

the sale till the determination of that suit. Instead of that he caused the sale to be held under the proclamation which contained the encumbrance, and that sale has been confirmed by the Court. No fraud is alleged on the part of the defendant No. 2, on the contrary his action has been held by the lower Courts to have been throughout *bond fide*. He cannot, therefore, now be deprived of what he has bought. Possibly, if the mortgage is non-existent, the plaintiff might have a remedy against the defendant No. 1 in the form of an action for slander of title, but that is quite different to what he asks for in the present suit. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

BALVANTRAO (ORIGINAL PLAINTIFF), APPLICANT, v. F. L. SPROTT
(ORIGINAL DEFENDANT), OPPONENT.*

Māmlatdār's Court—Jurisdiction of Māmlatdār over officers of Government sued in their official capacity—Act XIV of 1869, Sec. 32—Act X of 1876, Sec. 15—Bombay Irrigation Act (Bom. VII of 1879), Sec. 48—Leakage water—Rights of riparian proprietors—Water-course.

A Māmlatdār has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

A Māmlatdār has no power to inquire into matters not covered by the issues laid down by the Act itself.

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GANESH.

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April 10.

*Qualified
in 31 Bom.*

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APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Suit for an injunction.

Plaintiff was the owner of certain land (Survey No. 13) at the village of Loni, through which a stream of water flowed.

In 1893 the Irrigation Department sought to levy leakage rates on the plaintiff's land (Survey No. 13), alleging that the water of the stream was derived by leakage and percolation from a certain canal called the Mula Mutha Canal. Plaintiff resisted this levy, contending that the water of the stream was natural spring water and not canal leakage water.

While this matter was under the consideration of Government, a neighbouring owner of land (Survey No. 17) at the suggestion of the irrigation officers erected a dam across the stream so as to prevent the stream flowing down to plaintiff's land (Survey No. 13).

Thereupon plaintiff sued the owner of Survey No. 17 in the Mámlatdár's Court and obtained an order directing the dam to be removed and plaintiff's use of the stream to be restored.

Under this order the dam was removed by the village officers on 4th June, 1897.

On the 8th June, 1897, the irrigation officers re-erected the dam in Survey No. 17 which had been removed in execution of the Mámlatdár's order, and again prevented the water of the stream from flowing on to plaintiff's field.

Thereupon plaintiff filed the present suit in the Mámlatdár's Court, praying for an injunction against the Executive Engineer for Irrigation at Poona and three of his subordinates.

The defendants pleaded (*inter alia*) that under section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876, the Mámlatdár's Court had no jurisdiction to try a suit brought against officers of Government for acts done by them in their official capacity, and that the plaintiff had no right to sue.

The Mámlatdár held that he had jurisdiction to take cognizance of the suit against officers of Government. He further held, however, that as the water of the nála was canal leakage water, the Irrigation Department had a right to erect the dam and to give the sole

use of the water to the occupant of Survey No. 17. He, therefore, dismissed the plaintiff's suit.

Against this decision plaintiff applied to the High Court under its revisional jurisdiction.

Branson (with him *Ganpat Sadashiv Rao*) for applicant:—The Mámíatdár was wrong in discussing the title to the water of the nála. His finding that the water of the nála is canal leakage water is beside the question. Even assuming that it is leakage water, that does not empower the Irrigation Department to stop the flow of the water to plaintiff's land. Under section 48 of Bombay Act VII of 1879 the irrigation authorities can only levy leakage rates, if the requirements of the section are fulfilled; but they cannot dam up the stream, and obstruct the plaintiff's user of the water. The Mámíatdár has no authority to inquire into the legality of the obstruction caused — *Ganesh v. Ramchandra*⁽¹⁾. The only issues he has to try are those specified in section 15 of the Mámíatdárs' Courts Act (Bombay Act III of 1876). He was bound to find whether or not the obstruction we complained of was caused by defendant within six months before suit. But he has not done so. His decision is, therefore, illegal. The pleadings of the parties show that the issues laid down in the Act must be decided in plaintiff's favour.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for opponent:—The Mámíatdár's Court has no jurisdiction over officers of Government for acts done, or purporting to have been done, by them in their official capacity. Section 32 of Act XIV of 1869, as amended by section 15 of Act X of 1876, shows that the Court of a District Judge is the only Court which can have and determine a suit against officers of Government. If a Subordinate Judge or a Court of Small Causes has no jurisdiction over them, *a fortiori* a Mámíatdár's Court cannot have any. On the merits, the Mámíatdár has found that the water of the nála is canal leakage water. The defendant No. 1, who is a canal officer, also says in his evidence that the water is leakage water. His opinion on this point is final and conclusive under section 48 of Bombay Act VII of 1879—*Balvant G. Oze v. Secretary of State for India*⁽²⁾. The water being canal leakage water, the irrigation

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(1) P. J., 1891, p. 96.

