

1901.
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by him with reference to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Chandavarkar.

1901.
 August 26.

BHIMAPPA (ORIGINAL DEFENDANT No. 8), APPELLANT, v.
 IRAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (XV of 1877), sch. II, art. 11—Civil Procedure Code (Act XIV of 1882), section 335—Order under section 335—Subsequent suit—Partition—Present possession—Limitation.

The plaintiff purchased certain land at a Court sale in execution of a money decree against defendant No. 1. In attempting to obtain possession he was obstructed by defendant No. 8, who claimed the land under a mortgage with possession from the coparceners of defendant No. 1. He then applied to the Court for the removal of the obstruction under section 335 of the Civil Procedure Code (XIV of 1882), but his application was rejected on the 12th March, 1898. The present suit was brought on the 13th March, 1899, in which the plaintiff, while seeking a partition of the family property of the defendants, prayed that the order of the 12th March, 1898, might be set aside and a partition directed, and that at such partition he might be allotted and put in possession of the land in dispute.

Held, that the suit was barred under article 11 of the Limitation Act, 1877, as it was not brought within a year after the date of the order of the 12th March, 1898, passed under section 335 of the Civil Procedure Code, and as it was in form and substance one for establishing the plaintiff's right to and for the present possession of the particular land in question.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree passed by Ráo Sáheb Sheshgiri Ramchandra Koppikar, Joint Second Class Subordinate Judge at Dhárwár.

Suit by the plaintiff for possession of certain land (Survey No. 78) which he had purchased at an execution sale.

The land in question was the joint property of defendants Nos. 1 to 4, of whom defendants Nos. 3 and 4 were minors represented by their mother (defendant No. 5).

* Second Appeal No. 85 of 1901.

In September, 1892, defendant No. 5 as such guardian mortgaged the land with possession to defendant No. 8.

One Chanappa subsequently obtained a money decree against defendant No. 1, and sold the land in execution, and it was bought by the plaintiff on the 21st August, 1895, whose attempt to take possession was resisted by the mortgagee (defendant No. 8). He accordingly applied to the Court under section 335 of the Civil Procedure Code, but his application was rejected on the 12th March, 1898.

On the 13th March, 1899, the plaintiff filed this suit praying as follows :—“That a partition may be effected of the family property: that land No. 78 may be allotted to the share of defendants Nos. 1 and 2: that his title as auction-purchaser may be declared thereto; and that he may be put into possession.”

The mortgagee (defendant No. 8) pleaded that the suit was barred by limitation.

The Subordinate Judge passed a decree for the plaintiff, and in over-ruling the plea of limitation he said :

The adverse order against plaintiff was passed on 12th March, 1898, in the miscellaneous proceeding. The present suit was brought on the 13th March, 1899. In the plaint as first presented, the name of defendant No. 8 was omitted, though the matter relating to him appeared in the body of the plaint. The omission seems to have been a pure clerical mistake, and it was supplied by application dated 14th July, 1899. The application is more than a year from the order, though the plaint was filed in time. On the authority of the ruling in *Bhaguji v. Aniba* (I. L. R. 5 Bom. 25) I hold the present suit for partition is not time-barred.

On appeal, the District Judge confirmed this decree.

The mortgagor (defendant No. 8) preferred a second appeal.

S. V. Bhandarkar for the appellant (defendant No. 8) :—This suit is barred by article 11 of schedule II of the Limitation Act (XV of 1877). A suit for possession does not cease to be so, even if it contains a prayer for general partition. It is clear from the plaint that the plaintiff's real object was to get the order of the 12th March, 1898, set aside, and to obtain possession.

D. W. Pilgaonkar for the respondent (plaintiff) :—Section 335 of the Civil Procedure Code does not apply to this suit, which is

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one for partition. It applies only when there is a right to present possession. An auction-purchaser of the right, title and interest of an undivided member of a Hindu family has only a right to compel him to come to a partition. He cannot sue for present possession. Hence article 11 of the Limitation Act (XV of 1877) cannot apply. In the corresponding section of the Civil Procedure Code of 1859, the word was only "possession" and not "present possession." The case of *Rango v. Rikhhivadas* ⁽¹⁾ has no application, being a decision under the old Act. A general suit for partition does not cease to be so, although it contains a prayer to set aside the order of the execution Court,

CHANDAVARKAR, J. :—Both the lower Courts have not properly considered the question of limitation, which, in our opinion, is fatal to the plaintiff's suit as it was brought. He bought the right, title and interest of defendant No. 1 in Survey No. 78 at a Court sale, and when he went to take possession he was obstructed by defendant No. 8, who claimed under a mortgage from defendant No. 5, the guardian of defendants Nos. 3 and 4. The plaintiff then applied to the Court for the removal of that obstruction under section 335 of the Code of Civil Procedure, but failed. The order passed against him under that section is dated the 12th March, 1898. He brought the present suit on the 13th March, 1899.

