1892.

CHANDRA NÁIK v. BAHINÁBÁI.

As against the Collector no one can acquire a title by adverse possession till the expiration of the period of sixty years under article 149, Schedule II of the Limitation Act. The provisions of the Watandárs Act are similar to the provisions of the Bhágdári Act (Bombay Act V of 1862), and there are rulings to show that under the Bhágdári Act there was no period of limitation prescribed for making an application, and, therefore, such applications were not governed by any particular period under the Limitation Act—*The Collector of Broach* v. *Rájárám Láldás*(1); *The Collector of Thána* v. *Bháskar Mahádev*(2).

SARGENT, C. J.:—The sending the certificate by the Collector as contemplated by section 10 of the Watandárs Act is not an application to the civil Court, but only a proceeding in the nature of a notification which, the Watandárs Act itself provides, shall be acted upon by the civil Court in a certain manner. Clause 178 of the Limitation Act has, therefore, no application to it. We think that the Subordinate Judge cannot refuse to act on the certificate of the Collector, as expressly required by section 10 of Bombay Act III of 1874. If the purchaser has, since his purchase, acquired a title by adverse possession, it will be for him to take the proper measures to assert it as against the Collector or any other party, as the case may be.

Order accordingly.

(1) I. L. R., 7 Bom., 542. (2) I. L. R., 8 Bom. 264.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.

CHIMNA'JI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SAKHA'RA'M AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1892. *June* 20.

Mortgage—Redemption—Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of a mortgage other than the mortgage in respect of which suit brought—Right of plaintiff to have the question of latter mortgage determined—Practice—Procedure.

The plaintiff as purchaser of the equity of redemption sued for redemption. He alleged a mortgage, dated A.D. 1849, for Rs. 175. The defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger

* Second Appeal, No. 255 of 1891.

1892.

CHIMNÁJI v. SAKHÁRÁM.

sum. After the evidence was given, but before the judgment was delivered, the plaintiff applied to amend the plaint and to set up the mortgage admitted by the defendants. His application was refused, and the Court dismissed the suit on the ground that he had failed to prove the particular mortgage alleged in the plaint. The District Judge confirmed the decree, but observed that there probably was a mortgage for the larger sum as alleged by the defendants. On second appeal,

Held, reversing the decree and remanding the case, that the plaintiff was entitled to have the question of the mortgage for the larger sum inquired into.

SECOND appeal from the decision of T. Hart-Davies, Acting Assistant Judge of Poona.

Suit to redeem a mortgaged house.

The plaintiff alleged that on the 1st February, 1887, he had purchased the equity of redemption under a mortgage for Rs. 175, dated A.D. 1849, executed by one Rakhmáji to one Shiduji. He now sued to redeem the mortgage.

The first defendant (Sakhárám) was a son of the deceased mortgagee Shiduji. He denied the mortgage alleged by the plaintiff, but admitted another mortgage of a different date and for a different amount, *viz.*, for Rs. 256. He further stated that a moiety of the house belonged to him as his share.

Defendant No. 2 (Bábáji) was the second son of Shiduji. He denied the mortgage altogether, and claimed the house as his. He also alleged that his brother Sakhárám, (defendant No. 1), was in collusion with the plaintiff. He also pleaded limitation.

After the evidence was given, but before the judgment, the plaintiff applied to amend the plaint by alleging a mortgage for Rs. 256. The Court refused the application, but allowed the valuation of the claim to be increased to Rs. 256. It then dismissed the suit, holding that the particular mortgage alleged by the plaintiff was not proved. He was of opinion, however, that the evidence showed that the house had been mortgaged. On appeal the District Judge confirmed the decree, remarking that there probably had been a mortgage executed by the mortgagors to the mortgagee at some date prior to 1855 A.D. for Rs. 256, but, as that was a different transaction from the one sued on, the plaintiff was not entitled to succeed.

1892.

CHIMNÁJI v. SAKHÁRÁM.

The plaintiff preferred a second appeal.

Mahádeo Chimnáji Apté for the appellant:—The Courts should not have dismissed the suit, both being of opinion that there was a mortgage by the plaintiff's assignors to the defendants' family. The evidence given by plaintiff was *primâ facie* sufficient, and it lay on the defendants to displace it—*Hiru* v. *Bhikáji*[1]; *Chinto* v. *Suga*[2]; *Gánesh* v. *Vináyak*[3]; *Raghunáth Annáji* v. *Bábáji*[4].