(2) (1896) 22 Bom., 377.

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officers have the power under the Act to regulate the supply of such water in such manner as they think fit. See sections 8, 16, 22 of the Act. For this purpose it is open to them to erect a dam across a water-course. And if they erect one, they do no wrong for which an action will lie.

PARSONS, J.:—The first point raised in this application is, whether a Mámlatdár's Court has jurisdiction under the Act of 1876 to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The facts are these:—There is a nála or water-course which rises in the hill to the south of Loui. It runs through several fields, among them Survey No. 17 and Survey No. 13 (which latter field is next to Survey No. 17 and belongs to the plaintiff) and ultimately discharges into the Mutha Mula river. The irrigation canal is carried over it by a bridge at a spot which is over a mile distant from Survey No. 13. The owner of Survey No. 17 in 1897 built a dam across the nála thus preventing the flow of any water into the plaintiff's field; for this the plaintiff sued him in the Mámlatdár's Court and obtained an injunction, under which the dam was destroyed. A few days afterwards the dam was rebuilt by, and by order of, the defendants, who are the Executive Engineer for Irrigation at Poona and three of his subordinates, and the plaintiff has brought the present suit in the same Court to obtain against them the same relief.

The Mámlatdár held that he had jurisdiction, and we think that in this he is right. His Court is a Civil Court; the only enactment cited to us as restrictive of the powers of Civil Courts in their jurisdiction over persons is section 32 of the Bombay Civil Courts' Act, 1869, but it mentions Subordinate Judges and Courts of Small Causes only, and the Court of a Mámlatdár is neither of these.

The next point relates to the legality of the order of the Mámlatdár dismissing the suit, and as to this there can be no doubt that the Mámlatdár has been hopelessly wrong. He framed the proper issues, but instead of deciding as to the possession or enjoyment of the use claimed, he entered upon a long

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discussion into the title to the water in the nála and came to the conclusion that it was not natural water but canal leakage water and, as such, he says, the Irrigation Department had a perfect right to utilize it in the most advantageous manner, and to dam it up when and where they pleased, and to give the sole use of it to the occupant of Survey No. 17. The fact, that he thus tried a question of title and declined jurisdiction because he found that the water belonged to the Irrigation Department and not to the plaintiff, without any enquiry into the question of possession or enjoyment, would oblige us to reverse his order and remand the suit for retrial; but we think it necessary here to add a few words as to the nature of the title thus set up for the defendants by the Mámlatdár, for that it was set up by the Mámlatdár and not by the defendants is clear from the pleadings. Water which has leaked from a canal into the land of other persons would not belong to the Irrigation Department, so that the latter would have the right to follow it up and claim it as their own. Ordinarily it would belong to the owner of the soil, and the Act only gives the department the special right of charging a water-rate on the land which derives benefit from the leakage (see section 48 of the Bombay Irrigation Act, 1879). If the leakage flow was such that it itself had become in the eye of the law a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses. In the present case, the leakage flow, if any, was into an admittedly pre-existing water-course, and, therefore, the law applicable to the case is that which would be applicable to that water-course.

The Mámlatdár, however, has nothing whatever to do with the law of the case; all he has to do is to determine three simple issues of fact. Admittedly there is a water-course and there is a flow of water down that water-course, the use of which the plaintiff claims. What, therefore, the Mámlatdár has to determine is, (1) whether the plaintiff is actually in possession or enjoyment of the property or use claimed, (2) whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such possession or enjoyment, (3) whether such disturbance or obstruction or such attempted disturbance or obstruction

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first commenced within six months before the suit was filed ; and to pass a decree according to his findings thereon.

We reverse his present order and remand the case for a decision on the merits. All costs to be costs in the cause.

RANADE, J.:—In this case the applicant, who was plaintiff in the Mámílatdár's Court, had obtained a decree against one Javeri for the removal of a dam which had been constructed by the latter in his own (Survey No. 17) so as to obstruct the flow of a water-course into plaintiff's land (Survey No. 13.) This decree was obtained on 3rd June, 1897, and was executed by the removal of the dam. Within a day or two after, the present defendants, who are respectively (Irrigation) Executive Engineer and his subordinates, set up the dam, and obstructed the flow of water into plaintiff's Survey No. 13, and thereupon plaintiff applied under the Mámílatdárs' Act for an injunction to restrain the defendants from obstructing the flow of water into his land. The question of jurisdiction was raised before the Mámílatdár, but he overruled the objection. On the merits, the Mámílatdár held that the stream received its water-supply from the leakage of canal water, and not from any independent source, and that as the Irrigation Department had a right to control their leakage supply, it cannot be said that plaintiff had ever possession or enjoyment of this water, and there was thus no disturbance of that possession. The claim for injunction was, therefore, rejected by the Mámílatdár.

