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4 B. 594 = 5 Ind. Jur. 527.

case. We rest our decision on the conduct of the defendant Jesha Premaji himself, who treated the sums of Rs. (351) three hundred and fifty-one and Rs. (199) one hundred and ninety-nine, which coincide with the consideration moneys mentioned in Exs. 8 and 9, as debts due to himself from Hasha, and offered no explanation or evidence to the contrary. For these reasons we reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge, with costs of suit and both appeals to be paid by the defendant Jesha Premaji to the surviving plaintiff Mahadev bin Hasha. The Subordinate Judge should have named a reasonable time (say six calendar months) within which the redemption money should be paid; but, as we are informed by the pleaders on both sides that the redemption money mentioned in the decree of the Subordinate Judge has been paid, and possession of the lands given to the plaintiff, we deem it unnecessary to make any amendment in the Subordinate Judge's decree.

[This case is also referred to in 4 B. 594; 9 C. 528 (533).]

4 B. 611.

[611] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

KRISHNAJI VITHAL (*Original Defendant No. 2*), *Appellant v.* BHASKAR RANGNATH AND OTHERS (*Original Plaintiffs*), *Respondents** [17th August, 1880.]

Civil Procedure Codes, Act VIII of 1859, *s.* 246, *and Act X of* 1877, *ss.* 280, 281, 282—*Limitation Act, IX of* 1871, *sch. II, arts.* 14 *and* 15, *and Act XV of* 1877, *sch II.* 11.

V (defendant No. 1) obtained a decree against Waman, and, in execution thereof, attached certain immoveable property as belonging to his judgment-debtor. The plaintiffs, who were Waman's five brothers, thereupon applied for the removal of the attachment under s. 246 of the Civil Procedure Code (VIII of 1859), but their application was rejected on the 24th July, 1875, and the property was sold by the Court to K (defendant No. 2) on the 16th and 17th February 1876. The sale was confirmed on the 18th March 1876. The plaintiffs brought a suit on the 17th March, 1877, against V and K (the judgment-creditor and auction-purchaser), alleging that the property was the joint ancestral property of themselves and their brother Waman, and was not liable to attachment and sale for his separate debt. They prayed that the sale should be set aside. The Subordinate Judge dismissed the suit as barred by art. 15, sch. II of the Limitation Act (IX of 1871). His order was reversed in appeal, by the District Judge, who held that art. 14, sch. II of the Limitation Act applied to the case. K thereupon appealed to the High Court.

Held, that art. 15, and not art. 14, of sch. II of Act IX of 1871 applied to the case, and that the suit was barred.

The intention of the Legislature in passing s. 246 of the Civil Procedure Code (Act VIII of 1859) was that the order made under that section should be a final bar to the plaintiff's right, unless, such a suit as that section prescribed, was brought to retry the question of that right; and if, on such action being brought, the Court on the trial held that the plaintiff had established his right, its ruling would amount to a reversal of the order made under s. 246, and the suit would fall within art. 15 of sch. II of the Limitation Act (IX of 1871), which is substituted for the limitation provided by the twelve repealed words in s. 246 of Act VIII of 1859.

Settiappan v. *Sarat Singh* (1) concurred in.

Koylash Chunder Paul v. *Preonath Roy* (2) referred to and discussed.

[R., 9 B. 35 (38); 18 B. 260 (262); 22 B. 640; 9 C. 220 = 11 C.L.R. 263; 11 C. 673 (676); 8 M. 506; D., 10 C. 444 (449).]

THIS was a miscellaneous second appeal from the order of F. [612] Mactier, Judge of the District Court at Satara, reversing the order of Ramrav Subaji, Second Class Subordinate Judge at Wai.

* Miscellaneous Second Appeal No. 5 of 1880.

(1) 3 M.H.C.R. 220.

(2) 4 C. 610.

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The following are the facts of the case:—Vinayek Bhikaji (defendant No. 1) obtained a decree against Sakharam as principal and Waman as surety, and, in execution thereof, attached two fields as the property of Waman, one of the judgment-debtors. The plaintiffs, who were Waman's five brothers, thereupon applied, under s. 246 of the Civil Procedure Code (Act VIII of 1859) for the removal of the attachment. Their application was rejected on the 24th July 1875, and the property was sold by the Court to Krishnaji Vithal (defendant No. 2) for Rs. 83 on the 16th and 17th February 1876. The sale was confirmed on the 18th March of the same year. The plaintiffs thereupon brought the present suit on the 17th March, 1877, against Vinayek Krishnaji (the judgment-creditor and the auction-purchaser, respectively), alleging, among other things, that the property attached and sold was the joint ancestral property of themselves and their brother Waman, and that, as such, it was not liable to attachment and sale for Waman's separate debt. The relief which the plaintiffs asked in the plaint, was substantially, that the execution sale should be set aside, and that they should be continued in their possession as owners or proprietors of the property. The Subordinate Judge, without going into the merits of the case, rejected the suit on the 26th March 1877 as barred under s. 32 of the Civil Procedure Code (Act VIII of 1859) and art. 15 of sch. II of the Limitation Act (IX of 1871). His order was reversed in appeal by the District Judge, who held that the case was governed by art. 14, and not by art. 15 of sch. II of the Limitation Act. He, accordingly, ordered the suit to be taken on the file and tried (8th October 1879).

