

although a summons was issued to the arbitrator to be examined as a witness, yet no attempt was made to examine him, but that was not the fault of the respondent.

We think, therefore, that it is more probable that the petitioner felt that these objections could not be pressed, so that there are no grounds on which we should exercise our discretion by interfering under section 115. In fact there are some reasons for believing that this application was simply made for delay.

It seems necessary to point out again, as has been done in many other cases, that there is no obligation on the High Court to interfere on an application made under section 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and we cannot lay down any rules how that discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court which hears the application to decide on the particular circumstances of the case before it.

We would, therefore, discharge the rule with cost.

Rule discharged.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

TARABAI KOM RAMRAO HANMANTRAO PATANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* DATTARAM GOVINDBHAI GUJAR (ORIGINAL DEFENDANT), RESPONDENT^o.

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December
15.

Mortgagor and mortgagee—Equity of redemption—Adverse possession.

The lands in suit were the Deshpande watan lands of H. H mortgaged them to G and P in 1870. In 1878, the equity of redemption after diverse

^o Second Appeal No. 683 of 1922 (with S. A. Nos. 550 of 1922 and 76 of 1923).

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mesne assignments became vested in B and P in equal moieties. In 1881 G's son, D, assigned his interest in the mortgage to his co-mortgagee, P. In 1896, B's heir filed a suit against P and D for the redemption of the mortgage of 1870. In that suit eventually a decree was passed by the High Court on April 9, 1912, directing that B's moiety of the lands was free from the mortgage, and in the result B's heir got actual possession of that moiety from P's heirs in 1913. In 1907, H had died and in 1912, his son, R, filed a suit against the heirs of P and their tenants to recover possession of both moieties of the lands on the ground that, the lands being watan lands, the mortgage and subsequent alienation did not survive the death of H. In 1914, a decree was passed in R's favour and in 1915 he got possession in execution of both moieties. In 1918, B's heirs filed a suit to recover possession of a moiety from R's widow, T. It was contended on their behalf that they, or those through whom they claimed, had acquired title by adverse possession to a moiety in the suit lands,

Held, that B's heirs were not entitled to succeed as though B had acquired the equity of redemption of one moiety in 1878, his heirs had only obtained physical possession in the year 1913 and thereafter had retained it for only two years.

Per MACLEOD, C. J.:—Though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming is in physical possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor.

Puttappa v. Timmaji⁽¹⁾ and *Chinto v. Janki*⁽²⁾, considered.

SECOND appeal against the decision of R. R. Sane, First Class Subordinate Judge, with A. P., confirming the decree passed by V. G. Gupte, Subordinate Judge at Karad.

Suit to recover possession.

The lands in suit were Deshpande watan lands. They were originally held by one Hanmantrao. In 1870, the lands were mortgaged by Hanmantrao to Govindbhai Gujar and Antaji Parchure for Rs. 12,000 of which Rs. 8,000 were advanced by Govindbhai and Rs. 4,000 by Antaji.

⁽¹⁾ (1889) 14 Bom. 176.

⁽²⁾ (1892) 18 Bom. 51.

In 1872, one Balkrishna Agashe got a money decree against Hanmantrao.

In 1874, Hanmantrao's right, title and interest was brought to sale and in 1875 one-half was transferred to Agashe and one-half to Parchure.

Later on Govindbhai Gujar died and in 1881, the administrator of the estate of his minor son sold the minor's interest to Parchure for Rs. 1,500. That sale was, however, subsequently declared void as it was made without the sanction of the District Court (Bombay Act XX of 1864, section 18).

In 1896, Agashe's son, Vinayak, sued Parchure and Govindbhai's minor son, Dattaram, for the redemption of the mortgage of 1870. The suit came on appeal to the High Court and that Court in 1903 directed an account between the mortgagors and mortgagees, also an account between Agashe's son, Vinayak, and Dattaram, minor son of Govindbhai, with reference to the void sale and ordered redemption.

In 1907, Dattaram applied for execution. That matter again came before the High Court and on April 9, 1912, the High Court directed that Agashe's moiety of the lands was free from the mortgage and the other moiety was charged with Rs. 35,000 due from Parchure to Dattaram on the account taken of the void sale of 1881 and should be sold if Parchure failed to pay the amount within six months. The money was not paid and the right, title and interest of Parchure in the second moiety of the lands in suit was brought to sale in September 1914 and purchased by Dattaram who obtained possession in February 1915.

In the meantime in 1907 Hanmantrao had died. His minor son, Ramrao, attained majority in 1910 and in 1912 filed three suits against the heirs of Parchure and

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their tenants to recover possession of both the moieties. Ramrao died *pendente lite* and his widow, Tarabai, was placed on the record in his place. In December 1914, Tarabai got a decree in her favour and in August 1915 she got possession in execution of both the moieties.

There were two proceedings arising out of this execution. In the first Dattaram, Govindbhai's son, was restored to joint possession with Tarabai. In the second heirs of Vinayak Agashe failed to recover possession.

