

[APPELLATE CIVIL JURISDICTION.]

1872.

April 24.

Special Appeal No. 356 of 1871.

LAKSHMIBAI Widow..... *Appellant*
 VITHAL RAMCHANDRA..... *Respondent.*

*Mortgage—Limitation—Foreclosure suit—Act XIV. of 1859, Sec. I.
 Cl. 12.*

The plaintiff on the 2nd of August 1847, became mortgagee of a house under an instrument of mortgage, which provided that, in default of payment by the mortgagor of the mortgage loan within five years, the house should be considered as absolutely sold to the mortgagee. Default was made in payment, and the mortgagee entered into possession, and continued in possession until 1858 when he was dispossessed by the mortgagor. On the 29th March 1866 the plaintiff filed a suit, in the nature of a foreclosure suit, against his mortgagor, to which the defendant pleaded the law of limitation.

Held that the plaintiff's cause of action arose in 1858 when he was dispossessed by the defendant, and that he had under Act XIV. of 1859, Sec. I., Cl. 12, twelve years from that date within which to file his suit.

THIS was a special appeal from the decision of A. C. Watt Acting District Judge of Puna, in appeal No 226 of 1867, amending the decree of Krishnaji Vishnu, the Principal Sadr Amin of Puna.

Vithal Ramchandra sued to obtain possession of a house which had been mortgaged to him by the defendant, Naro-Bhimá Shanker, under a deed of mortgage dated the 2nd August 1847. The deed of mortgage stipulated that unless the loan was repaid within five years from the date of the deed, the house should pass absolutely to the plaintiff (the mortgagee) as owner.

The defendant, *inter alia*, pleaded that the suit was barred by the law of limitation, as the suit was brought after the expiration of twelve years from the time when the cause of action accrued.

The principal Sadr Amin found as a fact, that the plaintiff (mortgagee) had been in possession of the mortgaged premises until 1858, and decreed that the house should be delivered to him (plaintiff) unless the defendant paid the amount due on the mortgage, with interest, to the plaintiff.

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In appeal, the decree was confirmed, with a slight modification as to the time when the redemption money was to be paid by the defendant.

The appeal was argued before WESTROPP C.J., and Lloyed, J., on the 13th December 1871.

Shantaram Narayán, for the appellant:—The latest date on which the cause of action accrued was the 2nd August 1852, when according to the terms of the mortgage deed, the property absolutely passed, or was supposed to have passed, to the mortgagee, the respondent. Even supposing the mortgagee to have been in possession till 1858, that would not help him, as he did not avail himself of the provisions of Section 15 of the Act XIV. of 1859 to bring a summary suit to recover his lost possession within six months from the date of dispossession: *Dadabhai Narsidas v. sub-Collector of Broach* (a) *Huro Chunder Gooho v. Gudaáhur Koondoo* (b), *Khelut Chunder Ghose v. Turachurn Koondoo Chowdry* (c).

Nagindas Tulsidas, for the respondent:—Both the Lower Courts have distinctly found that the mortgagee (plaintiff) was in possession till 1858. The right to sue, therefore, arose in that year, when his possession was disturbed. The omission on his part to avail himself of the summary remedy provided by Section 15 of Act XIV. of 1859 does not change the cause of action. If he had brought such a summary suit, he would have recovered his possession without being put to proof of his title: *Kunhi Komapen Kurupu v. Changanarachan Kandil* (d).

Cur. adv. vult.

WESTROPP, C.J.:—This is a suit to recover a house mortgaged to the plaintiff by deed, dated 2nd August 1847, which in default of repayment of the loan within five years from date, was to become converted into a deed of sale. Such an instrument, conformably to the doctrine of this Court, in *Ramji v. Chinto* (e) is, notwithstanding the expira-

(a) 7 Bom. H. C. Rep. A. C. J. 87. (b) 6 Calc. W. Rep. Civ. R. 184.

(c) 6 Calc. W. Rep. Civ. R. 269. (d) 2 Mad. H. C. Rep. 313.

