

marriage ceremony with her ; secondly, wrote a number of letters showing that he was treating her as his wife ; thirdly, she acquired the reputation of being his wife. Lastly, he performed a pilgrimage to Násik with her : while at Násik he went with her through a ceremony called "*potia-snan*." In this ceremony he bathed in the river with her having her *sári* wrapped around them both, and similarly he went through the ceremony again bathing in the river a second time with his *dhotar* wrapped around them both. This ceremony is gone through only by persons who are husband and wife. Therefore I find that the defendant did go through the marriage at the Brahma-Samaj church intending to make the plaintiff his wife. But I hold that as defendant had at that time a wife married according to the Hindu Law alive, the marriage ceremony performed by Mr. Nagarkar between the defendant and plaintiff being contrary to the tenets of the Brahma-Samaj is invalid according to law.

Attorneys for the plaintiff.—*Messrs. Tyabjee & Co.*

Attorneys for the defendants.—*Messrs. Mirza & Mirza.*

FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Chandavarkar, Mr. Justice Butty and Mr. Justice Aston.

TUKARAM JAYARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI VALAD SAKHARAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

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April 3.

Mámlatdárs' Courts Act (Bom. Act III of 1876), sections 4, 15, 18 and 21 (1) — Limitation Act (XV of 1877), Schedule II, Article 47—Possessory Suit in Mámlatdárs' Court—Rejection of plaint—Subsequent suit for possession on title in ordinary Court—Limitation.

A plaintiff suing in the ordinary Courts on his title for the possession of land is not bound by reason of anything in Article 47, Schedule II, of the Limitation

* Second Appal No. 90 of 1903.

(1) Sections 4, 15, 18 and 21 of the Mámlatdárs' Courts Act (Bom. Act III of 1876).

4. Every Mámlatdár shall preside over a Court, which shall be called a Mámlatdár's Court, and which shall have power within such territorial limits as may from time to

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Act (XV of 1877), or section 21 of the Mámlatdárs' Courts Act (Bom. Act III of 1876) contained to bring his suit within three years from the previous rejection of his plaint by a Mámlatdár in a suit for the possession of that land.

As a suit on title is outside the Mámlatdár's jurisdiction, a mere rejection of a plaint by him cannot be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

SECOND APPEAL from the decision of F. X. DeSouza, Acting District Judge of Khándesh, confirming the decree of V. V. Wagh, Subordinate Judge of Jalgaum.

The land in suit originally belonged to one Rangu, in respect of which he, in the year 1892, had brought a possessory suit

time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been dispossessed or deprived thereof other wise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other right of any other person in respect thereof.

The said Court shall also have power within the said limits, when any person is disturbed or obstructed or when an attempt has been made to disturb or obstruct any person, in the possession of any lands, premises, crops, trees, or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

But no suit shall be entertained by a Mámlatdár's Court unless it be brought within six months from the date on which the cause of action arose.

The cause of action shall be deemed to have arisen on the date on which the dis-possession, deprivation, determination of tenancy or other right occurred; or on which the disturbance or obstruction, or the attempted disturbance or obstruction, first commenced.

15. On the day appointed the Mámlatdár shall proceed to hear all the evidence that is then and there before him, and to 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 ?

(b) If the plaintiff avers that he is entitled to possession of any property or restoration of any use by reason of the determination of any tenure or other right of the defendant in respect thereof :

(1) Whether the defendant is in possession of the property, or in the enjoyment of the use by a right derived from the plaintiff or from any person through whom he claims ?

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against the defendants in the Mámlatdár's Court. The Mámlatdár dismissed the suit and Rangu did not take any further steps under Article 47, Schedule II, of the Limitation Act (XV of 1877), to establish his title within three years after the dismissal of the suit. Subsequently, in the year 1899, Rangu sold the land to the plaintiff. He brought the present suit in the year 1900 to recover possession of the land, alleging that he was its absolute owner and was wrongfully dispossessed by the defendants.

The defendants contended that the suit was time-barred by reason of the Mámlatdár's order in the possessory suit. The Subordinate Judge allowed the defendants' contention and

(2) Whether such right has determined at any time within six months before the suit was filed?