Krishnaji appealed to the High Court on the 6th January, 1880. Vinayek (defendant No. 1) and the judgment-creditor did not join in the appeal.

Pandurang Balibhadra, for the appellant.—The suit is barred by limitation as rightly held by the Subordinate Judge The plaintiffs' cause of action accrued on the 24th July, 1875, when their application to raise the attachment was rejected, and not on the 18th March, 1876, when the sale was confirmed. The last twelve words of s. 246 of Act VIII of 1859 were repealed by s. 2 **[613]** and sch. I of Act IX of 1871, and art. 15 of sch. II of that Act is substituted for them, as ruled in *Jetii* v. *Syad Husein* (1). The limitation of one year begins to run, as decided in *Venkappa* v. *Chenbasappa* (2), from the date of the order rejecting the intervenient's application for the removal of the attachment, and not from the confirmation of the sale, as erroneously held by the District Judge. A party to an investigation under s. 246 is excluded from any remedy other than that expressly provided for him by that section, *viz.*, a regular suit to be brought within one year from the date of the order made against him. He is not to wait till the property is sold and the sale confirmed and then to bring his suit within one year from the date of the confirmation: *Settiappan* v. *Sarat Singh* (3). That the suit must be brought within one year from the date of the order, under s. 246, is also held in *Netietom* v. *Tayanbarry* (4). Such order is final, unless the party against whom it is made, bring a suit within one year from the date of that order, as prescribed by s. 246: *The Collector of Ahmedabad* v. *Samuldas Beehardas* (5). The learned pleader also referred to *Lalchand Ambaidas* v. *Sakharam* (6), and *Shaik Khoda Buksh* v. *Puramanund Dutt* (7).

Shamrav Vithal, for the respondents.—The plaint alleges that the property in dispute was not liable to be attached and sold, and expressly

(1) 4 B. 23, 24, note. (2) 4 B. 21. (3) 3 M.H.C.R. 220.
(4) 4 M.H.C.R. 472. (5) 9 B.H.C.R. 205 (213).
(6) 5 B.H.C.R.A.C.J. 139. (7) 5 W.R.C.R. 214=1 Wyman Rep. 280.

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prays that the sale should be set aside. The suit, therefore, falls under art. 14, as held by the District Judge, and not under art. 15. Article 14 is specially provided for such suits. The present suit is not one "to alter or set aside a decision or order of a Civil Court in a proceeding other than a suit," as provided in art. 15. That article may apply to suits brought by judgment-creditors for restoring an attachment raised on the intervenient's application under s. 246. But it does not apply to a suit like the present, brought by an unsuccessful applicant, under that section, for the setting aside of the sale. No provision is specially made in Act IX of 1871 in substitution of the limitation of one year contained in the last twelve words of s. 246, and repealed [614] by s. 2 and sch. I of that Act. This is the view of the Calcutta High Court as expressed in *Koylosh Chunder Paul* v. *Preonath Roy* (1). Article 15 may be taken as substituted for the limitation of one year provided in s. 1, cl. 5, of the old Limitation Act (XIV of 1859). The wording of art. 14 is similar to that of cl. 3, s. 1 of that Act. He also referred to *Babu Pertaub Chunder* v. *Babu Brojo Lall Shaha* (2).