(e) 3 Bom. H. C. Rep. 199.

of the five years on the 2nd August 1852, trea mortgage and the property held to be redeemable on repayment of the moneys due on the loan. And, therefore, the District Court treated this suit for possession as owner, as in the nature of a suit for foreclosure. The plaintiff is found by the District Judge to have been in possession so lately as 1858 at least, and the plaintiff himself alleges that he was sountil Fālgun Shake 1786, (*i.e.*, until sometime between the 26th February and the 27th March 1865,) at which time he asserts that his cause of action accrued by his dispossession. He filed his plaint against Nāro on the 29th March 1866. Nāro died on the 2nd July 1870, and his widow, Lakshmi, has been substituted for him on the record as defendant, she being his heir. Both of the Courts below have found that the mortgage was duly executed. The only question argued before us was, whether the suit is barred by Act XIV. of 1859. For the defence, and on behalf of the appellant, it has been contended that the cause of action must be considered as having accrued, if not at the date of the mortgage (2nd August 1847), at the latest on the 2nd August 1852, when the five years mentioned in the mortgage expired, and it became or was supposed to have become absolute, since which time more than twelve years have elapsed. And that the dispossession of the plaintiff in 1858, or at any period between that time and the time named by the plaintiff, Fālgun Shake 1786, (at the latest 27th March 1865) cannot in such an action as the present, brought, as it is, more than six months after either of the latest mentioned dates, be treated as the cause of action, inasmuch as Act XIV. of 1859 Section 15, must be considered as precluding such a course. The following passage in the judgment of our brother Melvill, in *Dadabhai Narasidas v. The Sub-Collector of Broach (f)* where he speaks of Act XIV. of 1859, Section 15, has been relied upon: "The law has fixed a period of limitation within which a party may recover possession without proof of title. If he allow that period to elapse, he must prove his title." In that passage we concur; but we do not think that it affords any support to the argument for the defend-

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ant, or that it in anywise affects the question as to what should be deemed to be the cause of action in this suit, or when that cause of action accrued.

Section 15 of Act XIV. of 1855 relates to the summary recovery of possession of immoveable property by any person dispossessed "otherwise than by due course of law." It gives to such a person the right to bring a suit within six months after dispossession to recover possession, "notwithstanding any other title that may be set up in such suit," that is to say, the recovery in such a summary suit may be effected without regard to the existence of title in the party who is dispossessed. The same section further provides that "nothing" in it "shall bar the person from whom such possession shall have been so recovered, or any other person instituting a suit, to establish his title to such property, and to recover possession thereof within the period limited by this Act." That period, in such a case as the present, (*i.e.* that of an unpaid mortgagee who was in possession at least until 1858, if not later,) is the period specified in Section 1, Clause, 12, viz, "twelve years from the time the cause of action arose." The mortgagee, so long as he was in possession, had not any occasion to sue. He was put out of possession not by due course of law, and it is said that either under Act XVI. of 1838, or Bombay Act V. of 1864, or Section 15 of Act XIV. of 1859, he might have summarily recovered the possession, and that, not having done so within six months from being dispossessed, he must fall back for his cause of action to the 2nd August 1852 (if not to the 2nd August 1847) when his title accrued. But this is untenable, and arises from a confusion of title and cause of action. It is true that a plaintiff, if he have suffered six months to have elapsed from the period of dispossession without bringing his suit, must, when he does bring it, prove title, and cannot recover without regard to title: but it does not thence follow that his cause of action under Section 12 and the commencement of his title are synchronous. If this were so, a man whose title accrued under a sanad dated fifty-one years ago, and whose possession was uninterrupted