The plaintiff ought to have been allowed to amend his plaint, as the nature of the suit would not have been materially affected thereby—*Lakshman* v. *Hari*[5].

Gangárám B. Rele for the respondent, (defendant No. 2):—The Subordinate Judge was right in not allowing the plaint to be amended. The application was made too late, *viz.*, about a year after the defendant No. 1 filed his written statement alleging the mortgage of Rs. 256, and five days before the judgment. The plaintiff failed to prove the mortgage he alleged in his plaint. He cannot be allowed now to prove another mortgage. When a particular instrument is sued upon, the plaintiff must establish his case on that particular cause of action and not on one similar to it—*Vithaldás* v. *Yedu*[6]; *Narsapa* v. *Bhimangavda*[7]; *Moro* v. *Dáda*[8]; *Lakshman Trimbak* v. *Bhagirathibái*[9]; *Govindráo* v. *Rágho*[10].

CANDY, J.:—The plaintiff sues as purchaser of the equity of redemption from certain Telis to redeem a mortgage which in his deed of assignment is recited as having been executed in *Shake* 1761 (A.D. 1839) for Rs. 175 to one Shiduji Máli. The first defendant, the elder son of the deceased Shiduji, pleaded that the mortgage was for Rs. 256, and not in *Shake* 1761; the second defendant, the second son of Shiduji, denied the mortgage altogether; and the third defendant, the sub-mortgagee under defendant No. 1, did not resist the claim.

(1) P. J., 1888, p. 131.
(2) P. J., 1886, p. 247.
(3) P. J., 1889, p. 370.
(4) P. J., 1890, p. 297.
(5) I. L. R. 4 Bom., 584.
(6) P. J., 1876, p. 270.
(7) P. J., 1877, p. 190.
(8) P. J., 1889, p. 159.
(9) P. J., 1892, p. 192.
(10) I. L. R., 8 Bom., 543.

1892.

CHIMNÁJI v. SAKHÁRÁM.

The Subordinate Judge included in the first issue framed by him the question whether the principal mortgage money was Rs. 175 or Rs. 256, and allowed the valuation of the claim to be increased to Rs. 256, but he rejected the claim, (quoting the case at I. L. R., 8 Bom., 543), on the ground that the particular mortgage recited by plaintiff had not been proved.

The District Judge confirmed this decision, though he thought it probable that there was a mortgage for Rs. 256.

We are of opinion that both the lower Courts have erred. In the case of *Govindráv* v. *Rágho*[1], (on which the Subordinate Judge relied,) the defendant pleaded that the lands were his ancestral property, and denied that there had at any time been any mortgage. Plaintiffs resorted to dishonest artifices to procure evidence of their case, and it was held that as a specific mortgage was sued on, and not proved, the Court was not authorized to give a decree on some indefinite supposed mortgage, which by the hypothesis the plaintiff could not have sued on. That case is easily distinguished from such cases as those to be found at I. L. R., 4 Bom., 584; P. J. for 1888, p. 131; P. J. for 1890, p. 297. In *Lakshman* v. *Hari*[2], defendant admitted that the relations between the plaintiff and himself were those of mortgagor and mortgagee, but pleaded the bar of limitation; it was held that when the question of limitation was decided in plaintiff's favour, then the amount of the mortgage debt was to be decided. The case of *Hiru* v. *Bhikáji*[3] is very similar to the present case, the defendants admitting that there was a mortgage, but pleading that it was for a different sum and of an earlier date. But the case of *Moro* v. *Dáda*[4] was very different; for there the defendant referred to a mortgage only to show that it had been paid off, not to admit any liability upon it.

We think, therefore, in the present case that the plaintiff was entitled to have the question of the mortgage for Rs. 256 inquired into, and we reverse the decrees of the lower Courts and remand the case for a decision on the merits. All costs hitherto incurred to abide the result.

Decree reversed and case remanded.

(1) I. L. R., 8 Bom., 543.
(2) I. L. R., 4 Bom., 584.
(3) P. J., 1888, p. 131.
(4) P. J. for 1889, p. 159.