(c) If the plaintiff avers that he is still in possession of the property, or in the enjoyment of the use, but that the defendant disturbs or obstructs, or has attempted to disturb or obstruct, him in his possession or use:

(1) Whether the plaintiff or any person in his behalf is actually in possession or enjoyment of the property or use claimed?

(2) Whether the defendant is disturbing or obstructing, or has attempted to disturb or obstruct, him in such possession or enjoyment?

(3) Whether such disturbance or obstruction, or such attempted disturbance or obstruction, first commenced within six months before the suit was filed.

If the Mámlatdár's finding upon these issues be in favour of the plaintiff, he shall make such order as the circumstances of the case shall appear to him to require, provided that the same be not in excess of the powers vested in him by section 4.

If his finding be in favour of the defendant, he shall reject the plaint.

In either case the costs of the suit, including the costs of execution, shall follow the decree.

18. The party to whom the Mámlatdár 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 Mámlatdár'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 an 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 Mámlatdár's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

21. Any suit instituted by any person bound by any order made under this Act, or by any one claiming under such person, shall be dismissed, although limitation has not been set up as a defence, unless it has been instituted within three years from the date of the final order in the case.

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dismissed the suit. He was of opinion that the Mámlatdár had heard and dismissed Rangu's suit and that no credence could be attached to the plaintiff's allegation, which was not proved, that the suit was compromised and, therefore, it resulted in dismissal.

On appeal by the defendant the Judge confirmed the decree, and in his Judgment he made the following observations:—

But Mr. Kotwal (plaintiff's Pleader) has argued that the suit was decided on a compromise and hence the bar of limitation would not apply. There is, however, not an *iota* of evidence that the suit was compromised except the bare statement of Rangu. This is, however, contradicted by the evidence of the defendant, Exhibit 19, as well as by the clear wording of the endorsement on Exhibit 43, which shows that the suit was decided after evidence had been recorded. But even if there had been a compromise, the bar of limitation would apply all the same as has been recently held by the Bombay High Court in the Ruling cited in Bombay Law Reporter, Vol. 2, page 680. Mr. Kotwal has also argued that no order was passed on the plaint by which the defendants' predecessor in title could be held to have been bound. I am unable to follow this argument. The plaint was dismissed under section 16 of the Act, and surely the order of dismissal was an order that bound him.

The plaintiff having preferred a second appeal it was argued before a Division Bench composed of *Jenkins, C. J.*, and *Batty, J.*, who, on the 17th February, 1904, referred the question to a Full Bench and delivered the following referring Judgment:—

BATTY, J.:—In this case, instituted in 1900, the plaintiff seeks to recover possession of land in respect of which his vendor had, in 1892, brought a possessory suit under the Mámlatdárs' Courts Act, Bombay Act III of 1876. The plaint in that possessory suit was rejected and no suit to recover the property was brought within three years after the date of the order rejecting the plaint, either by the plaintiff therein or by any one claiming under him.

The lower Courts held that the present suit was barred by Article 47 of Schedule II of the Limitation Act, 1877, and relied on the decision in *Purushottam Dayaram v. Chatargir Guru Arjun-ger*⁽¹⁾ which purports to follow that in *Gulabbhai v. Kasanji*⁽²⁾ and that in *Ramchandra v. Bhikibai*⁽³⁾.

(1) (1900) 25 Bom. 82; 2 Bom. L. R. 680.

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

(3) (1882) 6 Bom. 477.

We think there is good reason to doubt whether the cases above cited and others to similar effect were correctly decided and whether the plaintiff in a suit under the Mámlatdárs' Courts Act dismissed by an order containing no further direction, is a person bound by an order within the meaning of the Article 47 above mentioned.

We, therefore, refer to a Full Bench the following question, *viz.* :

Whether, when an order is passed rejecting a plaint or disallowing the claim of a plaintiff under the Mámlatdárs' Courts Act, Bombay Act III of 1876, and containing no direction as to possession, Article 47 of the second Schedule to the Limitation Act applies to a subsequent suit brought by the person who presented the (possessory) suit so rejected or disallowed, or by any one claiming under such person to recover the property which was the subject-matter of the plaint so rejected or claim disallowed.