On the face of it the suit is barred, not having been brought as required by article 11 of schedule II of the Limitation Act, 1877, within a year after the date of the order passed under section 335. But the Subordinate Judge who tried the suit held, following *Bhaguji v. Anibaba*, ⁽²⁾ that as the present was a suit for a partition of the family property of the defendants, article 11 of the Limitation Act did not apply. That was a case where the plaintiff brought a suit for the possession of a certain land under the Mámlatdárs' Act and failed. More than three years after the Mámlatdár's decree, the same plaintiff brought a suit for the partition of the family property which included the land to which the Mámlatdár's decree related. In such a case the Limitation Act (article 47) provides that any person bound by the Mámlat-

⁽¹⁾ (1874) 11 Bom. H. C. R., 174.⁽²⁾ (1877) 5 Bom. 25.

dár's decree cannot bring a suit "to recover the property comprised in such decree" more than three years after its date. But a suit brought for partition, in which the property comprised in the Mámlatdár's decree is brought into hotchpot, is not a suit for the recovery of that property. It is a suit for the recovery of such share as the plaintiff may get on partition. The mere fact that the property comprised in the Mámlatdár's decree is included in the subsequent suit for partition does not make the properties in both identical. In the eye of the law, the property of which exclusive possession was sought in the Mámlatdár's Court is different from the property of which a share is claimed on the ground of a joint title, and it is only an accident that the plaintiff in the partition suit may get the former property allotted to his share. But where, as in the present case, the plaintiff claimed in the miscellaneous proceeding under section 335 of the Code of Civil Procedure a right to the possession of certain property and failed, and more than a year after the date of the order passed against him under that section he brings what is in name a suit for partition but in substance a suit for the possession of that very property under the selfsame right put forward without avail in the miscellaneous proceeding, his suit is "to establish his right" to the same property covered by the order.

We have carefully examined the plaint in this case, and we find that while seeking a partition of the family property of the defendants he prays that the order in the miscellaneous proceeding be set aside and a partition directed, and that at such partition he be allotted and put in possession of Survey No. 78. He values his claim not as for the one-fourth share of defendant No. 1 under whom he claims, but at five times the assessment of Survey No. 78. The suit is therefore, both in form and substance, one for establishing the plaintiff's right to and for the present possession of Survey No. 78, and, having been brought more than a year after the date of the order in the miscellaneous proceeding under section 335 of the Civil Procedure Code, is barred: see *Bhau v. Bapaji*.⁽¹⁾ The plaintiff may have some right as the purchaser of the right, title and interest of defendant No. 1 in Survey No. 78, and may be entitled to it hereafter. But, as was held in *Bhau v. Bapaji* we need not consider any hypothetical

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case in this suit, the prayer of which is the same as the prayer of this application in the miscellaneous proceeding.

We must, therefore, following that ruling, reverse the decrees of the Courts below and reject the plaintiff's claim with costs throughout on him.

Decree reversed.

FULL BENCH.

CRIMINAL REFERENCE.

*Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy
and Mr. Justice Chandawarkar.*

KING-EMPEROR v. SADA.*

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August 28.

*Criminal Procedure Code (Act V of 1898), sections 4 (h), 250—Complaint—
Report of Police officer—Complaint by a Police officer in a non-cognizable
case—False complaint—Compensation.*

There is no section in the Criminal Procedure Code, 1898, which empowers a Police officer to make, of his own motion, any report to a Magistrate in a non-cognizable case; hence, where he files a formal complaint in such a case, he cannot be said to 'make a report' and his complaint falls within the definition of 'complaint' in section 4 (h) of the Criminal Procedure Code, 1898.

Where a Police officer appears before a Magistrate and makes a formal complaint of a non-cognizable offence, which is found to be false, the Magistrate can order him, under section 250 of the Criminal Procedure Code, to pay compensation to the accused.

REFERENCE made by Frederick Pratt, District Magistrate of Kaira, under section 438 of the Criminal Procedure Code (Act V of 1898).

The complainant Tatia Hariba, a Constable in the Kaira District Police, filed a complaint against Sada for committing a nuisance on the public road, under section 61 of the Bombay District Police Act (Bom. Act IV of 1890).

The Police Constable appeared before the Third Class Magistrate of Matar and stated the facts on solemn affirmation.

* Criminal Reference No. 26 of 1901.