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us an appeal where the lower Court has disposed of the suit upon a preliminary point. We cannot then remand the case under Order XLI, Rule 23, unless we reverse the decree in this appeal. But what materials have we to justify us in reversing the decree? The presumption based upon high authority is that the decree was perfectly right, but the appellant has come to this Court to have the decree set aside and the case remanded without a particle of documentary evidence, without any statement based upon affidavit, to induce us to hold that evidence is forthcoming which ought to have been produced in the lower Court in the interest of the plaintiff, and which would have been produced but for some grave error on the part of his pleader. We cannot presume that this is the case. We, therefore, hold that the decision of the lower Court was right. We dismiss the appeal with costs.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

1914. *December 22.*

JAVERBHAI JORABHAI (ORIGINAL PLAINTIFF), APPELLANT, v. GORDHAN NARSI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.[*]

Bhagdari and Narwadari Tenures Act (Bom. Act V of 1862), section 3—Unrecognised sub-division of a bhag*—Mortgage—Covenant in the mortgage-deed—Claim for compensation based on covenant maintainable—Indian Contract Act (IX of 1872), section 65—Specific Relief Act (I of 1877), section 38—Mortgagor holding as tenant of mortgagee for upwards of twelve years—Adverse possession of limited interest.*

In 1897, the house in suit and certain other properties were mortgaged to the plaintiff's father by the defendants they having purchased the properties from the bhagdar owner in 1893. In 1901, on accounts being taken, part

[*] Second Appeal No. 582 of 1913.

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of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit. The deed of mortgage contained a covenant in the following terms :—

"If there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced." Ever since 1897 the defendants held the house as plaintiff's tenants under yearly rent-notes, the last of which was passed on 20th June 1908. At the termination of the last rent-note, that is in July 1909, the defendants refused to surrender possession to the plaintiff. On the 9th November 1910, the plaintiff sued to recover possession of the house or in the alternative Rs. 749 as compensation. The defendants contended that both the mortgage and rent-notes were void under the Bhagdari Act and that the suit was barred by limitation. The lower Courts upheld these contentions and dismissed the suit. The plaintiff having appealed :—

Held, (1) that the mortgage as well as the rent-notes were void under the provisions of Bhagdari Act, 1862 ;

(2) that, so far as the contract of mortgage was concerned, the consideration failed *ab initio*, and the money advanced by the plaintiff being money received by the defendants for the plaintiff's use, the suit to recover it was barred under Article 62 of the Limitation Act ;

(3) that, although the mortgage was void under the Bhagdari Act, it was open to the plaintiff to claim under the covenant contained in the mortgage-deed ;

(4) that the plaintiff's possession from February 1897 to July 1909 gave him an absolute title to the limited interest as mortgagee and so justified his claim under the covenant for compensation for disturbance ;

(5) that the claim under the covenant was within time for the breach of the covenant did not occur till 1909 when the defendants refused, on demand, to surrender possession.

SECOND appeal from the decision of Mohanrai Dolatrai, Subordinate Judge of Broach with appellate powers, confirming the decree passed by Karsandas Jeshingbhai Desai, Subordinate Judge of Jambusar.

Suit by a mortgagee for recovery of possession of a house mortgaged or in the alternative to recover the amount of the mortgage, namely Rs. 749, from the person and other property of the defendants.

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The plaintiff alleged that the house in suit and certain other properties were by a registered deed of 3rd February 1897 mortgaged to the plaintiff's father by the defendants 1 and 2 and Shankar Narsi, the deceased husband of defendant 3, these mortgagors having purchased the properties from the bhagdar owner in 1893; that in 1901, on accounts being taken, part of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit; that the defendants 1 and 2 and Shankar Narsi, or, after his death, his widow the 3rd defendant remained in possession of the house as plaintiff's tenants under yearly rent-notes; that the last such rent-note was passed in 1908; that the defendants refused to surrender possession; that even if the said mortgage be proved to be one relating to a separated portion of a *bhag*, still, by reason of twelve years having already elapsed since the original mortgage of 1897, the plaintiff had become owner of the right by adverse possession as mortgagee. It was further pleaded that in case the plaintiff should not be held entitled to recover possession, he was in any event entitled to a sum of Rs. 749 as compensation under a covenant contained in the deed of mortgage in following terms:—

If there should be any hindrance or obstruction concerning the house or if the house should be taken out of your possession then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced.