Further litigation thereupon ensued between the various parties, in the course of which the heirs of Vinayak Agashe sued Tarabai and others to recover possession (Suit No. 354 of 1917). The Subordinate Judge held that till July 18, 1913, the Agashes had no possession at all; that since July 18, 1913, till their dispossession on August 3, 1915, they had only symbolical possession which was not sufficient to give them title by adverse possession against the real owner, Tarabai. On appeal the decree was confirmed. The plaintiffs appealed to the High Court (Second Appeal No. 76 of 1923).

Tarabai also filed a Suit No. 542 of 1918 against Dattaram Govind to establish her right to the possession of the moiety of the lands alleging that the defendant was never in possession of the same and had no right to claim possession thereof from her as they were watan lands and alienations of the same made by Hanmant-
rao had already become void. The defendant denied the claim contending that Agashe had become owner of a part of the equity of redemption in September 1914 in execution of the decree in suit of 1896 and obtained possession in February 1915.

The Subordinate Judge held that the plaintiff, Tarabai, was entitled to the possession sought. On appeal the decree was reversed and the plaintiff's suit was dismissed. Tarabai thereupon appealed to the High Court (Second Appeal No. 683 of 1922).

Dattaram Govindbhai Gujar filed a suit (Suit No. 336 of 1919) against Tarabai to recover arrears of rent for three years, 1915 to 1918. The suit was dismissed and the decree was confirmed in Second Appeal No. 550 of 1922.

G. N. Thakor, with *P. B. Shingne*, for the appellant.
Coyajee, with *K. N. Koyajee*, for the respondent.

MACLEOD, C. J.:—The facts in the second appeal are somewhat complicated, they are set out correctly at length in the judgment of the lower appellate Court and for the purposes of this judgment may be summarised as follows :—

One Hanmantrao in 1870 mortgaged the lands in suit, which were watan properties, to Govindbhai Gujar and Antaji Parchure for Rs. 12,000 of which 8,000 were advanced by Govindbhai and 4,000 by Antaji.

The equity of redemption after divers mesne assignments commencing from 1872 became vested in Balkrishna Agashe and Antaji Parchure in equal moieties. Govindbhai died leaving a minor son, Dattaram, whose guardian assigned his interest in the mortgage to the co-mortgagee, Antaji, in 1881. Balkrishna Agashe died leaving his son Vinayak. In 1896, Vinayak filed a suit against Antaji and Dattaram and three others for redemption of the mortgage of 1870.

Hanmantrao died in 1897. A final decree was passed in Vinayak's suit on April 9, 1912. It was decided that the assignment by Dattaram's guardians to Antaji was a nullity and as between the two Antaji had to

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pay Vinayak Rs. 35,000. In favour of Vinayak it was declared that the mortgage money had been paid off and surplus profits were due to him.

On April 16, Ramrao, son of Hanmantrao, filed a suit against Antaji for a declaration that the mortgage of the watan lands in 1870 and the auction sale in 1872 did not survive the death of Hanmantrao, and for possession. It was contended that the heirs of Vinayak, who had died, were necessary parties but unfortunately the Judge decided that it was not clear that they were interested in the suit property as holders of any share in the equity of redemption. In September 1914, Dattaram executed his decree against Antaji and at a Court sale purchased Antaji's share in the suit lands. It is alleged he got possession from the Court in February 1915. Meanwhile Ramrao having died, his widow, Tarabai, continued the suit against Antaji and obtained a decree in December 1914. In August 1915, she obtained possession from Dattaram. Dattaram applied to the Court for restoration of possession, and recovered possession in April 1918 jointly with Tarabai, who had also obtained possession of the half claimed by the heirs of Vinayak Agashe.

[After dealing with, and deciding, the questions arising in the other appeals, the learned Chief Justice proceeded, with reference to Appeal No. 76 of 1923 :]

The heirs of Vinayak filed the suit to recover possession of the other half of the watan lands. After the final decree in the suit of 1896 was passed in April 1912, Vinayak obtained possession of his half share in July 1913. In August 1915, Tarabai, in execution of her decree against Antaji, dispossessed the tenants of Vinayak as well. Jankibai, widow of Vinayak's uncle, sought to recover possession, but her application was rejected in 1916. After her death her grand-daughter

filed this suit against Tarabai making Vinayak's grandson and nephew party defendants.

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The trial Judge held that the validity of the mortgage ceased at the death of Hanmantrao, and Parchure who was then in possession became a trespasser. But the plaintiff did not claim through Parchure and until July 1913 neither they nor their predecessors had any possession at all. From July 1913 they had only symbolical possession. As Tarabai sued Parchure for possession and was successful, plaintiff's right to possession also ceased. Consequently the suit was dismissed. The appellate Judge agreed with this decision except that he found that the Agashes obtained possession in 1913.