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—In a suit in which Vinayek Bhikaji was plaintiff and Sakharam Gopal and Waman Rangnath were defendants, a decree was obtained against those defendants by the plaintiff, and certain property, alleged to be that of the defendant Waman Rangnath, was attached in execution of that decree. The plaintiffs in the present suit (five in number) are his brothers, and, intervening under s. 246 of Act VIII of 1859, sought to raise the attachment. Their application was rejected on the 24th of July, 1875. The attached property was sold by the Court, upon the 16th and 17th of February, 1876, to Krishnaji Vithal for Rs. 83, and that sale was confirmed on the 18th of March, 1876. The plaint in the present suit was filed on the 17th of March, 1877, by the five brothers of Waman Rangnath against Vinayek Bhikaji (the plaintiff and judgment-creditor in the former suit) and Krishnaji Vithal (the purchaser in that suit). The five plaintiffs in the present suit in their plaint alleged that their cause of action accrued upon the 24th of July, 1875, which, it will be remembered, was the day on which their application, under s. 246 of Act VIII of 1859, had been rejected. They alleged that the property, the subject of that application, was the undivided ancestral *inam* property of themselves and Waman, and that they, the plaintiffs, were entitled to five-sixths of it and that those five-sixths were not in anywise liable to the decree held by Vinayek Bhikaji in respect of a debt as to which Sakharam Gopal was principal debtor and Waman only a surety, and, therefore, that plaintiffs' five-sixths of the property were not properly liable to the attachment or sale in satisfaction of that debt. They prayed that "the sale should be set aside," and that their "possession under proprietary right should be continued." [615] The Subordinate Judge held that their suit was barred by art. 15 of sch. II of Act IX of 1871. The District Judge reversed that decree, and held that art. 14 of that schedule, and not art. 15, was applicable to this suit, and that, inasmuch as the plaint had been filed on the 17th March, 1877, within one year from the confirmation of the sale which occurred on the 18th March, 1876, the suit was not barred.

(1) 4 C. 610. (2) 7 W.R. 253.

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The second defendant Krishnaji Vithal, the purchaser, has appealed to this Court against the decree of the District Judge.

Laying aside the fact that the plaintiffs themselves have, as already mentioned, averred that their cause of action accrued on the 24th July, 1875, when their application, under s. 246 of Act VIII of 1859, was rejected, and assuming that, notwithstanding that averment, it is open to the plaintiffs to contend that time did not begin to run against them until a later date, we think they have failed in that contention.

It has been for them denied that for the concluding twelve words "at any time within one year from the date of the order," contained in s. 246 of Act VIII of 1859 (which words were repealed by s. 2 and sch. I of Act IX of 1871), art. 15 of sch. II of Act IX of 1871 was substituted, so far as those twelve words related to suits, like the present suit, brought by a person who had been an intervenient under s. 246 of Act VIII of 1859, and who had failed to obtain the removal of an attachment under that section. Yet it was admitted that art. 15 of sch. II of Act IX of 1871 would apply to a suit brought to restore an attachment which had been removed under s. 246 of Act VIII of 1859, inasmuch as that would be a suit "to alter or set aside a decision or order of a Civil Court in a proceeding other than a suit." But the present suit is said to be a suit to set aside a sale, and, as such, specially provided for by art. 14 of sch. II of Act IX of 1871. The plaint does, indeed, in words, ask that the sale to Krishnaji Vithal, the auction-purchaser, should be set aside. But that is not, in substance, the real drift of the suit. The sale was not a sale of the shares or interest of the five present plaintiffs in the *inam* property, but was merely a sale of the right, title and interest of their brother. [616] Waman, the second defendant in the other suit, to which the present plaintiffs were not parties, and they do not deny that his share in the *inam* property passed to the purchaser at that sale. It has not been, in argument, contended that they have any right to ask the Court to set aside the sale of Waman's share.

It is the settled law of this Presidency, that the share of an undivided co-parcener may be taken in execution, and sold for his separate debt: *Vasudev Bhat* v. *Venktesh Sanbhav* (1); *Fakirapa* v. *Chanapa* (2): *Pandurang Anandrav* v. *Bkaskar Sadashiv* (3); *Udaram Sitaram* v. *Ranu Panduji* (4). That being so, and there not having been any other sale than that of the share of Waman in relation to the *inam* property, the date of that sale or of its confirmation cannot afford any terminus whence time should run against the present suit, inasmuch as the sale of Waman's share gave no cause of action to his brothers, the plaintiffs. Hence art. 14 of sch. II of Act IX of 1871 has no application to this suit. This view is in complete accordance with that of Melvill and Kemball, JJ., in *Venkápa* v. *Chenbasapa* (5), who there abandoned that article as affording any terminus whence time could run against a party who had, under s. 246 of Act VIII of 1859, failed to obtain the removal of an attachment. In *Settiappan* v. *Sarat Singh* (6), which was decided in 1866 before the concluding twelve words in s. 246 were repealed, the High Court of Madras said: "We think that the effect of the last sentence of s. 246 is to exclude a party to an investigation, under that section, from any other remedy than that expressly provided for him by that section, *viz.*, a regular suit to be brought within

(1) 10 B H.C.R. 139. (2) *Ibid.* 162 (3) 11 B.H.C.R. 72. (4) *Ibid.* 76.
(5) 4 B. 31. (6) 3 M.H.C. R. 220= 4 M. H. C. R. 472.