The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdāri Act, the house mortgaged being an unrecognised sub-division of a *bhag*; that the plaintiff took no interest in the property either under the mortgage or under the rent-note and that the suit was barred by limitation.

The Subordinate Judge held that the mortgage and rent-notes were void; that the possession by defendants of the house as plaintiff's tenants from 1897 did not give to the plaintiff statutory title to the mortgage interest in the house; and that the plaintiff's claim for compensation was barred by limitation. His grounds of decision were expressed as under :—

"I shall first deal with the question whether the mortgage-deeds (exhibits 8 and 22) are valid and operative in view of section 3 of Bhagdari Act and of the admitted fact that the sale-deed passed by the original bhagdar was void. It is manifest from what is shown above that plaintiff's mortgagors have been in adverse possession of the house in suit for over twelve years. They can therefore resist the claim of their vendor to possession of the house on the ground of invalidity of the sale under section 3 of the Bhagdari Act, on the strength of the ruling reported at page 1128 of 10 Bom. L. R., *Adam Umar Sale* v. *Bapu Bavaji.* The question therefore arises whether the right which plaintiff's mortgagors acquired subsequently to the passing of the deeds, exhibits 8 and 22, can or cannot be held to have occurred to plaintiff under section 18, clause (*a*) of the Specific Relief Act. If the mortgage was void on the ground that the mortgagor had no interest in the land mortgaged at the time of its execution, subsequent acquisition of interest in land or property mortgaged by mortgagors will be sufficient to give valid interest of mortgage to the mortgagee. In the present case the mortgagors have acquired a right to retain possession of the plaint house as against the original bhagdar vendor. Cannot the plaintiff claim to have acquired mortgaged interest in the right by virtue of his mortgage-deeds on the strength of the above said section of Specific Relief Act? Is there any difference in the title which a vendee acquires under a deed void by reason of failure of consideration in the form of absence of title in the vendor and that under a deed declared void by Bhagdari Act? In the case of a sale of any property by a person without a title, the vendor can, I think, be held to have conveyed a good title as soon as he acquires by adverse possession, cannot a similar title be held to have been conveyed by the present defendants? It is further to be noted that as against their vendor, the plaintiff's mortgagors could have claimed to retain possession so long as the compensation due to them was not paid by him. Cannot this claim pass to plaintiff? If it was open to me to decide these points, I would probably have decided them in plaintiff's favour but the ruling of our Bombay High Court reported at p. 693 of XI Bom. L. R., *Jijibhai Laldas* v. *Nagji Gulab*, decides that the alienation by a non-bhagdar of a portion of a bhag conveyed to him by a bhagdar, is invalid. * * * I, therefore, hold that both the mortgage-deeds, exhibits 8 and 22, are void under section 3 of Bhagdari Act,"

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"The next point for determination, therefore, is whether the plaintiff's suit is barred by limitation. It will appear from the decision referred to above that compensation was awarded under section 65 of the Indian Contract Act as well as by virtue of the collateral agreement contained in the deed avoided. Section 65 enacts that when any agreement is discovered to be void, party who has received any advantage under such an agreement must return it to the party from whom it was received. Apparently, therefore, no claim for such a refund could be advanced unless the party advancing it comes to know or in other words discovers, that the transaction in which he paid the money or thing is void. In the present case I have held that plaintiff came to know of the allegation by defendants that the house appertains to *bhag*, only after the decision of Suit No. 563 of 1908. Can he be said to have legally discovered at that time only the defect in his title ? In the case reported at p. 593 of I. L. R. 25 Bom., it has been held that when the contract of sale was void *ab initio*, the consideration for the sale must be deemed to have failed from the date of the contract, whether purchaser knew of the defect or not. The Privy Council case reported at page 123 of I. L. R. 19 Cal. was the basis of that decision. Similar principle was laid in the case reported at p. 750 of I. L. R. 26 Bom. These rulings govern the present case. * * * I, therefore, hold that the present suit not having been brought within three or six years from the date of the mortgage-deed in suit, is barred."

The plaintiff appealed, but the decree of the lower Court was confirmed by the District Judge.

The plaintiff preferred a second appeal.