The reference was heard by a Full Bench composed of *Jen. kins, G. J., Chandavarkar, Batty and Aston, JJ.*

M. B. Chaubal appeared for the appellant (plaintiff):—The order passed by the Mámlatdár in the possessory suit was an order rejecting the plaint and nothing more. We submit that an order merely rejecting a plaint is not an order respecting possession within the meaning of Article 47, Schedule II, of the Limitation Act, nor is it an order falling under section 21 of the Mámlatdárs' Courts Act. The reason for enacting section 21 of the present Mámlatdárs' Courts Act was obviously not to include therein all orders whatsoever passed by a Mámlatdár in possessory suits. Under the former Acts Mámlatdárs had no jurisdiction to grant relief by issuing injunction. They were invested with jurisdiction to grant injunction by the present Act (Bom. Act III of 1876), and the wording of Article 46, Schedule II, of the former Limitation Act (IX of 1871) was not wide enough to include orders passed by Mámlatdárs under this new jurisdiction. Section 21 of the Mámlatdárs' Courts Act was, therefore, enacted to include within the operation of limitation such orders also.

The Legislature could not have intended that the longer period of limitation, namely, twelve years, should be curtailed by orders like the present which do not relate to the possession of property or the restoration of any use to any person, but which simply

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reject a plaint. Such an order is not a final order contemplated both by section 21 of the Mámlatdárs' Courts Act and Article 47 of the Limitation Act. The words "comprised in such order in Article 47 of the Limitation Act clearly show that the orders contemplated by them are those which, under the terms of the Mámlatdárs' Courts Act, the village officers have to carry out. When the order simply rejects a plaint and does nothing more, the village officers can have nothing to do with such order.

This interpretation, we submit, is more in accordance with the general principles of *res judicata* than the one contended for and apparently upheld in some cases.

Ráo Bahádur G. N. Nadakarni (with *G. G. Nadakarni*) appeared for the respondents (defendants):—The question referred to the Full Bench is concluded by several rulings of this Court. The present case is on all fours with *Annaji v. Daji*⁽¹⁾ wherein section 21 of the Mámlatdárs' Act was construed along with Article 47 of the Limitation Act and three years' limitation was held applicable. See also *Gulabbhai v. Kasanji*,⁽²⁾ *Chinto v. Vishnu Ganesk*⁽³⁾ which was followed in *Purushottam v. Chattergér*⁽⁴⁾.

Our next contention is that section 4 of the Mámlatdárs' Act is the keystone of the Mámlatdár's jurisdiction. The third paragraph of that section lays down that a suit must be brought within six months from the date on which the cause of action arose. Section 5 of the Act mentions the particulars which are to be given in the plaint, and among those the date on which the cause of action arose is mentioned. If the plaint fails to disclose the fact that the cause of action arose within six months then the plaint is not admissible, and the Mámlatdár has no jurisdiction to hear the case. Section 11 lays down that if the plaint is admissible the Mámlatdár shall receive and file it and try the case. Section 9 enacts, *inter alia*, that the Mámlatdár shall reject the plaint if the cause of action arose more than six months before the plaint was presented. If there be no objection apparent on the face of the plaint for its admission then the Mámlatdár becomes seized of the case and orders passed sub-

(1) (1889) P. J., p. 161.

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

(3) (1883) P. J., p. 131.

(4) (1900) 25 BOMR. 82.

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sequently are final orders within the meaning of section 21 of the Act. There is a distinction between dismissal of a plaint on the ground of limitation apparent on the plaint and the dismissal on the ground of limitation determined after the hearing of the case has commenced.

Section 13 of the Mámlatdárs' Act provides that a plaint should be rejected with costs on plaintiff's default and that the case should be heard *ex parte* if the defendant fails to attend. Further, section 15 has prescribed certain sets of issues to be framed and decided with respect to certain cases. Therefore, if a Mámlatdár passes an order rejecting a] plaint [after he has applied his legal mind to the facts of a particular case and has decided against the plaintiff, the order evidently confirms the defendant in his possession.

[JENKINS, C. J. :—That may be the effect of the order but the Act does not say so.]

