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are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, we are of opinion that that would be an irregularity only, and not an illegality requiring interference by a Court of appeal or revision.

APPELLATE CIVIL.

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

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March 20.

MAHAMAD DASU (ORIGINAL DEFENDANT), APPELLANT, *v.* AMANJI DASU (ORIGINAL PLAINTIFF), RESPONDENT.*

Bhágdár—Bhágdári estate—Alienation by a bhágdár of his share—Bombay Act V of 1862, *Sec.* 3—*Collector setting aside sale of share—Subsequent suit to recover share—Limitation.*

In the year 1871 the plaintiff, a co-sharer in a bhág, alienated his share to a stranger. In the year 1882 the Collector declared the alienation to be illegal, and in the year 1883 ordered that the plaintiff should be reinstated in the possession of his share. At plaintiff's request his share was given into the possession of the defendant, who was the plaintiff's brother and khátedár of the entire bhág. In the year 1892 the plaintiff brought this suit against the defendant to recover possession of his share. The defendant contended that the suit was time-barred, the plaintiff not having been in possession since the year 1871.

Held, that the suit was not barred, the possession of plaintiff's alienee being the possession of the plaintiff himself, and the defendant not being entitled to tack to the period of his own possession that of the plaintiff's alienee.

SECOND appeal from the decision of R. J. C. Lord, Assistant Judge of Broach with full powers, confirming the decree of Chunilal D. Kavishvar, Second Class Subordinate Judge.

In 1871 plaintiff, a co-sharer in a certain bhág, sold his share to one Valli Adam, who was a stranger to the bhágdár family. Valli Adam continued in possession till the year 1883, when the Collector, who had in the meanwhile declared the sale to be illegal by an order dated the 12th January, 1882, directed that the plaintiff's share be restored to him. The plaintiff thereupon requested that, as he was not living in the village in which the bhág was situate, possession of his share should be given to the defendant, who was his elder brother and the khátedár of the entire bhág. The defendant was accordingly put into possession.

* Second Appeal, No. 575 of 1898.

In the year 1892 the plaintiff brought this suit against the defendant to recover his share, contending that the defendant held possession of it as trustee for him.

The defendant denied that he held the property on plaintiff's behalf, and pleaded (*inter alia*) that the suit was barred by limitation, the plaintiff having been out of possession for more than twelve years.

The Subordinate Judge found that the defendant held the property for the plaintiff and that the suit was not time-barred. He, therefore, allowed the claim.

On appeal by the defendant, the Judge (V. V. Paranjpe, First Class Subordinate Judge with appellate powers), without recording findings on all the issues raised, reversed the decree and rejected the claim on the ground that it was time-barred, in as much as the plaintiff had not sued within three months from the date of the Collector's order as provided by section 3 of the Bhágdárs Act (Bom. Act V of 1862).

The plaintiff having preferred a second appeal, the High Court reversed the decree and remanded the appeal for a rehearing. See Printed Judgments, 1897, p. 228[1]. On the remand the Judge found that the claim was within time, and he confirmed the decree of the Subordinate Judge.

The defendant preferred a second appeal.

H. C. Coyaji for the appellant (defendant).

Gokuldas K. Parekh for the respondent (plaintiff).

PARSONS, C. J. (ACTING) :—The remand order in this case will be found in *Amanji* v. *Mahamad*[2], where the facts are clearly stated.

(1) The following the judgment of the Court :—

FARRAN, C. J. :—Following the ruling in *Haribhai* v. *Gokal* (P. J., 1897, p. 109) we reverse the decree of the lower Court and remand the appeal for re-hearing upon the remaining issues. In this particular case the only order the Collector made was this—"I sanction the several portions being rejoined to the bhág." There was nothing in that order which the plaintiff could object to or sue to set aside.

We amend the sixth issue in order to raise the question suggested by Mr. Gokuldas —that the defendant can have no lien on the property for the amount expended in repairing the house, as he has enjoyed the profits of the land—by adding to the last query the words "and has the defendant a lien on the property for the same" after the sentence "what money was so spent."

(2) P. J., 1897, p. 228.

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The Judge of the lower appellate Court on the rehearing found all the issues in favour of the plaintiff, and the only objection raised here now to his decision is on the ground of limitation.