D. A. Khare for the appellant (plaintiff) :—We submit that the title to an unrecognised sub-division of a bhag can be acquired by adverse possession : *Adam Umar* v. *Bapu Bawaji*[1]. Here the defendants had acquired such title against their original vendor. As mortgagee from defendant, we had therefore acquired title by adverse possession of limited interest.

Further, we are entitled to recover compensation on the strength of the covenant mentioned in the mortgage-deed, and section 65 of the Contract Act favours such a view. The consideration cannot be said to have failed until the defendants refused to pass a rent-note.

(1) (1908) 33 Bom. 116.

Our suit is within time from such period: *Narsing Shivbakas* v. *Pachu Rambakas*[1].

Again, the defendants are estopped by their having acknowledged our title as mortgagee: see section 43 of Transfer of Property Act.

G. N. Thakor for the respondents (defendants):—We contend that an alienation of an unrecognised sub-division of *bhag* properties even by a non-bhagdar is void: *Jijibhai* v. *Nagji*[2].

No question of adverse possession can arise here as the mortgage and the rent-notes were both void: *Laxmanlal* v. *Mulshankar*[3], *Shridhar Balkrishna* v. *Babaji Mula*[4].

As to compensation, *Jijibhai* v. *Nagji*[2] seems to be against us, but in that case no question of limitation arose as the suit was brought within two years of the date of alienation. Here the claim was barred as the mortgage was void *ab initio* and so the consideration for the mortgage failed on the date of the mortgage: *Hanuman Kamat* v. *Hanuman Mandur*[5]; *Ardesir* v. *Vajesing*[6]; *Tulsiram* v. *Murlidhar*[7]; *Narsing Shivbakas* v. *Pachu Rambakas*[1].

As to estoppel, there can be no estoppel against an act of the legislature. *Shridhar Balkrishna* v. *Babaji Mula*[4].

Khare, in reply.

BATCHELOR, J.:—The plaintiff, who is the appellant before us, brought this suit as mortgagee to recover possession of a house and Rs. 14 as rent or, in the alternative, to recover Rs. 749 from the mortgaged

(1) (1913) 37 Bom. 538.
(2) (1909) 11 Bom. L. R. 693.
(3) (1908) 32 Bom. 449 at p. 454.
(4) (1914) 38 Bom. 709.
(5) (1891) 19 Cal. 123.
(6) (1901) 25 Bom. 593.
(7) (1902) 26 Bom. 750.

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house and other properties of defendants in case the Court should hold that plaintiff's mortgage was void. The plaint set out that the house in suit and certain other properties were, by a registered deed of 1897, mortgaged to the plaintiff's father by defendants 1 and 2 and Shankar Narsi, the deceased husband of defendant 3, these mortgagors having purchased the properties from the *bhagdar* owner in 1893; that in 1901, on accounts being taken, part of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit; that the defendants 1 and 2 and Shankar Narsi, or, after his death, his widow, the third defendant, remained in possession of the house as plaintiff's tenants under yearly rent-notes; that the last such rent-note was passed in 1908; and that the defendants refused to surrender possession. It was further pleaded that, in case the plaintiff should not be held entitled to recover possession, he was in any event entitled, under a covenant contained in the deed of mortgage, to a sum of Rs. 749 as compensation, that being the sum due under the mortgage.

The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdari Act, that the plaintiff took no interest in the property either under the mortgage or under the rent-notes, and that the suit was barred by limitation. On the material issues both the trial Court and the lower Court of Appeal have found that the mortgage and the leases were void *ab initio*, that the defendants were not estopped from raising this contention and that the plaintiff's claim to compensation was barred by limitation. On these findings, so far as concerns the house now in litigation, the suit was dismissed. From this dismissal the plaintiff brings the present appeal.

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The property in suit being admittedly an unrecognised sub-division of a *bhag*, its alienation is prohibited by section 3 of the Bhagdari Act, 1862. The argument advanced in the lower Courts that this mortgage could be saved from the prohibition was not pressed before us, and *Jijibhai* v. *Nagji*[1] is authority for the view that the mortgage is void under the Act none the less because the original mortgagors were not *bhagdars*. The rent-notes were, we think, part and parcel of the one indivisible transaction; they are, therefore, tainted with the illegality which affects the mortgage, and they must suffer the same fate. We hold that both the mortgage and the rent-notes are void.