The Act does not say so, but the result of the order is the same as we contend for. When the plaintiff sues for recovery of possession, issues are framed with respect to possession and the order of the Mámlatdár must, therefore, necessarily be with respect to possession. Section 16 of the Act lays down that the order of the Mámlatdár must be endorsed on the plaint with reasons for the same. Therefore, so long as the Act stands unamended, three years' limitation must govern. The framing of the suit may be immaterial. The pleadings of the parties must be specially considered: *Shrinivas v. Hanmant*⁽¹⁾. It is the plaintiff who sets the law in motion and he must take the consequences of his act. To hold that an order rejecting a plaint is not an order respecting possession would be to inflict a very great hardship on the defendant as is apparent from the circumstances of the present case.

Section 18 of the Mámlatdárs' Act provides that a party in whose favour the Mámlatdár decides a case shall reap the fruit of that decision until ousted by a decree or order of a Civil Court. If the aggrieved party does not bring a suit to set aside the order of the Mámlatdár within three years as provided for by Article 47 of the Limitation Act, then section 21 of the

(1) (1899) 24 Bom. 360.

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Mámlatdárs' Act comes into operation, and that section imperatively lays down that the suit shall be dismissed although limitation has not been set up as a defence. The section makes no distinction between a plaintiff and a defendant.

Again, there is no hardship in applying three years' limitation to the plaintiff whose claim is rejected by the Mámlatdár after inquiry. Under the Civil Procedure Code, when the claim of a person to attach certain property is disallowed, he is bound by the same limitation of one year as the opponent when the latter's right is disallowed.

JENKINS, C. J. :—I would answer the reference by saying that a plaintiff suing in the ordinary Courts on his title for the possession of land is not bound by reason of anything in Article 47 of the Limitation Act or section 21 of the Mámlatdárs' Act contained to bring his suit within three years from the previous rejection of his plaint by a Mámlatdár in a suit for the possession of that land. My learned colleagues agree with this conclusion, which is limited to meet the actual circumstances of the case out of which the reference arises. I have had an opportunity of reading their Judgments which state at length the reasons justifying this conclusion, and it would serve no useful purpose for me to make a separate statement of those reasons. It will suffice for me to say that as a suit on title is outside the Mámlatdár's jurisdiction, it is (in my opinion) impossible to hold that a mere rejection of a plaint by him can be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

Therefore I think the plaintiff cannot for the purposes of the civil suit, be held to be bound by the order under the Mámlatdárs' Act.

CHANDAVARKAR, J. :—The question is—What is “an order respecting the possession of property” under the Mámlatdárs' Act, to which Article 47 of the Limitation Act was intended to apply? That Article must be read with section 21 of the Mámlatdárs' Act, and, when so read, the answer to the question depends upon what is an order under the Mámlatdárs' Act “by which any person is bound” within the meaning of the Act. Generally

speaking, apart from the Act, all orders of a Court may be said to be more or less binding *inter partes*. But there is a special sense in which, according to the Act, an order under it is binding between the parties, *i.e.*, in the sense that the effect given to it by the Mámlatdár in the exercise of his jurisdiction is binding till it is superseded by a decree or order of a Civil Court. All orders by which a Mámlatdár gives immediate possession to a party or restores a use to him or issues an injunction in his favour have a binding effect in this special sense of the term "bound by an order" according to section 18 of the Act. And the last proviso to that section shows that by the Mámlatdár's decision "respecting the possession of any property" was meant only that decision which is referred to in the first paragraph of the section.

The intention of the Legislature to restrict the term "bound by an order" to only those orders which are dealt with in the first paragraph of section 18 and to no others appears clearly from the following considerations. The orders which a Mámlatdár can pass on the question of possession may, having regard to the different sections of the Act, be divided into the following classes:—(1) orders restoring possession to a plaintiff who has been dispossessed otherwise than by due course of law within six months before suit, or, where a plaintiff's possession has been obstructed by a defendant within that period, orders issuing an injunction to the defendant and thereby confirming the plaintiff in possession; (2) orders rejecting the plaint for default; and (3) orders rejecting the plaint on the ground that the plaintiff has failed to prove all or any of the issues laid down in section 15, clauses (a), (b) and (c).

