

1929
 APPA DADA
 v.
 RAMKRISHNA
 VASUDEO
 Patkar J.

defendants. There were transactions on each side creating independent obligations on the other and the balance has shifted from one side to the other. I may refer in this connection to the cases of *Satappa v. Annappa*⁽¹⁾ and *Ganesh v. Gyanu*.⁽²⁾ I think, therefore, that the proper Article applicable to the present case is Article 85 of the Indian Limitation Act and that the suit is within time.

On these grounds I think that the decision of the lower Court is correct and this appeal must be dismissed with costs.

The cross-objections are allowed as against defendants Nos. 2 and 3 only with costs and interest is awarded at 6 per cent. on Rs. 5,103-11-9 from the date of suit till payment.

Appeal dismissed and cross-objections allowed.

J. G. R.

⁽¹⁾ (1922) 47 Bom. 128.

⁽²⁾ (1897) 22 Bom. 606.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

LAXMAN RAMJEE JADHAV (ORIGINAL PLAINTIFF), APPELLANT v. DATTA-TRAYA RAMKRISHNA ADVILKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), Article 11A—Civil Procedure Code (Act V of 1908), Order XXI, rule 103.

The plaintiff obtained a decree for redemption and in execution recovered possession of the property in dispute. He was however dispossessed by reason of proceedings under Order XXI, rule 100 of the Civil Procedure Code. More than one year after the order in those proceedings he filed the present suit to recover possession on the strength of his title :

Held, that the suit was barred by limitation inasmuch as the right to present possession on the strength of title was a right which it was necessary to enforce by a suit within one year under Article 11A of the Indian Limitation Act and Order XXI, rule 103 of the Civil Procedure Code.

Bhau valad Bala Bhujari v. Bapaji Bapuji,⁽¹⁾ approved.

*Second Appeal No. 144 of 1927 from the decision of G. S. Rajadhyaksha, District Judge of Satara, in Appeal No. 45 of 1926.

⁽¹⁾ (1889) P. J. 101.

1929
 March 15.

The suit contemplated by Order XXI, rule 103, is not confined to a suit for possession of the property. It is a suit to establish a right which the plaintiff claims to the present possession of the property. And this right may be established either on account of his right to possession or on account of his title.

Sardhari Lal v. Ambika Pershad⁽¹⁾; *Mahadev v. Babi*⁽²⁾ and *Chail Behari Lal v. Kidar Nath*,⁽³⁾ followed.

Laxmishankar Devshankar v. Hamjabhai Usufally,⁽⁴⁾ distinguished.

Though rules 58 to 63 and rules 97 to 103 relate to different matters, the principles applying to one set of rules equally apply to the other. The former rules relate to the objections with regard to the attachment of the property at the instance of a claimant having some interest in or possession of the property, while the latter relate to the objections respecting the possession of the property in execution of a decree by a purchaser of the property or by the decree-holder or some person other than the judgment-debtor.

Minguel Antone Lopes v. Waman Lakshman Lohar⁽⁵⁾ and *Karsan v. Ganpatram*,⁽⁶⁾ followed.

Suit to recover possession of property.

The property in dispute belonged originally to two persons, Bala and Krishna, as mirasdars. They executed three mortgages on the property; (1) for Rs. 44 on April 3, 1864; (2) for Rs. 150 on June 7, 1864; and (3) for Rs. 152 on June 23, 1867.

On March 1, 1921, the heirs of Bala and Krishna sold the equity of redemption to Lakshman (plaintiff) for Rs. 530.

The plaintiff brought a suit (No. 1060 of 1921) to redeem the mortgages. In that suit, Dattatraya and others (defendants) were impleaded as party defendants as they were the original Inamdars. The trial Court, following *Satagauda v. Satapa*,⁽⁷⁾ held that they were not necessary parties, and struck out their names. The plaintiff obtained a decree in his suit on July 15, 1922, and obtained possession of the lands, on November 30, 1922.

The defendants next applied under Order XXI, rule 100, to be reinstated in possession of the lands and obtained an order in their favour on April 11, 1923.

⁽¹⁾ (1888) 15 Cal. 521.

⁽²⁾ (1902) 26 Bom. 730.

⁽³⁾ (1919) 1 Lah. 57.

