

Statute of Limitations a dead letter. See *Shoteenáth Mookerjee v. Obhoy Nund Roy*⁽¹⁾. It has, however, been stated before us that the original obstruction was by a third person, and that the present obstruction is by the judgment-debtor himself. No point was made of this before the Subordinate Judge. But assuming it to be the case, and that the present obstructor does not claim in any way through the third person who was in possession in 1877, which, however, is denied by the *vakil* for the opponent, it may be that, as three years have not elapsed since the applicant came of age, summary proceedings might be taken, under the Civil Procedure Code, to remove such an obstruction notwithstanding what occurred in 1877. We must, therefore, reject the application for the exercise of the extraordinary jurisdiction, and leave the applicant to take such proceedings as he may be advised.

Application refused with costs.

(1) I L. R., 5 Cal., 331.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánábhái Hariddás.*

SAWÁBA KHANDÁPA, (ORIGINAL PLAINTIFF), APPELLANT, v. ABÁJI
JOTIRÁV, (ORIGINAL DEFENDANT), RESPONDENT.*

1887.
February 15.

Mortgage—Regulation V of 1827, Sec. 15—Mortgagee in possession, liability of, to protect the mortgaged property from claims under a paramount title—Limitation for a suit to recover debt personally from the mortgagor where mortgage-deed contains no personal undertaking of repayment.

By a registered mortgage-deed dated the 11th May, 1876, the defendant mortgaged certain land with possession to the plaintiff for a term of five years, the mortgage-deed stipulating that the plaintiff was to enjoy the profits, pay the assessment for it, and restore it to the defendant on repayment of the debt. But no personal undertaking to pay was given by the defendant. The land was sold by the revenue authorities for arrears of assessment due from the defendant for certain other lands of the defendant. The plaintiff now sought to recover the debt personally from the defendant. The Court of first instance dismissed the plaintiff's claim, on the ground that the failure, on the part of the plaintiff, to pay the arrears of assessment, disentitled him to recover the debt from the

*Civil Reference, No. 1 of 1887.

1887.
VINÁYKRÁV
AMRIT
v.
DEVBRÁO
GOVIND.

1887.

SAWÁPA
KHANDÁPÁ
v.
ABÁJI
JOTIRÁY.

defendant personally. The plaintiff appealed to the District Judge, who referred the case to the High Court.

Held, that the plaintiff was not bound to save the mortgaged property from a paramount title, his liability being confined, under the terms of the mortgage, to the payment of assessment for the property mortgaged which he had duly discharged, and that the case did not fall under section 15⁽¹⁾ of Regulation V of 1827. The mortgage consideration for the debt having failed, the debt was recoverable within three years--the registered mortgage-deed containing no personal undertaking by the defendant (mortgagor) to pay the loan.

THIS was a reference by S. Tágoré, District Judge of Sholápur-Bijápur, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff in this case sought to recover the amount due on a mortgage-bond, dated 11th May, 1876, from the defendant personally, as the land mortgaged by the bond had been sold by the revenue authorities for arrears of Government assessment which were due upon other land of the defendant.

The Subordinate Judge of Mádba, being of opinion that it was the plaintiff's duty, as mortgagee in possession, to pay up arrears of revenue, in order to save the property from sale, held that the plaintiff had lost his right to recover the debt personally, and, accordingly, dismissed the plaintiff's claim with costs.

On appeal, the District Judge of Sholápur-Bijápur referred the following questions to the High Court for its decision :—

1. Whether, under the circumstances, the plaintiff was bound to pay up arrears of Government revenue to save the property from sale ?
2. Whether, under the circumstances, and having regard to the provisions of the mortgage-bond, the plaintiff is entitled to sue the defendant personally for the mortgage-debt ?
3. Whether the suit is barred by the law of limitation ?

The District Judge's opinion on the first point was in the affirmative, and on second and third in the negative.

