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APPEL-
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[21] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

VENKAPA (*Original Plaintiff*), *Appellant v.* CHENBASAPA AND OTHERS (*Original Defendants*), *Respondents.**
[25th August, 1879.]

Civil Procedure Code (Act VIII of 1859), *ss.* 246 *and* 247—*Limitation Act (IX of* 1871), *s.* 2, *Arts.* 14 *and* 15 *and* 145.

A claimant against whom an order has been made under s. 246 of the Civil Procedure Code (Act VIII of 1859), must sue to establish his right within one year from the date of such order. But when the Civil Court disallows an investigation under s. 247 of that Code, the claimant may bring his suit within the ordinary period of limitation applicable to his suit.

A person who has been unsuccessful in a proceeding under s. 246 of Act VIII of 1859, and who sues to recover the attached property from the purchaser at the Court sale, may be said to sue, not to set aside the sale, but to set aside the order of the Court under s. 246.

[F., 4 B. 611; R., 11 B. 119 (123); 22 B. 875 (883); 9 C. 230=11 C.L.R. 363; 13 C.P. L.R. 69; 1 C.W.N. 24.]

THIS was a second appeal from the decision of A. L. Spens, Judge of the District of North Kanara, amending the decree of the Subordinate Judge of Sirsi.

On the 12th September 1872 the plaintiff made an application, under s. 246 of Act VIII of 1859, for the release of a house from an attachment obtained by one Sanappa in execution of a decree held by him against defendant No. 4, who was the plaintiff's brother. On the same day the Court rejected the application without inquiry, on the ground that it was made too late.

On 14th February 1873 Sanappa sold the house in execution of his decree and purchased it himself, and on the 28th June 1873 a certificate of sale was granted. On the 9th July 1874 Sanappa entered into possession.

The plaintiff brought this suit in February 1876. Sanappa being then dead, the defendants to the suit were his (Sanappa's) two brothers and his son (defendants Nos. 1, 2, 3). Defendant No. 4 was the plaintiff's brother, against whom Sanappa had obtained the decree. The plaintiff prayed that the execution sale might be set aside and for possession of the house.

The defendants (*inter alia*) contended that the suit was barred by limitation, it not having been brought within a year of the confirmation of the sale.

[22] The Subordinate Judge disallowed the plea, and decreed that the plaintiff should recover half the house. In appeal the Judge held the claim to be time-barred on the authority of *Jetti* v. *Sayad Husein* (S. A. No. 19 of 1879) (1), and rejected the claim altogether.

Shamrav Vithal, for the appellant.—The District Judge was in error in holding that arts. 14 and 15 of sch. 2 of Act IX of 1871 were applicable to the present suit. Article 14 has no bearing whatever, and art. 15 contemplates a case in which a final decision or order is

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* Second Appeal No. 54 of 1879.

(1) See note 4 B. 23.

passed. Here there was a refusal to pass such a decision or order. The short limitation originally provided in s. 246 of the old Code of Civil Procedure, and subsequently in the Limitation Act of 1871, presupposed a foregoing investigation by a competent Court. Where this is wanting as in the present case, the ordinary limitation applies, that is to say, 12 years under art. 145 of Act IX of 1871. The District Judge refused to apply this provision, because he thought that it was not intended to include adverse possession, by a defendant placed in such possession by an order of Court. He is not justified in drawing a distinction between such possession and possession obtained by a defendant without the instrumentality of the Court: *Lalchand Ambaidas* v. *Sakharam Chandrabhen*(1); *Syed Mahomed Afzul* v. *Kanhya Lal and others* (2); *Mukhan Lall Panday* v. *Sab Kundun Lall* (3); and *Venkatanaru* v. *Akkamma* (4).

