

paternal uncle of the defendant, that the father of the defendant and Krishnáji were divided and that she was entitled to the property of Krishnáji.

The defendant alleged that Krishnáji was his father's brother, that Krishnáji's son, the husband of the plaintiff, had predeceased Krishnáji, that he held the subject-matter of the suit as his own property, and that Krishnáji gave his share to him by a will. Both the lower Courts held that the plaintiff was the heir of her father-in-law and preferable to the defendant who was the son of Krishnáji's separated brother. The defendant preferred an appeal to the High Court which was decided on 12th June, 1871, by Mr. Justice Melvill and Mr. Justice Kemball.

MELVILL, J.—We think the decision of the Courts below must be reversed. The plaintiff's claim is by virtue of inheritance from her father-in-law Krishnáji. We think that the defendant who was the son of the brother of the deceased Krishnáji, is entitled to inherit before the daughter-in-law. The defendant had put forward a will made by Krishnáji, which was unnecessary, as he was heir-at-law, and this will contains a provision for plaintiff's maintenance. The validity of this will is disputed by the plaintiff, and we cannot now consider how far that provision is binding, nor can we make any award for maintenance for which, if so advised, the plaintiff can bring another action.

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## APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.*

NILO PA'NDURANG (ORIGINAL PLAINTIFF), APPELLANT, v. RAMÁ  
PA'TLOJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

July 31.

*Mortgage—Money decree against mortgagor—Sale of equity of redemption by mortgagor—Mortgaged land attached and sold in execution—Claim by purchaser of equity of redemption.—Civil Procedure Code, Act VIII of 1859, Sec. 246—Civil Procedure Code, Act XIV of 1882, Secs. 278 to 283.*

In 1870 B. mortgaged to N. with possession a certain piece of land. On 17th June, 1871, M. and T. obtained a money decree against B. On 9th March, 1872, the defendants bought from B. his equity of redemption. In July, 1872, M. and T. attached the land in execution of their decree. The defendants objected to the attachment under section 246 of the Civil Procedure Code, Act VIII of 1859, but on investigation of their claim an order was made disallowing their claim on the 23rd December, 1872. In June, 1873, the defendants paid off the mortgage debt and were put into possession by the mortgagee. In October, 1873, M. and T. put up the land for sale in execution of their decree and the plaintiff became the purchaser. On seeking to obtain possession the plaintiff was resisted by the defendants whose claim was allowed by the Subordinate Judge after inquiry. The plaintiff, therefore, brought this suit under section 335 of the Civil Procedure Code Act XIV of 1882. The lower Courts rejected his claim. On appeal to the High Court,

\* Special Appeal, No. 195 of 1883.

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*Held* that where under section 246 of the Civil Procedure Code Act VIII of 1859, or the corresponding sections (273 to 283) of the Civil Procedure Codes of 1877 and 1882 an order has been passed against any person making a claim to property under attachment, such person may bring a suit to establish his title to the property within one year from the date of such order; but in default of his bringing such suit within the prescribed time he is precluded from asserting his title against the auction purchaser whether as plaintiff or defendant. • In the present case an order had been passed against the defendants under section 246 of the Civil Procedure Code, 1859, on the 23rd December 1872; and as they had brought no suit within a year from that date, they could not now contest the plaintiff's title to the property.

The defendants however having, since the date of the said order, paid off the mortgage, *held* that it would be contrary to justice, equity and good conscience, for the Court to assist the plaintiff in obtaining possession unless he paid the defendants the amount paid by them to the mortgagee to free the property from the incumbrance.

THIS was a second appeal from the decision of R. F. Mactier, District Judge of Sátára, confirming the decree of Ráv Bahádur Purushottam S. Binivale, Subordinate Judge (First Class) of Sátára.

In 1870 one Bála bin Apa mortgaged with possession to Narhargir a piece of land belonging to him. On the 17th of June, 1871, two brothers, Mádhavráv and Trimbakráv obtained a money decree against Bála. On the 9th of March, 1872, the defendants purchased the equity of redemption from Bála. In July or August, 1872, Mádhavráv and Trimbakráv in execution of their decree attached the land. The defendants objected to the attachment, but after inquiry under section 246 of the Code of Civil Procedure of 1859 the Subordinate Judge on the 23rd of December, 1872, disallowed the defendants' claim. On the 2nd of June, 1873, the defendants paid off the mortgage and obtained a release from the mortgagee of all claim upon the land, and were put into possession by the mortgagee. On the 18th October, 1873, M. and T. sold the land in execution, and the plaintiff became the purchaser. On seeking to obtain possession he was resisted by the defendants in whose favour the Subordinate Judge made an order after a summary inquiry. The plaintiff therefore brought the present suit in 1880 under section 335 of the Code of Civil Procedure, Act XIV of 1882, to establish his title to the possession of the property. The defendants contended that they were in

possession under a deed of sale previous to that of the plaintiff and that the sale to the plaintiff was invalid, as at the date of it the land was in the possession of Narhargir to whom it had been mortgaged.