The applicant seeks the revision of this decree on the ground that the Mámílatdár had no authority under the Act to inquire into any other question save that of possession and obstruction, and that his inquiry into the source of the supply was *ultra vires*. The Government Pleader, who appeared to support the decree, raised a preliminary question about the jurisdiction of the Mámílatdár's Court to entertain the suit, and he also urged that the decree was right on the merits.

It will be convenient to consider the question of jurisdiction in the first instance. It is admitted that the Mámílatdárs' Act is silent on the point, and contains no limitation as regards the parties to possessory suits over which these Courts have jurisdic-

tion. Section 10 of the Act directs the Mámlatdár to return the plaint if the subject of the plaint is not within his jurisdiction. It is, however, contended that as under section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876, the Subordinate Judges cannot receive or register a suit in which the Government or any officer of Government is a party in his official capacity; the same restriction should obtain in the case of Mámlatdárs' Courts, where, as in the present suit, officers of Government are defendants. It may be argued, on the other hand, that questions of jurisdiction cannot be properly decided on grounds of presumption or analogy. Though under section 32 of Act XIV of 1869, the Subordinate Judges' Courts had no jurisdiction over Sirdárs who could only be sued in the Agents' Courts, these latter were subject to the jurisdiction of Small Cause Courts in the Mofussil until the Act of 1887 was passed into law. Similarly, Courts of Small Causes were not subject to the same limitations as those which bound the Subordinate Judges' Courts till section 15 of the Revenue Jurisdiction Act was amended. It was only this section which included Small Cause Courts with Subordinate Judges' Courts as being subject to this restriction of their powers in suits to which Government or an officer of Government acting in his official capacity is a party. The Mámlatdár had, therefore, jurisdiction to entertain this suit. It is further clear also that the provisions of section 424 of the Civil Procedure Code have no application in respect of the acts of public officers which could not possibly be said to have been done by them in their official capacity. On the whole I feel satisfied that the Mámlatdárs' Court had jurisdiction to entertain this suit, though irrigation officers were defendants.

We have next to consider the decision on the merits. I feel satisfied that the Mámlatdár has gone out of his way in considering the question of the source of water-supply, and basing his conclusion on the view he took of that source of supply. The Act itself lays down the issues that must be considered in such suits, and all matters not covered by these issues are extraneous, and ought not to influence the decision either way. It is admitted that plaintiff had obtained a decree against Javeri, and that decree was executed. The irrigation officers, who are parties

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to this suit, in a day or two after re-set up the dam; and this action was sought to be justified on the ground that they had power to do so under section 48 of the Irrigation Act. That section, however, empowers canal officers only to charge a water-rate on lands which in their opinion receive a supply from percolation or leakage or surface flow. It did not empower the defendants to act in open defiance of the authority of the Mámlatdár's Court, and set at naught the decree of that Court.

The only issues the Mámlatdár had to consider were, whether the plaintiff was in possession, whether defendants obstructed or disturbed that possession, and, lastly, whether this disturbance was within six months before suit—*Basapa v. Lakshmapa*⁽¹⁾. The pleadings of the parties made it clear that these points must be disposed of in plaintiff's favour. The plea of justification set up on the ground of the source of the water-supply being leakage from the canal was not a point which could be pleaded in the Mámlatdár's Court—*Ganesh v. Ramchandra*⁽²⁾—and the Mámlatdár was in error in entering upon this inquiry, and basing his decision on the result of the conflicting evidence offered on that point. The opinion of the Collector Mr. Ommanney was apparently in favour of the view that the stream had an independent source of supply. Justification and title other than that of possession within six months could only be pleaded in a properly instituted suit in a Civil Court. This is not a case where the discretion about the non-interference of this Court can be exercised with advantage as was the case in *Rakhma v. Tulaji*⁽³⁾ and *Nathekha v. Abdul Alli*⁽⁴⁾. I would, therefore, set aside the Mámlatdár's order, and send back the case to him for a proper and legal order.

Order reversed and case sent back.

(1) (1877), 1 Bom., 624.

(2) P. J. for 1891, p. 96.

(3) (1894), 19 Bom., 675.

(4) (1893), 18 Bom., 449.