The only remaining question is that to which the arguments before us were almost exclusively confined, namely, whether the plaintiff is entitled to any and what compensation. The lower Courts, following *Jijibhai's case*[1], have decided that the plaintiff has a good claim to compensation under section 65 of the Contract Act, but both Courts have felt compelled to hold that the claim is out of time, though the learned Subordinate Judges recognise the hardship of a decision which deprives the plaintiff both of his mortgage security and of the money which he advanced. It may be observed in passing that the hardship happens in this case to be all the greater because it is found that the plaintiff had no knowledge of the *bhag* character of the property until the decision of a former suit filed so late as 1908. But both the Courts have felt constrained to hold that, inasmuch as the contract of mortgage was void *ab initio*, the consideration must be taken to have failed from the date of the contract, that is, 1897, whether the plaintiff was aware of the illegality or not; for this view they have relied on *Ardesir* v. *Vajesing*[2],

[1] (1909) 11 Bom. L. R. 693. [2] (1901) 25 Bom. 593.

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which followed the decision of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*[1]. It cannot be denied that if this view be sound and taking account of the whole of plaintiff's case, the claim for compensation is out of time. So far as the contract of mortgage is concerned, the consideration unquestionably failed *ab initio*, and the money advanced by the plaintiff's predecessor-in-title was money received by the defendants for the plaintiff's use, within the meaning of Article 62 of the Indian Limitation Act. Under that Article, therefore, the plaintiff is now too late to obtain compensation in respect of the consideration attaching to the mortgage.

But there still remains the question whether the plaintiff is not entitled to recover for breach of a separate covenant contained in the deed of mortgage. That covenant was passed by the defendant mortgagors in the following terms, "if there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced." Assuming for the moment, that this covenant can properly be made the basis of a claim for compensation independently of the original mortgage it is plain that that claim will be within time, for the plaintiff's case is that the breach of the covenant did not occur till 1909 when, the term of the last lease having expired, the defendants refused, on demand made, to surrender possession and the suit was filed in 1910. We may notice also that this covenant is of a different character from that which, in *Ardesir's case*, was held incapable of saving the plaintiff's suit from the bar of limitation. For there neither the plaintiff

(1) (1891) 19 Cal. 123.

nor his vendor had possession of the *wanta* land in suit, and the covenant, it was held, did not amount to an agreement to compensate the purchaser for non-possession, but proceeded on the assumption that he had obtained possession. Here the covenant covers as well the cases where hindrance or obstruction should occur in taking possession as the case where possession, after having once been obtained, is afterwards taken away from the purchaser.

It remains to determine whether, although the mortgage is void under the Bhagdari Act, it is open to the plaintiff to claim under this covenant. It has not been suggested that in the Indian Contract Act or any other Indian enactment there is anything to prohibit such a claim ; and the only provision which has any bearing upon the question of its validity, namely section 65 of the Contract Act, favours the view that the defendants are bound to make restitution. Having regard, however, to the precise wording of section 65, there may perhaps be difficulty in holding that this section is directly applicable to our present facts, but the section at least indicates that the plaintiff's claim is consonant with the general principle adopted by the statute. Assuming that the plaintiff's claim under the covenant cannot be wholly justified by reference to section 65, it follows that the point under discussion is not covered by any Indian enactment. That being so, it is competent to us to turn for guidance to the decisions of the English Courts on a similar state of facts. In *Kerrison* v. *Cole*[1] the plaintiff sued upon a bill of sale transferring to him the property in certain ships by way of mortgage security for a sum of £2,500 advanced by the plaintiff. But the bill of sale itself was void under a particular statute inasmuch as it did not recite the certificates of registry. Yet it was held that the plaintiff was entitled to sue the mortgagor upon his

(1) (1807) 8 East. 231.