As to the first class there can be no doubt, and it is not disputed at the Bar, that they are orders respecting possession. According to section 4 of the Act, which lays down the extent and purpose of the Mámlatdár's jurisdiction, he has power to restore possession to a party who has been illegally dispossessed or to confirm a party in possession whose possession has been illegally disturbed or obstructed, provided such dispossession or disturbance or obstruction has taken place within six months immediately before the date of the suit. The issues laid down in section 15, clauses (a), (b) and (c), of the Act, are framed with

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reference to the extent and purpose of the special jurisdiction created by section 4; and section 18 says that where a party is either restored to possession or confirmed in possession by means of an injunction, by the Mámlatdár, such party shall continue in possession until ousted by a decree or order of a Civil Court. This latter section has reference only to the first class of these orders, *i.e.*, to a plaintiff who, having been dispossessed, is restored by the Mámlatdár to immediate possession or who, having been obstructed while in possession, has the obstruction removed by an injunction of the Mámlatdár and is maintained in possession. A party dissatisfied with such orders, says section 18, must go to a Civil Court if he wishes to dispossess the party who has succeeded in the Mámlatdár's Court by being either restored to or confirmed in possession. In other words, the obligation is cast by the Act upon a party who has been dispossessed or whose obstruction has been removed by the Mámlatdár to bring a suit in a Civil Court if he desires to get back the possession or justify the obstruction. Such an order then is an order by which a person, to whose prejudice it is, is bound until he gets it superseded by a Civil Court. The 2nd proviso to section 18 makes it clearer still that it is an order of this kind only which, according to the Act, falls within the category of "the Mámlatdár's decision respecting the possession of any property."

It is significant that while the Act in express terms imposes the obligation of suing in a Civil Court on a party against whom there is an order either restoring possession to or confirming possession in his adverse party, there is no section in the Act which either expressly or by necessary implication imposes a similar obligation on a party who has against him an order of either the second or the third class mentioned above. Had the Legislature intended to treat all orders alike, whether falling under the first, second or the third class, as in fact orders respecting possession and, therefore, binding until superseded by a Civil Court's decree or order, they would have and should have worded section 18 accordingly. "In that case section 18 would have run as follows:—

"The party to whom the Mámlatdár shall give immediate possession or restore a use, or in whose favour an injunction has

been granted, or in whose favour any other order is passed by the Mámílatdár, shall continue in possession or use or shall have the benefit of the order in his favour as the case may be until the Mámílatdár's order is superseded by a decree or order of a Civil Court."

The omission, then, from section 18 of orders other than those belonging to the first class shows that the Legislature intended a sharp distinction between orders falling under the first class on the one hand and those of the second and the third class on the other in point of a binding effect as regards the important question of their supersession by a Civil Court. Orders, therefore, to which section 18 relates are the only orders by which parties are under the Act bound until a Civil Court's decree or order comes in and upsets their effect. It follows from that intention of the Legislature that the three years' limitation prescribed by section 21 of the Mámílatdárs' Act and Article 47 of the Limitation Act was prescribed for suits of the kind referred to in section 18 of the former Act as suits relating to orders respecting possession.

Orders other than these may, no doubt, in one sense, be spoken of as orders respecting possession, in the sense, that is, that the Mámílatdár disallows a claim to possession by such order. But if we are to read Article 47 of the Limitation Act with section 21 of the Mámílatdárs' Act, as I think they should be read, two conditions are necessary for the application of the three years' limitation:—(1) that the party suing should be bound by the order under the Mámílatdárs' Act and (2) that the order should be respecting possession. And section 18 of the Act explicitly points out the orders to which these two conditions apply. They must belong to the first of the three classes above mentioned. It follows from this that the Legislature could not have intended to prescribe the three years' period of limitation, which is shorter than the ordinary period, for orders belonging to the 2nd or the 3rd class without giving them a binding effect in the same terms as in section 18, *i.e.*, by imposing upon the party against whom such orders are passed the obligation of going to a Civil Court. If one class of orders respecting possession has been treated by the Legislature in express terms in section 18 of the Mámílatdárs'

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Act as binding until superseded by a Civil Court's decree or order and nothing is said about the other classes, on the principle of *expressio unius est exclusio alterius* we must infer that these other classes of orders were intended by the Legislature to be excluded as carrying no similar binding effect but as falling within the ordinary period of limitation prescribed for suits.