for fifty years from the date of the sanad, and when at the end of that time was dispossessed, and remained out of possession for more than six months, would be barred, because he had not brought a suit within six months from his dispossession, inasmuch as more than 12 years had elapsed from the date of the sanad. The case of a mortgagee, expelled from possession during the continuance of his title as mortgagee, differs in no respect from that of a sanadi-proprietor so expelled. The legislature has not perpetrated any such absurdity or injustice as this. The plaintiff, the mortgagee, had no occasion to sue so long as he was in possession; but when he was dispossessed (which was at all events within twelve years before the filing of his plaint) a cause of action arose, and by Section 1, Clause 12, he has twelve years from that time within which he may bring his suit. In that suit, brought, as it was, more than six months after the dispossession, he was bound to show his title, and has shown a good title as mortgagee; and he was further bound to show a cause of action within twelve years, and he has done so, viz. his ouster from possession within twelve years before suit, brought. If he had brought a summary suit within six months after dispossession, he might have done so on easier terms, namely, by simply showing dispossession within that time. But the cause of action (the dispossession) is one and the same in both suits. The existence of a right during six months to sue on easier terms under Act XVI. of 1838, or Bombay Act V. of 1864, or Section 15 of Act XIV. of 1859, does not in anywise affect Section 1, Clause 12, of that Act, or the plaintiff's right to avail himself of it. We fully agree in the opinion thus expressed by the High Court of Madras in *Kunhi Konayen Kurupu v. Chanjaraichen Kandil Chembatu Ambu* (g):—"It (Section 15 of Act XIV. of 1859) was intended not to abridge any rights possessed by a plaintiff, but to give him the right, if dispossessed otherwise than by course of law, to have his possession restored without reference to the title on which he holds and that which the dispossessor asserts. In cases under that section, a lessor who had dispossessed otherwise than by due course of law a

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lessee whose term had expired would be compelled to restore possession to the lessee. The plain object is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the person who has taken the law into his own hands deriving any benefit from the process."

The case of *Huro Chunder Gooho v. Gadadhur Koondoo (h)* and *Khelut Chunder Ghose v. Tarachurn Koondoo Chowdry (i)* have not any application here as neither of the mortgagees in those cases ever had possession.

Mr. Justice Macpherson, in his work on Mortgages, page 152, referring to a case (which seems to have been decided on the law as it stood before Act XIV. of 1859 came into force) in which the mortgage deed treated the mortgagee as already in possession, although in fact he had never been so, says that "it was held that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that, *as he had never been in possession, a suit for dispossession by him must be brought within twelve years from the date to the deed.*"

The same learned author mentions thus in the same page, another case also apparently decided upon the law as it stood before Act XIV. of 1859 came into force :---When a lease by way of mortgage was given in consideration of an advance, and the mortgagee held possession for many years, but was afterwards ousted and after a time sued to recover what was due on the loan, with interest, the twelve years, during which his suit would lie, were counted from the time when he was turned out, not from the date of the deed under which he entered." (*j*)

There seems to us to be nothing in Act XIV. of 1859 to prevent the principle of that case being applicable since as well as before that Act; nor any distinction between the case of an improperly expelled mortgagee and that of any other person having title who has been turned out of possession while his title continued.

(h) 6 Calc. W. Rep. Civ. R. 184. (i) 6 Calc. W. Rep. Civ. R. 269

(j) S. D. A., 1848, p. 722,

In *Wise v. Bhoobun Moyee Debia Chowthrainee* (k), ¹⁸⁷² ~~Lakshumbai~~
 where an estate had been sold by auction for arrears of revenue in 1833, and the purchaser was put into possession; possession was afterwards restored, in 1840-41, to certain adverse claimants—that was merely a summary proceeding, and the purchaser's representatives were left to their regular suit to recover the property under their original purchase—it was held that the cause of action arose at the date of the dispossession in 1840-41, not at the date of the purchase in 1833. ^{v. Vitha Rānchan}

Section 6 of Act XIV. of 1859, which has been referred to on behalf of the defendant, relates simply to the effect of payments of principal or interest in respect of mortgage debts in keeping alive the right of the mortgagee to sue in Courts established by royal charter to recover the immovable property mortgaged, and does not at all affect the question as to the effect of possession by the mortgagee and a subsequent disturbance of it.

We are equally at a loss to perceive how Act XXIII. of 1861, Section 26, also referred to on behalf of the defendant, can affect this case.

We affirm the decree of the District Judge with costs with, however, this variation, that the time for payment of the principal moneys found due, and interest and costs, shall be extended to the 24th day of July next, and that, in default of payment of such principal, interest, and costs, including the costs of this appeal, on or before the said 24th day of July next, the defendant shall be for ever barred and foreclosed from recovering the house, the subject of the mortgage, in the plaint mentioned, and the plaintiff (respondent) shall be then put into possession of the said house and declared the owner thereof.

Decree affirmed.

(k) 10 Moo. Ind. App. 1,65,170; S. C. 3 Cal. W. Rep. P. C. 5.