⁽⁴⁾ (1919) 44 Bom. 515.

⁽⁵⁾ (1889) P. J. 17.

⁽⁶⁾ (1897) 22 Bom. 875.

⁽⁷⁾ (1919) 44 Bom. 698.

1929

LAKMAN
RAMJEE
v.DATTATRAYA
RAMKRISHNA

On December 18, 1924, the plaintiff filed a suit to recover possession of the property from the defendants.

The trial Court raised a preliminary issue, whether the plaintiff's suit was barred by reason of its having been brought more than a year after the order was passed against him, and found it in the affirmative. The suit was accordingly dismissed.

On appeal the decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

K. N. Koyaji, for the appellant.

P. V. Kane, for respondent No. 1.

V. D. Limaye, for respondent No. 3.

PATKAR, J. :—In this case the property in suit originally belonged to Bala Bapu and Krishna Mahadu. By their deeds on April 3, 1864, June 7, 1864, and June 23, 1867, they mortgaged the property to one Bhiku Sonar. On March 1, 1921, the plaintiff purchased from the heirs of the mortgagors their equity of redemption, and brought Suit No. 1060 of 1921 for redemption against the mortgagees to which defendants Nos. 1 and 4 were made parties. They contended that they were the Inamdars of the village, and had also the mirasi right, but as the title which they set up was paramount both to the mortgagor and the mortgagee, their names were struck off in the redemption suit. The plaintiff however obtained a redemption decree on July 15, 1922, and got possession on November 30, 1922. Defendants Nos. 1 and 4 made two applications, Exhibits 111 and 120, under Order XXI, rule 100, and were successful in their applications, and possession was handed over to them on April 11, 1923. The present suit was brought by the plaintiff on the strength of his title more than a year after the order in the Miscellaneous Proceedings. Both the Courts held that the

suit was barred under Article 11A of the Indian Limitation Act.

It is urged on behalf of the appellant that the view of both the Courts that the suit is barred by limitation under Article 11A is erroneous. Under rule 103 of Order XXI a party who is unsuccessful in the Miscellaneous Proceedings is entitled to bring a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit the order shall be conclusive. It is urged on behalf of the appellant that the present suit is not based on the right to present possession of the property, but is based upon his title, and therefore Article 11A of the Indian Limitation Act does not apply. It is further urged that there is difference in the wording of rule 63 of Order XXI, and rule 103 of Order XXI. The former refers to a suit to establish a right to the property in dispute, whereas under the latter the suit contemplated relates to the right which the plaintiff claims to the present possession of the property. In support of this contention reliance is placed on the cases of *Laxmishankar Devshankar v. Hamjabhai Usufally*,⁽¹⁾ *Rukmabai v. Fakirsa Hanmantsa*⁽²⁾ and *Rango Vithal v. Rikhiadas bin Rayachand*.⁽³⁾

Rules 58 to 63 corresponding to sections 278 to 283 of the old Civil Procedure Code and rules 97 to 103 corresponding to sections 328 to 335 of the old Civil Procedure Code, run on parallel lines. The former sections relate to the objections with regard to the attachment of the property at the instance of a claimant having some interest in or possession of the property, while the latter relate to the objections respecting the possession of the property in execution of a decree by a purchaser of the property or by the

1929

LAXMAN
RAMJEE

v.

DATTATRAYA
RAMKISHNA

Patkar J.

⁽¹⁾ (1919) 44 Bom. 515.⁽²⁾ (1926) 51 Bom. 158.⁽³⁾ (1874) 11 Bom. H. C. 174.

1929

LAXMAN
RAMJEE
v.DATTATRAYA
RAMKRISHNA

Patkar J.

decree-holder or some person other than the judgment-debtor. As the former set of rules relates to attachment of the property, rule 63 refers to a suit to establish the right which the plaintiff claims to the property in dispute. As the latter set of rules refers to possession, rule 103 refers to a suit to establish the right which the plaintiff claims to the present possession of the property. Though the two sets of rules relate to different matters, the principles applying to one set of rules equally apply to the other according to the decisions in *Minguel Antone Lopes v. Waman Lakshman Lohar*⁽¹⁾ and *Karsan v. Ganpatram*.⁽²⁾ The suit contemplated by rule 103 of Order XXI is not confined, in our opinion, to a suit for possession of the property. It is a suit to establish a right which the plaintiff claims to the present possession of the property. And this right may be established either on account of his right to possession or on account of his title. According to the view of the Privy Council in *Sardhari Lal v. Ambika Pershad*,⁽³⁾ the policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought. Their Lordships observed (p. 526) :—

“ But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him. However that may be, . . . in this case the order was made; and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the Law of Limitation says that the plaintiff must be prompt in bringing his suit.”