The result, therefore, in my opinion, is that for the purposes of the three years' limitation applicable to a regular suit in a Civil Court a party is bound by only that order of the Mámlatdár which restores his adverse party to possession or confirms the latter in possession by means of an injunction. This view is in accordance with the interpretation of section 18 in *Bapu v. Mahadaji*⁽¹⁾. Moreover, it gives coherent and consistent effect to the extent and purpose of the Mámlatdár's jurisdiction as laid down in specific terms in section 4 of the Act. According to it the jurisdiction is of a limited and special character, with the conditions of it distinctly defined. It is only where those conditions are fulfilled that the Mámlatdár's jurisdiction arises, not otherwise. As observed by the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynodeen Khan*⁽²⁾ "wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament) and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise." Applying this principle to the Mámlatdárs' Act, jurisdiction is given on certain terms to the Mámlatdár to restore a plaintiff to possession or to confirm him in possession, those terms being that the plaintiff in the former case should be, *first*, dispossessed otherwise than by due course of law; *secondly*, that the dispossession should be by the defendant; and, *thirdly*, that the dispossession should be within six months before the date of the suit; and that the plaintiff, in the latter case, should be, *first*, himself in possession; *secondly*, that he should be obstructed by the defendant; and, *thirdly*, that the obstruction should be within six months before the date of the suit. Where these

(1) (1898) 18 Bom. 348.

(2) (1855) 6 Moo. I. A. 184 at p. 155.

terms are complied with, the special power vested in the Mám-latdár comes into operation—that power being to restore the plaintiff to possession in the former case, to confirm him in possession in the latter by issuing an injunction. Where the requirements or terms are not complied with, the power does not arise. All orders passed by the Mám-latdár, whether they be orders allowing the plaint to be withdrawn or rejecting the plaint for default, or allowing or disallowing the claim, may be binding so far that they cannot be questioned by another suit in the Mám-latdár's Court upon the same cause of action. But it is a different question whether they are binding so far as the obligation imposed upon a party to get them superseded by a Civil Court's decree is concerned. In respect of such an obligation the Act has a specific provision (section 18) as to orders passed by the Mám-latdár exercising and giving effect to the power vested in him by the terms of section 4 of the Act. The omission of the Legislature to give a similar obligatory effect to other orders and their exclusion from section 18 could only be due to the fact that those are orders to which no effect can be given by the Mám-latdár, because they do not fall within the terms of his power or jurisdiction defined in clear terms by section 4.

The decision in *Chinto v. Vishnu*⁽¹⁾, which has been followed in this Court till now, proceeds upon what is a pure assumption, which is that when a Mám-latdár passes an order rejecting a plaintiff's claim, such order maintains the defendant in possession. There is no warrant whatever in any of the provisions of the Act for this assumption. The Mám-latdár maintains a party in possession only when he issues an injunction in favour of that party restraining his adverse party from obstructing (see section 18). If an order of the Mám-latdár rejecting a plaint or disallowing a claim were to be treated as having the effect of maintaining the defendant in possession, we should be improving upon, by adding words to, section 18 and further we should be imputing to the Legislature the absurdity of having intended that even where a Mám-latdár rejects a claim on the ground that the defendant in his opinion and according to his finding is not in

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(1) (1888) P. J., p. 131.

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possession, the Mámíatdár's decision must be nevertheless treated as proceeding upon a contrary finding and that his order must be interpreted as confirming the defendant in a possession which, the Mámíatdár has expressly found, the defendant has not.

For these reasons my answer to the reference is the same as that given by the learned Chief Justice.

BATTY, J. :—The question formulated in the order of reference does not specifically mention section 21 of the Mámíatdárs' Courts Act (Bombay Act III of 1876). But it seems necessary to consider the applicability of that section in this case, and arguments on that point have been addressed to us.

The wording of that section is somewhat wider than that of Art. 47 of Schedule II of the Limitation Act, 1877, and as suggested in argument, was probably intended to include suits by persons bound by orders restoring uses or taking the form of injunctions, as well as by orders respecting possession only.

