's order in that suit, it is time-barred under article 47, Schedule II of the Limitation Act—*Gulabhai v. Kasanji*⁽¹⁾; *Ramchandra v. Bhikibai*⁽²⁾.

(1) P. J., 1897, p. 246.

(2) (1882) 6 Pom., 477.

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Uttamram Lallubhai, for the respondent (plaintiff):—In the possessory suit the Mámílatdár made no order, as to the possession of the land. Article 47, Schedule II of the Limitation Act contemplates such an order being made and is, therefore, not applicable. On the day of hearing both the parties being absent, the Mámílatdár did not consider the issues which had been raised under section 15 of the Mámílatdárs' Courts Act. There was no inquiry at all either formal or on the merits of the case. In *Ramchandra v. Bhikibai*⁽¹⁾ the suit was dismissed on account of the non-appearance of the plaintiff. The ruling in *Gulabbhai v. Kasanjí*⁽²⁾ is also distinguishable. In that case, both the suits were filed in the Mámílatdár's Court, while in the present case, the second suit, that is, the present one, was filed in the Subordinate Judge's Court. Section 13 of the Mámílatdárs' Courts Act makes no provision for a case in which both the parties are absent, while section 99 of the Civil Procedure Code has provided for that contingency. We submit that as there was no adjudication by the Mámílatdár with respect to the right of possession, his order merely rejecting our plaint cannot operate as a bar to our present suit.

RANADE, J.:—This case has been distinguished by the Courts below from the decision in *Ramchandra v. Bhikibai*⁽¹⁾, on the ground that the dismissal in this last case was on account of the non-appearance of plaintiff alone, whereas in the present case both the parties appear to have put in no appearance in the Mámílatdár's Court. It appears to us that this circumstance does not establish any real distinction between the two cases: Section 13 of the Mámílatdárs' Courts Act contains no provision for cases where both parties do not appear. It provides first for cases where plaintiff fails to appear or keep his evidence ready, and it directs that in such cases, an order of rejection shall be made. It next provides for cases where defendant fails to appear, and, on proper proof of service, it empowers the Mámílatdár to pass an *ex-parte* decree. The section next provides for a re-hearing of the suit in both classes of cases on proper application being made within a time fixed.

(1) (1882) 6 Bom., 477.

(2) P. J., 1897, p. 246.

The present case is expressly stated to have been disposed of by the Mámíatdár under the first part of section 13; and it is clear that an order of rejection under section 13 was made. The decision in *Gulabbhai v. Kasanji*⁽¹⁾ governs the present case. It was stated in the judgment in that case that section 13 does not distinguish between cases where defendant appears and where he does not appear. The parties to the present suit admittedly represent the parties to the suit before the Mámíatdár; and as the present suit was brought more than three years after the date of the Mámíatdár's order of rejection, the claim must be held to be barred under article 47 of the Limitation Act.

We must, therefore, reverse the decrees of the Courts below and reject the claim with costs on the respondent throughout.

Decrees reversed and claim rejected.

(1) P. J. for 1897, p. 246.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

ANTONE (ORIGINAL DEFENDANT No. 3), APPELLANT, v. MAHADEV ANANT (ORIGINAL PLAINTIFF), RESPONDENT.*

1900.

July 10.

Mesne profits, suit for—Nature of suit—Jurisdiction—Appeal—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Cl. 31.

The plaintiff purchased certain land in June, 1892, at a sale in execution of a decree against R. He did not obtain formal possession until June, 1894. The defendant was in actual possession of the land under an alleged private sale by R. to him in October, 1892. The plaintiff now sued the defendant for mesne profits for three years, *viz.*, from 1894 to 1896, alleging that they had been wrongfully received by the defendant.

Held, that the suit fell within the exception of clause 31 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) and was not of a nature cognizable by Courts of Small Causes, and that, therefore, an appeal lay to the District Court from the Court of the Subordinate Judge.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, reversing the decree of Ráo Bahádur Jayasatya Bodhrav Tirmalrao, First Class Subordinate Judge of Kárwár.

* Second Appeal, No. 79 of 1900.