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personal covenant, contained in the same instrument of mortgage, for the repayment of the money. For the defendants it was contended that the whole instrument was void, and Counsel relied upon the comprehensive words of the statute which were that "the Bill or other instrument of sale shall be utterly null and void to all intents and purposes," arguing that the suit was an attempt to make the instrument good to one intent and purpose. The Court, however, held that the statute was not to be construed thus harshly, and Lord Ellenborough, C. J., after observing that in terms the statute purported to vacate only the bill of sale, said "It does not vacate the whole instrument which may happen also to contain any other independent contract between the parties; but that part of it only which operates as a bill of sale.........To go farther, and vacate the covenant for the payment of the money lent, would be going beyond the reason and object of the Legislature in order to work injustice." And Le Blanc, J. said: "The object of the Act, which was to enforce a mere political regulation, is effectually attained by avoiding the transfer of the ships, for want of the requisites in the bill of sale: and there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further." The words which we have quoted seem to us to be apposite to the present case. The Bhagdari Act, like the English statute, has for its object to enforce a political regulation, the preamble setting forth that the permanence of this superior tenure is endangered by the practice of attachment and sale, by civil process, of the homesteads and buildings appertaining to the *bhags*, and that it is desirable to prevent the alienation of any unrecognised portion of a *bhag*. But, as in the English case, there is nothing immoral in such alienations *per se;* for political reasons they are prohibited by law. And as the

English statute, in the words of Lord Ellenborough, vacated only the bill of sale itself, and not any other independent contract which might be contained in the instrument, so section 3 of the Bhagdari Act provides only that it shall not be lawful (*inter alia*) to alienate or mortgage any unrecognised sub-division of a *bhag*, that any such alienation or mortgage shall be null and void, and that the Collector may remove from possession any such alienee or mortgagee who is in possession in violation of the section. It is, in the present case, the mortgage only that is to be avoided, and, following the language of Le Blanc, J., we may say that the object of the Act is effectually attained by avoiding the mortgage and, there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further so as to enable the mortgagor both to recover possession of the security and to retain the moneys advanced. *Kerrison* v. *Cole*[1] was followed in *Payne* v. *Mayor of Brecon*[2], where *Mouys* v. *Leake*[3] was also relied on. This latter case was concerned with the grant of a rent-charge created by a rector out of his benefice, such charge being absolutely void under the statute 13, Eliz. c. 20. But as the deed of grant contained a covenant by the rector personally to pay the charge, the Court refused to order the deed to be delivered up for cancellation, and held the covenant to be valid. The grounds upon which LordKenyon, C. J. put the judgment of the Court were stated in the following words, which appear to us applicable to the present appeal: "In this case," said his Lordship, "one of the defendants executed a deed, by which he granted an annuity or rent-charge out of certain benefices. This is not *malum in se*. There is nothing wrong in such a transaction, except as far as it

(1) (1807) 8 East. 231. (2) (1858) 3 H. & N. 572.
(3) (1799) 8 T. R. 411.

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is prohibited by the statute. If indeed there had been any moral turpitude mixed in it, I would have followed it in all its consequences : but a deed that was intended to operate one way, may operate another way, *ut res magis valeat quam pereat*, if honesty requires it." It seems, therefore, to be clear that where, as here, the covenant is collateral and not merely dependent upon the principal contract, it may, in such circumstances as these, form the proper basis of a claim, even though the main contract be, as here, wholly null and void by statute. It appears necessary to explain that this is so in conformity with the authorities cited, because in *Payne* v. *Mayor of Brecon*[1] Baron Bramwell, as he then was, used language which might seem to cast doubt on the proposition that the covenant might be good even though the alienation might be wholly void by statute. We do not think, however, that the language used was really intended so to decide a question which was not then strictly before the Court, because the learned Judge himself quoted with approval the decision in *Kerrison's case*, where the mortgage of the ships was void by statute, and Watson, B. relied upon Lord Kenyon's judgment in *Mouys* v. *Leake*[2], where the grant of the rent charge was void by statute. The most, therefore, that defendant's counsel can now make of *Payne* v. *Mayor of Brecon*[1], is to say that it was not so strong a case as either of the other two, and that the Court decided the case they had before them ; but in so doing, they expressly approved the decisions in *Mouys* v. *Leake*[2] and *Kerrison* v. *Cole*[3]. For the rest it is only necessary to add that in *Payne's case*[1] the Municipal Corporation of Brecon had borrowed money for a purpose to which the borough fund was not applicable by section 92 of 5 and 6 Will. 4, c. 76, and

(1) (1858) 3 H. & N. 572. (2) (1799) 8 T. R. 411.
(3) (1807) 8 East 231.