There was no appearance for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—In special appeal No. 19 of 1877, to which the District Judge refers, it was decided by this Bench that a person who has been unsuccessful in a proceeding under s. 246 of Act VIII of 1859, and who brings a suit to recover the attached property from the purchaser, may properly be said to sue either to set aside the decision under s. 246, or to set aside the sale, and, therefore, that he must bring his suit within the period of one year provided as the period of limitation in arts. 14 and 15 of the second schedule of Act IX of 1871. On reconsideration [23] we are disposed to think that it would have been better and more accurate if we had confined our reference to art. 15 only, and treated the suit in question as one, not to set aside the sale, but to set aside the order of the Civil Court made under s. 246 of Act VIII of 1859 (5). With this qualification we adhere to our former decision, and hold that a claimant, against whom an order has been made under s. 246, must sue to establish his right within one year from the date of such order. But in the present case it is contended, and we think rightly contended, that no order was ever made against the plaintiff under s. 246. The District Judge states that the plaintiff's application for an investigation under s. 246 was rejected, because it was made too late. The investigation asked for was, in fact, refused under s. 247; and the order made against the plaintiff was not that he had failed in making out his case but that the Court refused to inquire into his case. It cannot be said that in bringing his present suit he is seeking "to alter or set aside a decision or order of a Civil Court," since there has been no decision and no order beyond a refusal to make an order. We think that the view taken by the Calcutta Court in the case referred to by the District Judge, and reported 2 Calc. W. R. 263, is correct; and it is in accordance with the opinion expressed by the Madras Court in *Venkatanaru* v. *Akkamma* (4), and by the Judicial Committee in *Sab Mukhan Lall Panday* v. *Sab Kundun Lall* (3).

We, therefore, hold that the present claim is not barred by limitation; and we, accordingly, reverse the decree of the District Court, and remand

(1) 5 B.H.C.R. 139.
(2) 2 W. R. 263.
(3) 15 Beng. L. R. 228.
(4) 3 M.H.C.R. 139.
(5) See a contrary decision in *Koylash Chunder* v. *Preonath Roy*, 4 C. 610.

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the case for a decision of the appeal on its merits. Costs to follow final decision.

Decree accordingly.

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NOTE.—The following is the judgment of Melvill and Kemball, J., in the case of *Jetti* v. *Sayan Husein* (Sp. Ap. No. 19 of 1877) referred to in the above case:—

MELVILL, J.—A decision was passed against the plaintiff in a proceeding taken by him under s. 246 of Act VIII of 1859, and he now sues to recover the property purchased at the Court sale. We consider that the [24] period of limitation applicable to such a suit is one year. Though the last eleven words of s. 246 have been repealed by Act IX of 1871, we do not believe there was any intention to prolong the period of limitation. In this as in all similar cases the policy of the Legislature requires that a person, who has once commenced to litigate, should carry his litigation to an end within a reasonable time. We should, therefore, expect to find that the provision contained in the last eleven words of s. 246 was re-enacted in Act IX of 1871; and we consider that it is re-enacted with sufficient distinctness in arts. 14 and 15 of the second schedule of the Act. A person who has been unsuccessful in a proceeding under s. 246, and who brings a suit to recover the attached property from the purchaser, may properly be said to sue either to set aside the decision under s. 246, or to set aside the sale.

But it is argued for the plaintiff that the limitation of one year does not apply to his suit, inasmuch as there is no valid order under s. 246 in existence. The plaintiff made an application under s. 246, evidence was taken, and on the 12th September 1871 the Subordinate Judge took time to consider his decision. The decision was given against the plaintiff on the 24th October 1871. Meanwhile, on the 30th September the property was sold. If we understand the argument aright, it is contended that, after selling the property, the Subordinate Judge had no jurisdiction to make any order under s. 246, inasmuch as by determining the attachment of the property he put it out of his own power to pass "an order for releasing the said property from attachment," as contemplated by the section. Probably, when he allowed the sale to proceed, the Subordinate Judge had made up his mind to disallow the claim. Or, if not, he may have thought that there was no harm in allowing the sale to proceed, so long as he did not confirm it before his decision was passed. However this may be, it must be admitted that the Subordinate Judge committed an irregularity in selling the property before he had disposed of the plaintiff's application. But we cannot say that, because the sale was irregular, the Subordinate Judge had no jurisdiction to decide, after the sale, that the property was liable to be sold. It is not necessary to consider in what manner, if the Subordinate Judge had taken a view favourable to the plaintiff's application, he would have given effect to his decision. All that we have to determine is, whether the Subordinate Judge's decision, disallowing the plaintiff's application, is an invalid order, and made without jurisdiction, merely because it was delivered after the sale had taken place. It appears to us that it is not on this account inefficacious; and regarding it as a valid order, we think that the Acting Judge was right in holding this suit to be time-barred.

We, therefore, confirm the decree with costs.

[N.F., 9 C. 230 (233); **Cons.,** 4 B. 21 (23); **R.,** 16 B. 608 (616).**]**