Both the lower Courts allowed the defendants' contention and rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

*Ganesh Rámchandra Kirloskar* for the appellant.—The objection of the defendants under section 246 of Act VIII of 1859 was disallowed on the 23rd of December, 1872. Within a year from that date they took no steps to establish their right. They cannot therefore retain possession against the plaintiff—*In the matter of Bance Madhab Roy*<sup>(1)</sup>; *The Collector of Ahmedabad v. Sámal-dás Bechar-dás*<sup>(2)</sup>; *Krishnáji Vithal v. Bháskar Rangnáth*<sup>(3)</sup>; *Rango Vithal v. Rekhardás Rayachand*; <sup>(4)</sup> and *Badri Prasád v. Muhámmad Yusuf*<sup>(5)</sup>.

*Ghanashám Nilkanth Nádkarni* for the respondent.—The sale to the plaintiff was without possession and therefore invalid. The defendants are in possession, which they obtained by paying off the mortgagee who was in possession and it would be inequitable to deprive them of it and their money. They have done everything they could to fortify their possession. Omission on their part to sue within a year of the order in the summary proceedings does not estop them from contesting the suit—*Sháh Mukh un Láíl Panday v. Sháh Komdun Láíl*<sup>(6)</sup>.

SARGENT, C. J.—In this case the plaintiff was the purchaser, on 18th October, 1873, at auction sale of the land in question in execution of a decree obtained against one Bála bin Apa. The defendants were the purchasers from Bála bin Apa on 9th March, 1872, and on the occasion of the property being attached by the judgment-creditors in execution of their decree, entered an objection under section 246 of the Code of Civil Procedure of 1859, which was disallowed on the 23rd December, 1872. It is not disputed that when the attachment was placed on the property it

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(1) 13 Cal. W. R. 431, Civ., Rul.

(2) I. L. R., 4 Bom., 611.

(5) I. L. R., 1 All., 381.

(2) 9 Bom. H. C. Rep., 205.

(4) 11 Bom. H. C. Rep., 174.

(6) 15 Ben. L. R., 228.

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had been already mortgaged in 1870 by Bala, and was then in the possession of the mortgagee. On the 2nd June, 1873, defendants paid off the mortgage, and obtained a release from the mortgagee of all claim upon the land and a receipt for the mortgage-debt, and were put into possession by the mortgagee. Upon the plaintiff's endeavouring to obtain possession of the land as the auction-purchaser, he was obstructed by the defendants, and the Subordinate Judge, after inquiring into the matter, made a summary order in favour of the latter. The plaintiff has now brought this suit, under section 335 of the Code of Civil Procedure, (XIV of 1882,) to establish his right to the present possession of the property.

Now, the authorities show that where an unsuccessful claimant, under section 246 of the Code of Civil Procedure of 1859 or the corresponding section of the present Civil Procedure Code, fails to assert his title to the property within one year from the date of the order in the summary proceedings, he is precluded from asserting it against the auction-purchaser, whether as plaintiff or defendant. It will be sufficient to refer to the cases of *Rango Vithal v. Rikhwadas bin Rayachand*<sup>(1)</sup>; *Krishnaji Vithal v. Bhaskar Rangnath*<sup>(2)</sup>; and *Badri Prasad v. Muhammad Yusuf*<sup>(3)</sup>. In the first of these cases West, J., says: "In determining the claimant's right in such a suit (alluding to the suit which may be brought to assert his right under section 246 of the Civil Procedure Code of 1859 by the unsuccessful party in the summary proceedings), the Court disposes finally of all rights which have combined to make it up. All the claimant's rights, and, therefore, every individual right, being thus the proper subject of inquiry, the limitation clause shuts out the assertion of any right at all after the lapse of one year." The Full Bench decision in *Badri Prasad v. Muhammad Yusuf*<sup>(3)</sup> carries the above view of section 246 a step further by holding that the unsuccessful party in the summary proceedings cannot assert his right even as a defendant after the expiration of the year. The Court says: "The argument that limitation does not apply to

(1) 11 Bom. H. C. Rep., 178.

(2) I. L. R., 4 Bom., 617.

(3) I. L. R., All., 381.

a defendant is not in our opinion pertinent. The question is whether or not the defendant is not bound by an order which he did not contest within the time allowed him. In our opinion, having failed to prove his right within that time, he is precluded from asserting it by an order which has become final."

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The above conclusions as to the proper interpretation and application of section 246 of the Code of 1859 are still more clearly deducible from the language of the corresponding sections 278 to 283 of the Codes of 1877 and 1882. The last section says: "The party against whom an order under sections 280, 281 and 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit (if any) the order shall be conclusive." In the present suit, therefore, the plaintiff is right in his contention that the defendants cannot rest their right to the possession on their purchase of 9th March, 1872, that title not having been established by a suit within one year from the making of the order of 23rd December, 1872.

The defendants, however, have since the order of the 23rd December, 1872 paid off the mortgage, and the question arises how far they can avail themselves of that circumstance in protecting their possession. Now, it is true the defendants have not taken a transfer of the mortgages either to themselves or a trustee, and that the mortgagee simply dealt with them as the owners of the equity of redemption, and on payment of the mortgage-debt released to them all claims on the property by sale. But although the order of 23rd December, 1872, is conclusive as against the defendants' claim to the equity of redemption, it would be contrary to equity, justice, and good conscience were the Court to assist the plaintiff in obtaining possession without paying the defendants what they have paid to the mortgagee to free the property from the incumbrance and to recover possession of it from the mortgagee. We must, therefore, reverse the decree of the Court below, and direct that the plaintiff be put into possession of the property in question on his paying to the defendants the sum paid by them to the mortgagee to obtain the release of his mortgage rights. Parties to pay their own costs throughout.

*Decree reversed.*