In *Bhanu valad Bala Bhujari v. Bapaji Bapuji*,⁽⁴⁾ under similar circumstances, the claim was held to be barred

⁽¹⁾ (1889) P. J. 17.⁽²⁾ (1897) 22 Bom. 875 at p. 883⁽³⁾ (1888) 15 Cal. 521.⁽⁴⁾ (1889) P. J. 101 at p. 103.

on the ground that it was brought more than a year after the order in the execution proceedings. It was held that the prayer in the plaint was exactly the same as the prayer in the application that defendant's obstruction should be removed and possession given. In that case, just as in the present, the plaintiff did not attempt to put forward any title consistent with the defendant's present possession or to admit that defendant had a right to present possession though for a limited period. On the contrary the plaint was based on the assertion that plaintiff had by virtue of the purchase the right to present possession and that defendant had no right to possession at all. To the same effect is the decision in the case in *Mahadev v. Babi.*⁽¹⁾ In *Unni Moidin v. Pocker*⁽²⁾ it was held that the scope of a suit under rule 103 of Order XXI, Civil Procedure Code, filed to contest an order made under either rule 98 or rule 99 or rule 101, is not the determination of the mere question of possession of the parties concerned, but the establishment of the right or title by which the plaintiff claims the present possession of the property. It was observed after referring to the difference in the wording of rules 63 and 103 that (p. 229) :—

“ This does not show that a suit under rule 103 is concerned only with the question of actual possession at the date of the summary order. The suit is to establish the right which the plaintiff claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the summary order against him.”

In *Chail Behari Lal v. Kidar Nath*⁽³⁾ it was held that the effect of the order under Order XXI, rule 99, was to hold the person who succeeded in the Miscellaneous Proceedings as entitled to possession as against the decree-holder unless and until a regular suit was brought against him, and that the plaintiff had to

⁽¹⁾ (1902) 26 Bom. 780.

⁽²⁾ (1920) 44 Mad. 227

⁽³⁾ (1919) 1 Lah. 57.

1929

LAXMAN
RAMJEE
v.

DATTATEAYA
RAMKRISHNA

Patkar J.

1929

LAXMAN

RAMJEE

v.

DATTAPRAYA

RAMKRISHNA

Patkar J.

establish by that suit his own right to present possession as well as his own title and he could not succeed merely by showing that the finding under rule 99 was erroneous. Decree-holders or auction-purchasers are never in possession at the time of the order under rule 99 and are still bound to bring a suit within one year under rule 103 and Article 11A of the Indian Limitation Act. We think, therefore, that even if the subsequent suit contemplated by rule 103 is brought on the strength of title, it must be brought within one year under Article 11A of the Indian Limitation Act and rule 103 of Order XXI of the Civil Procedure Code.

The case of *Laxmishankar Devshankar v. Hamjabhai Usufally*,⁽¹⁾ relied on on behalf of the appellant, has no application to the facts of the present case, for in that case there was no investigation in the execution proceedings, and no order necessary to be set aside. On the other hand in the execution proceedings, the plaintiff who subsequently brought the suit was specially authorised to bring a regular suit. It is observed at p. 523 :—

“ In this case as the Subordinate Judge had made no inquiry into the validity of Shivaath's mortgage, but merely directed the decree-holder to bring a regular suit, and that order was confirmed by the High Court, it follows that no conclusive order had been made, and the decree-holder was entitled to his ordinary remedies to establish his right to the property claimed by Shivaath, and he could only do that by getting the mortgage set aside.”

Similarly, the case of *Rukmabai v. Fakirsa Hamantsa*⁽²⁾ is distinguishable on the ground that it was a suit to set aside an award decree, and though the plaintiff sought to recover possession of the property, he could not urge the claim with regard to the nature of the award decree in the execution proceedings. In the execution proceedings the plaintiff claimed that possession should not be allowed to be transferred until he took steps to set aside the award decree, which he said was obtained

⁽¹⁾ (1919) 44 Bom. 515.