Both the article and the section in question in defining the suits to which they apply require that suits should be suits brought by persons bound by an order. The section (21 of Bombay Act III of 1876) contains indeed no further definition. It cannot be supposed that it was intended to cover suits of every description, and the definition must be construed as limited to suits by persons suing only in the character of persons bound by an order, and in no other character, and on no other ground whatsoever. The phrase is ambiguous must be construed liberally, *i.e.*, in favour of the right to proceed: *Umiashankar Lakhmiram v. Chhotalal Vajeram*¹. The defining phrase cannot, I therefore think, be extended by implication to a suit brought by a person whose plaint or claim under the Mámíatdárs' Courts Act has been rejected or disallowed. It is true that section 16 of the Bombay Act refers to orders "for rejecting a plaint or disallowing a claim." But orders for such purposes impose no obligation on the plaintiff to do or to abstain from doing anything. They amount at most to a refusal to pass any order binding on any person. They may include orders based on want of jurisdiction, or on proof that the plaintiff's possession has never been disturbed by the defendant. In no such case is there

anything to enforce, and the Act gives no further effect or operation to such orders. The jurisdiction ceases with the decision dismissing the suit: *Ganesh Nath v. Ganpat*⁽¹⁾. It is contended for the respondent that the dismissal of a suit by the Mámlatdár confirms the defendant in possession. And this was apparently held in *Chinto v. Vishnu*⁽²⁾. But a dismissal may, as above indicated, proceed on the ground that the defendant is not in possession. The respondent is thus driven to the assumption that the plaintiff may be bound by the *decision* or *finding* of the Mámlatdár, though not by his order. This is opposed to the distinct provision in section 13 of the Act that the Mámlatdár's decision respecting the possession of any property shall not be held to be conclusive: *Basapa v. Lakshmapa*⁽³⁾, *Mudkapa v. Nimgapa*⁽⁴⁾, and *Ramchandra v. Narsinhacharya*⁽⁵⁾. Neither section 21 of the Mámlatdárs' Courts Act nor Article 47 of the 2nd Schedule to the Limitation Act attaches any effect to a bare decision by a Mámlatdár. There is no provision corresponding to section 13 of the Code of Civil Procedure which would make the decision of the Mámlatdár operative as *res judicata*. The Mámlatdárs' Courts Act gives the Mámlatdár no power to decide upon the *rights* of the parties, and the order rejecting a suit or disallowing a claim involves no decision as to the *right* of the plaintiff to possession. His rights are strictly unaffected thereby, and therefore a decision rejecting a plaint in no sense confirms the defendant in possession.

The Article 47 of the Limitation Act and section 21 of the Bombay Mámlatdárs' Act relate only to orders which are binding, that is to say, which are enforceable. The Article of the Limitation Act further specifies that the suits to be barred must be suits to recover possession of property comprised in the order whereby the plaintiff is bound. But a specification of the property claimed is no essential part of an order dismissing a suit under the Mámlatdárs' Courts Act.

For the above reasons I concur in the answer given by the learned Chief Justice.

(1) (1895) P. J., p. 56.

(3) (1877) P. J., p. 58.

(2) (1883) P. J., p. 131.

(4) (1877) P. J., p. 115.

(5) (1899) 24 Bom. 251 ; 1 Bom. L. R. 630.

1901.

TUKARAM

HARL.

1904.

TEKARAM
v.
HARI.

ASTON, J. :—I concur with the judgment of the learned Chief Justice. In my opinion the reference should be answered as there stated, for the reasons given.

It is unnecessary, therefore, to discuss the question whether a plaintiff, whose claim to recover possession of property after alleged unlawful dispossession has been rejected or disallowed in a Mámlatdár's Court, is in a better position as regards limitation if he subsequently sues in the regular Civil Court on the same bare possessory right than if he had not sued unsuccessfully in the Mámlatdár's Court.

ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

SIR E. SASSOON AND OTHERS (PLAINTIFFS), APPELLANTS, v. TOKERSEY
JADHAWJEE (DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 30—Wagering Contracts.

In order that a transaction may fall within section 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager, and both sides must be parties to the wager.

It is of the essence of a wager that each side should stand to win or lose, according to the uncertain or unascertained event, in reference to which the chance or risk is taken; in other words, to make an agreement a wager there must be a common intention to bet.

The plaintiffs filed two suits against two firms, one carrying on business in the name of Tokersey Jadhawji and the other in the name of Motiram Jadhawji. Substantially both firms did the same kind of business and in the present case one suit would have been filed but for the fact that in the former firm there were two partners who were not connected with the latter firm.

The plaintiffs' business with the defendants consisted mainly of dealings in American cotton, and these two suits were brought in respect of deficiencies arising on the resale of certain American cotton purchased by the plaintiffs on behalf of the two firms and