The following is a translation of the mortgage-bond :—

“ I, Abáji Jotiráy, Kulkarni of Nárkhed, hereby pass to you this mortgage-deed in *Fusli* 1285, to the effect that the lands

(1) Section 15.—When a creditor is placed in possession of property by mortgage or otherwise, as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security.* * * * *

(as mentioned in the deed), which stand in the name of my brother, Balbhim Joti, and which are in our joint occupancy, have been mortgaged to you for the consideration of bonds for Rs. 150 passed to you by my brother, and which are hereby cancelled, and this deed passed, in lieu thereof, for the above-mentioned sum of Rs. 150. I hereby make over possession of the said lands to you. You should enjoy the same in lieu of interest on the said sum." (Here follows the description of the lands.)

"The above lands have been given to you for a period of five years. You should restore the lands to me on payment of the loan of Rs. 150. Your claim and title over the lands will cease after the amount is paid. You should pay the Government assessment of the lands yourself. We are not responsible for the same. You should keep the boundary marks in repair. We shall redeem the land on payment of the sum and at the close of the cultivating season.

"I have passed this deed of mortgage of my own accord and in my right senses. Dated *Vaishákh, Vadya 3, Shaka 1798* (11th May 1876).

"In the hand of Pralhád Rámchandra Atre.

(Signed) ABA'JI JOTIRÁV.

"I, Balbhim Joti, the brother of the executant of the deed, hereby declare my consent to the terms of the mortgage-deed."

Mahádev B. Chaubal for the plaintiff.

Vásudev Gopál Bhandárkar for the defendant.

SARGENT, C. J. :—The mortgagee was only under an obligation, by the terms of the mortgage, to pay the assessment due in respect of the mortgaged lands, and this obligation he duly discharged. There is no rule of law which requires the mortgagee to incur expense to save the mortgaged property from a paramount title. The mortgagee's security, therefore, came to an end by the default of the mortgagor in paying the assessment on the other lands standing in his brother's name; and under these circumstances, we do not think that Regulation V of 1827, sec. 15, would apply. The mortgage consideration for the loan

1887.

SAWÁBA
KHANDÁPÁ
P.
ABÁJI
JOTIRÁV.

1887.

SAWÁBA
KHANDÁPÁ
v.
ABÁJI
JOTIRÁV.

having failed—see *Báláji v. Dáji* ⁽¹⁾—it became at once recoverable by the plaintiff, the action for which, however, would be barred in three years, as the registered mortgage contains no undertaking by the mortgagor to pay the loan.

(1) Printed Judgments for 1884, p. 59.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

LALLU TRIKAM, APPLICANT, v. BHA'VLA MITHIA' AND

ANOTHER, OPPONENTS.*

1887.

February 24.

Execution of a decree—Decree transferred to the Collector for execution—Collector's duties and powers in execution—Civil Court's jurisdiction to revise Collector's proceedings in execution—Civil Procedure Code (Act XIV of 1882), Secs. 320-325.

A decree was transferred to the Collector for execution. The Mámlatdár, under the orders of the Collector, put up for sale certain immovable property belonging to the judgment-debtors. The sale was confirmed by the Mámlatdár with the sanction of the Collector.

Some time afterwards the auction-purchaser applied to the Collector for a certificate of sale, but the Collector refused the certificate, and set aside the sale, on the ground that the purchaser was a relative of the decree-holder, and had really purchased the property on his behalf without the permission of the Court.

Against this proceeding of the Collector the purchaser made an application, first to the Subordinate Judge who had transferred the decree to the Collector for execution, and then to the District Court. But both Courts declined to entertain his application, on the ground of want of jurisdiction.

Held, on an application to the High Court, that the Subordinate Judge had jurisdiction to deal with the application, and to revise the Collector's proceedings in execution.

Held, also, that the Collector having through his subordinate put up for sale the judgment-debtor's property, and confirmed the sale, had in that way completely executed the decree so far as he could, and was so far *functus officio*. His duty was to make a return to the Court of what he had done. After confirmation of the sale he could not set it aside.

Per WEST, J.—The Collector, like the Názir in India, is a ministerial officer when he executes a decree. He, like the Názir, must carry out the decree of a Civil Court in general subjection to the judicial direction of the Court on whose authority the coercive power exercised by him rests, and which alone can deal judicially with the questions that arise in execution. His proceedings and orders

* Application under Extraordinary Jurisdiction, No. 192 of 1886.