⁽²⁾ (1926) 51 Bom. 158.

by fraud, and the subsequent suit brought by him could not therefore be treated as a suit to establish his right to the present possession of the property which he claimed in those proceedings, and the order in the execution proceedings was based on the view of the Court that so long as the award decree stood, the plaintiff, who subsequently brought the suit, was bound by it, and there was no reason to justify his obstructing the delivery of possession to the defendant in the case. Besides, there was no investigation in the execution proceedings, and the question with regard to the validity of the award decree was not in fact, and could not be, gone into in the previous proceedings. The case of *Rango Vithal v. Rikhivadas bin Rayachand*⁽¹⁾ does not support the appellant's contention. It was held as the result of all the considerations set forth in the judgment that where there is a subsisting right which is contradicted by the summary order and the possession obtained or confirmed under it, and such right continues to subsist during 12 months so as to ground a suit for possession, and to be properly asserted by such a suit, the suit by the person dispossessed or refused possession to establish his right must be brought within one year, failing which he cannot sue afterwards on any portion of such right, but that in other cases, as his right is consistent with the order and the possession, he is not forced to any action until some present relief becomes legally claimable. At p. 177 it is observed:—

“ If the order has been made against the purchaser in execution of the title of the judgment-debtor, it amounts to a denial that that title embraces a right to present possession. If the title does embrace such a right, the order ought to have been different, and the purchaser suing ‘ to establish his right ’ must succeed if he establish this right to present possession, no matter what other rights over the same land may be vested in his opponent. But the words, it is plain, are intended to have but a single sense, whether they are applied to the execution-purchaser or his antagonist: if they mean the right to present possession for the former, they must mean it also for the latter.”

⁽¹⁾ (1874) 11 Bom. H. C. 174.

1929

LAXMAN
RAMJEE
v.
DATTATRAYA
RAMKRISHNA
Patkar J.

1929
 LAXMAN
 RAMJEE
 v.
 DATATRAYA
 RAMKRISHNA
 Patkar J.

In the present case the right to the present possession of the plaintiff is contradicted by the order in the previous execution proceedings, and the relief asked by the present plaintiff is not consistent with the order obtained by the defendants for possession in the previous Miscellaneous proceedings. The right, therefore, to the present possession on the strength of title would be a right which it was necessary to enforce by a suit within one year under Article 11A and Order XXI, rule 103. We think, therefore, that the view of the lower Court that the plaintiff's claim is barred by limitation is correct. The appeal must therefore be dismissed with costs. The appellant will pay two sets of costs.

Appeal dismissed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

1929
 March 20.

SHEIKH AHMED VALAD BHAUDDIN PANKAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 12), APPELLANTS v. BABU DEVJI ZUJAM AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 13 TO 15), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11, explanation IV—Res judicata—Khoti Kularagi land—Mortgage—Sale of equity of redemption—Dispossession by mortgagor—Suit to recover possession by mortgagee vendee—Suit decreed on the strength of sale deed and adverse possession—Subsequent suit by mortgagor for redemption—Khoti Settlement Act (Bom. Act I of 1880), section 9.

The lands in suit belonged to one Pandu as occupancy tenant in a Khoti Village. In 1870 Pandu mortgaged the lands to the ancestors of defendants Nos. 1 to 12. The mortgagees were in possession since the date of the mortgage. In 1882 Pandu sold the equity of redemption to the mortgagees under a registered deed. In 1915 the plaintiffs (who, with defendants Nos. 13 to 15, were the descendants of Pandu) recovered possession of the lands by a possessory suit under section 9 of the Specific Relief Act, 1877. In 1918 the mortgagees (defendants Nos. 1 to 12) filed Suit No. 243 of 1918 against the mortgagors (the descendants of Pandu) to recover possession on strength of the sale deed in their favour. A decree was passed in favour of the mortgagees on the ground that after the date of the sale deed the possession of the mortgagees was adverse and the sale deed was held binding on the descendants of the mortgagor. This decree was confirmed in second appeal to the High Court on the ground that defendants

*Appeal from Order No. 18 of 1927.