In appeal before us it was argued that the Agashes had acquired a title by adverse possession to a moiety in the suit lands. Now Antaji Parchure was in possession as sole mortgagee till it was declared in the suit of 1896 that the assignment of Dattaram's share in the mortgage was void, and it was further held that the mortgage had been paid off. If Antaji could have been considered as holding adversely to the next heir of Hanmantrao while holding possession as mortgagee any suggestion of that sort is put an end to

(1) by the finding that the mortgage was paid off so that the owners of the equity of redemption became entitled to possession under their purchases ;

(2) by the decision in Tarabai's suit against Antaji.

It was faintly argued that Antaji must be considered as having been in possession of half the mortgaged lands in trust for Dattaram and consequently that Dattaram had acquired some interest by adverse possession. But this was an impossible argument. There could be no question of trust while Antaji was holding under the assignment in his favour ; when that was

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set aside he became liable to account for half the profits.

But it was argued that the Agashes had acquired a title to the equity of redemption by adverse possession. It is difficult to see how a person can be in possession of an equity of redemption adversely to the true owner. A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. It is true that it appears to have been considered in *Puttappa v. Timmajji*⁽¹⁾ that an equity of redemption can be acquired by adverse possession, but in that case Narsibai actually delivered possession to her vendee, Ramappa, in 1856 and it was contended that the plaintiff's suit was barred by his adverse possession for more than twelve years, and consequently it did not become necessary to determine what right Narsibai had when she sold. In *Chunto v. Janki*⁽²⁾ it was held that there may be possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. *Puttappa v. Timmajji*⁽¹⁾ was considered and I think that though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming is in physical possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. Since Tarabai must be considered as the only person with a title other than possessory to the moiety in suit she is entitled to succeed against the plaintiffs who are out of possession unless

⁽¹⁾ (1859) 14 Bom. 176.

⁽²⁾ (1892) 18 Bom 51

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they can show not only that her rights have been extinguished but that they have already acquired a good title. But at the most they obtained possession in July 1913 and retained it for two years. It is impossible, therefore, to say that they have a right to oust Tarabai and in my opinion the decree in her favour was correct and the appeal should be dismissed with costs.

CRUMP, J. :—[In so far as the judgment related to Appeal No. 76 of 1923.]

This is a suit by the heirs of Agashe against Tarabai. As regards this moiety of the lands Agashe's heirs hold the rights of both mortgagor and mortgagee by virtue of the order of the High Court in 1907. The question is whether they or those through whom they claim have acquired any title by adverse possession. It is obvious that on Hanmantrao's death in 1897 any alienation by him became null and void, but it may be that persons who remain in possession after that date could acquire a title by prescription against the heirs of Hanmantrao who were at that date entitled to immediate possession. It is necessary, therefore, to consider the possession of the lands from 1897 onwards.

If I apprehend the position correctly the only persons who could acquire any title by adverse possession would be the persons in actual possession of the lands. The actual possession up to 1913 was with Parchure. Up to 1907 the heirs of Agashe held one-half of the equity of redemption, and in 1912 they became the full owners but they got no possession until 1913. If the possession of Parchure as mortgagee was adverse to the heirs of Hanmantrao, they might have become entitled to hold as mortgagees, but from 1907 their possession was also adverse to the heirs of Agashe whose share was then declared free of the

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mortgage. It is difficult, therefore, to see how the heirs of Agashe could acquire a title by adverse possession and as between Parchure and the heirs of Ramrao the matter is concluded by the suits of 1912. As regards the suggestion that there was adverse possession of the equity of redemption it is clear that Agashe's heirs could not hold that equity adversely when they were never in physical possession of the property. As matters stood Hanmantrao's heirs could not at any time have sued the heirs of Agashe alone as holders of the mere right to redeem.

Appeal dismissed.

J. G. R.

FULL BENCH.
APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Shah and
Mr. Justice Crump.*

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December 19.

MEHBUNISSA BEGUM *alias* SADLIBEGUM AND OTHERS (HEIRS OF ORIGINAL DEFENDANT NO. 1), APPELLANTS. *v.* MEHMEDUNNISA BEGUM (ORIGINAL PLAINTIFF), RESPONDENT¹.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 2 (3)—Execution of decree—Payment out of Court—Uncertified by Court—Such payment not recognized by executing Court.

Under Order XXI, Rule 2 (3), of the Civil Procedure Code, 1908, the Court executing a decree cannot recognize payments not certified by the Court.

Gharry v. Gowrya⁽¹⁾ and *Ganesh v. Yeshwant*⁽²⁾, followed.

Hansa Godhaji v. Bharva Jogaji⁽³⁾ and *Trimbak Ramkrishna v. Hari Laxman*⁽⁴⁾, overruled.

THIS was an appeal against the decision of V. P. Raverkar, First Class Subordinate Judge of Surat, in Darkhast No. 289 of 1921.

Execution proceedings.

¹Appeal No. 194 of 1923 from Original Decree.

⁽¹⁾ (1921) 46 Bom. 226.

⁽³⁾ (1915) 40 Bom. 333.

⁽²⁾ (1922) 25 Bom. L. R. 247.

⁽⁴⁾ (1910) 34 Bom. 575.