had, as security, executed a deed of mortgage without the approbation of the Lords of the Treasury, as required by section 94 of the Act. The mortgage was consequently invalid, but the deed contained a covenant to repay the borrowed money, and it was held that this covenant was valid. The judgment of the Court was, as we have said, based upon the cases of *Mouys* v. *Leake*(1) and *Kerrison* v. *Cole*(2) as to which Watson, B. said "Those cases are founded on good sense and are sound law, and it would be mischievous to disturb them." That being so, it cannot, we think, be fairly said that in *Payne's case*(3) the Court decided for the validity of the covenant merely because the mortgage executed by the corporation was only invalid, and not wholly void by the statute. Apart from the general reliance on the authority of the cases of *Mouys* v. *Leake*(1) and *Kerrison* v. *Cole*(2), the *ratio* of the decision in *Payne's case*(3) was, in the words of Martin, B., that there was nothing in the statute of Will. IV which prohibited a corporation from entering into a covenant to pay its lawful debts. We find that there is nothing to that purpose in the Bhagdari Act, and that, though the transfer by way of mortgage must be set aside as void under the statute, the English authorities show, consistently with the principles embodied in section 65 of the Indian Contract Act and section 38 of the Specific Relief Act, that the plaintiff is entitled to claim under the covenant.

Now the covenant promises compensation in the event of the disturbance of possession, and the plaintiff's case upon this point is put in this way. The first mortgage was executed on 3rd February 1897, and covered the house now in suit together with certain other properties. By another mortgage of 1901, the house alone

(1) (1799) 8 T. R. 411. (2) (1807) 8 East 231.
(3) (1858) 3 H. & N. 572.

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was secured. The house was never redeemed from the mortgage of 1897, and the possession then transferred to the plaintiff was held by him continuously till July 1909, when it was first challenged by the defendants. Throughout this period, the defendants passed annual rent-notes to the plaintiff, and, consequently, held as the plaintiff's tenants. The last of such rent-notes was passed on 20th June 1908, and it was not till after the expiry of this rent-note, that is July 1909, that the defendants, upon demand made, refused to surrender possession. The period from February 1897 to July 1909 exceeds the twelve years prescribed by the statute, and the plaintiff relies upon his possession throughout that period as giving him an absolute title to the limited interest and so justifying his claim under the covenant for compensation for disturbance. In our opinion this contention must be allowed. The mortgage and the rent-notes are void, but the plaintiff for over twelve years was in possession of the limited interest as mortgagee in possession and in assertion of that right held adversely to the defendants, who continuously attorned to him. As against the defendants the plaintiff's title to the limited interest had become absolute by July 1909, and it is now too late for the defendants to deny either the plaintiff's possession or their own disturbance of that possession in July 1909. If authority be needed for these conclusions, we may refer to *Adam Umar* v. *Bapu Bawaji*[1] as showing that possession held under an alienation void under the Bhagdari Act is adverse to the true owner, and to *Budesab* v. *Hanmanta*[2] as showing that possession of a limited interest, equally with possession of the absolute interest, creates, when held adversely for the statutory period, an unimpeachable title.

[1] (1908) 33 Bom. 116.

[2] (1896) 21 Bom. 509

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It follows that the plaintiff has a good claim for compensation under the covenant. But since the mortgage is void, the amount of the claim must, under the *Damdupat* rule, be limited to double the principal. There will therefore be a decree for the plaintiff for Rs. 400 with costs throughout and interest on judgment at 6 per cent. till realisation.

Decree varied.

J. G. R

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1915. *January* 8.

VITHAL RAMKRISHNA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PRAHLAD RAMKRISHNA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Mitakshara—Partition by grandsons—Paternal step-grandmother entitled to a share.

According to the Mitakshara, the paternal step-grandmother is entitled to a share in the family estate when it is partitioned among her grandsons.

APPEAL from the decision of N. B. Majumdar, First Class Subordinate Judge of Dhulia.

Suit for partition.

The facts were that one Sitaram died leaving him surviving a son Ramkrishna by his first wife, and a widow Gangabai, his second wife. On Ramkrishna's death, two of his sons (plaintiffs) sued the other three (defendants) for partition of the family property.

The defendants contended *inter alia* that Gangabai (the paternal step-grandmother) was entitled to a share on partition of the property and was a necessary party to the suit.

* First Appeal No. 218 of 1912.