It is contended that the plaintiff, who had sold his share in 1871 and had, therefore, been out of possession since that time, was barred by prescription from bringing this suit. This contention, however, is based upon a misconception of the relationship that subsists between the parties. They are both sharers in the bhág. The sale by the plaintiff of his share in that bhág and the possession of his alienee were as adverse to the defendant as they were to the plaintiff, and the action of the Collector in 1883, setting aside the sale and reinstating the owners in the possession of the bhág, was beneficial to both, and the effect of it was to restore the parties to their original condition as owners of an unencumbered bhág. It is impossible to assent to the proposition put forward on his behalf that the defendant can prefix to his possession since 1883 the possession of the alienee of the plaintiff between 1871 and 1883, and count the whole period as his possession adverse to the plaintiff; we ought rather to hold that the possession of the alienee was the possession of the plaintiff himself. In alienating the share he transferred his rights over it to his alienee for as long as the alienation lasted, and when the Collector intervened and put an end to the alienation, the effect was to reconvey to the plaintiff those same rights: the plaintiff and his alienee are thus properly to be regarded as successors in title, and the defendant in order to succeed in this suit would be bound to prove adverse possession against both. This he has not done, and the result is that his defence fails. We confirm the decree with costs.

RANADE, J. :—The appellant and respondent are brothers, and, along with two other brothers, owned equal shares in a bhág which comprised lands and houses. It is admitted that the land and house in dispute belonged to the respondent before they were alienated by him to strangers in Samvat 1927 (1871). In 1881 the appellant, as khátedár of the entire bhág, applied (Exhibit 23) to the revenue authorities for the cancellation of this alienation, and for the restoration of the land and house to the bhág entered in his kháta under section 3 of Bombay Act V

of 1862. The alienation was accordingly set aside by an order dated 12th January, 1882, and it was directed that the land and house should be restored to the bhág. The appellant wanted the land and house to be made over into his possession. The alienees were, however, willing to restore the land and house to their vendor, the respondent, and not to the appellant. An order was passed accordingly to restore the land and house to the respondent's possession, but he informed the village authorities (Exhibits 38, 54) that as he was employed in service in another village, the land and house should be made over into appellant's possession, as he had vahivat of his property, and they were accordingly made over into the possession of appellant on 31st August, 1883. The respondent later on changed his mind, and as appellant refused to give up possession, the respondent brought his present suit in 1892 to recover possession of the land and house on the ground that the appellant held possession on respondent's behalf. The appellant denied that he held possession of the property on respondent's behalf, and further contended that the respondent plaintiff's claim was time-barred.

The Court of first instance awarded the claim. In appeal it was held that respondent was entitled to be placed in possession, but as appellant did not hold possession on behalf of respondent, and, further, as respondent had not sued to set aside the final order of the Collector within three months under section 3 of Act V of 1862, the claim was time-barred. In second appeal it was held that section 3 did not apply to the case, and this Court remanded back the case for decision on the merits. The Assistant Judge has now held that the appellant had obtained possession as trustee for the respondent, and that the latter's claim was not time-barred.

It will be seen from the summary given above that the only two points about which the parties are not agreed are (1) whether appellant or respondent was entitled to the possession of the land; (2) and whether the claim was time-barred.

As regards the first point, section 3 directs that after the sale is cancelled, the Collector should restore the property to the possession of such person as he deems entitled thereto. The Collector's discretion is thus not absolute and unrestricted. He

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has to determine the question as to the claim for possession, and not of the title to the property—*Haribhai* v. *Gokal*(9). In this case, that discretion was exercised when the District Deputy Collector ordered the Mámlatdár to restore the land to the respondent. The order in appellant's favour was made after respondent had informed the village authorities of his intention to that effect. Appellant did not obtain possession in virtue of a decision of the Collector that he was the person entitled to possession. Quite independently of this circumstance, it is clear that the alienation by respondent having been set aside under the Act, respondent's previous title revived. If, instead of complete alienation, there had been a mortgage or charge, and the Collector had interfered under the same section, and set them aside, it is clear that respondent, and not appellant, would have been benefited thereby. Even though there was no express trust in this case, there can be no doubt that the person entitled to the property was the respondent.

The next question is whether the respondent's claim was time-barred. Respondent alienated the land in 1871, and from that time down to 1892, when the present suit was brought, a period of more than twelve years intervenes, during which time respondent was not in possession, and appellant contends that the respondent had no title left to bring the suit. The appellant thus joins his own eight years' possession with the previous twelve years' possession of the aliences of respondent. If the appellant had derived his right from the aliences, his contention would have been valid. But he does not derive his title from the vendees. Their possession, being declared illegal, cannot be pleaded as adverse against the person from whom they derived their title, and who alone was entitled to possession under Act V of 1862. As between the parties to this suit, both of whom held possession of parts of the bhág, the appellant's adverse possession could only commence, at the best, in 1883. The respondent's right to recover possession is, therefore, not time-barred. We confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

P. J. for 1897, p. 109.