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one year from the date of the order made against him, and that, consequently, such party cannot wait till the sale of the attached property has taken place and been confirmed, and then bring his suit within one year from the last date." In the Limitation Act then in force (Act XIV of 1859) there was in s. 1, cl. 3, a period of limitation fixed for suits to set aside the sale of property sold under an execution of a decree of any Civil Court not established by Royal Charter; but the High Court of Madras, in the [617] case just cited, refused to resort to it in favour of an unsuccessful party to an investigation under s. 246 of Act VIII of 1859. We concur in that decision. That Court then also expressed an opinion that if the Limitation Act had been resorted to, the case would have ranked rather under s. 1, cl. 5, than under s. 1, cl. 3, of that Act. Section 1, cl. 5, is that which provides a limitation of one year "to suits to alter or set aside summary decisions and orders of the Civil Courts not established by Royal Charter," which provision closely resembles that in art. 15 of sch. II of Act IX of 1871. The view which this Court has taken of the finality of an order, under s. 246, upon parties to a proceeding under that section, if they did not bring their suit within the time thereby prescribed, is illustrated by *The Collector of Ahmedabad* v. *Samuldas Bechardas* (1). It appears to have been held in *Koylash Chunder* v. *Proenath Roy* (2) that, on the repeal of the last twelve words in s. 246 of Act VIII of 1859, art. 15 of Act IX of 1871 was not substituted for them, and it is not in that case pointed out that any other provision was substituted for those twelve words. Possibly, the Court which decided that case, was of opinion that the defeated intervenient under s. 246 had twelve years within which he might bring his suit to establish his right. The report of that case does not show in what capacity the plaintiff there claimed; so we are unable to conjecture what was the article of Act IX of 1871 under which the Court may have supposed the suit to range. It was said there that the suit could not be regarded as one to set aside the decision against the plaintiff under s. 246 of Act VIII of 1859. That, however, seems to us to be inconsistent with the intention of the Legislature in passing that section, which, we (in accordance with the High Court of Madras in the case of *Settiappan* v. *Sarat Singh* already cited) think, was to treat the order made under that section as a final bar to the plaintiff's right, unless such a suit, as that section prescribed, was brought to retry the question of that right. And if, on such action being brought, the Court on the trial held that the plaintiff had established his right, such a ruling would amount to a reversal of the order under s. 246.

[618] That being so, we think that the suit would fall clearly within art. 15 of sch. II of Act IX of 1871. We do not believe that the Legislature, in repealing the twelve concluding words in s. 246 by Act IX of 1871, intended to give to plaintiffs, bringing suits to get rid of the decision against their right under that section, any longer time than they previously had for the institution of such suits. We think that the Legislature must have intended to substitute art. 15 of sch. II of Act IX of 1871 for the limitation provided by the twelve repealed words in s. 246. This opinion is fortified by the course which the Legislature has taken in making its intention clear in Act XV of 1877, sch II, art. 11, with reference to suits brought to establish their right by persons against whom orders have been passed under ss. 280, 281 and 282 of the Civil Procedure Code

(1) 9 B.H.C.R. 205 (213). (2) 4 C. 610.

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(X of 1877), which sections are analogous to s. 246 of the Civil Procedure Code (VIII of 1859). By that art. 11 the institution of such suits is limited to one year from the date of that order.

For these reasons we hold this suit to be barred barty. 15 of sch. II of Act IX of 1871. We, therefore, must reverse the order of the District Judge, and restore that of the Subordinate Judge.

The plaintiffs are to pay to the defendants their costs of the suit and of both appeals, in so far as the defendants, respectively, have incurred such costs.

We do not desire, by anything which we have said in this case to impair the authority of *Lalchand Ambaidas* v. *Sakharam* (1) it being a case in which the plaintiffs had not intervened under s. 246.

Order reversed.

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4 B. 619.

[619] ORIGINAL CIVIL.

Before Mr. Justice West.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, (*Plaintiff*) *v.* MAHOMED IBRAHIM PARKAR (*Defendant.*)*

[13th April, 1880.]

Practice—Expenses of witness—Service of summons on the wrong person—Erroneous description of defendant in plaint—Dismissal of suit.

A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has applied for them before giving his evidence.

In a suit brought by the plaintiffs against A, the summons was by mistake served upon B, who thereupon filed a written statement denying his liability and alleging that he was erroneously described in the title to the plaint. On the day of the hearing of the case the plaintiffs' agent saw B for the first time, and ascertained that he was not the real defendant in the suit.

Held, that B having done nothing to mislead the plaintiffs as to his identity, was entitled to his costs of suit.

Held, also that the case having come on for hearing, and there being nothing to show that the plaintiffs had been in any way deceived by B, the proper order to be made was for the dismissal of the suit.

[R., 28 B. 647=6 Bom. L. R. 1025.]

SUIT to recover Rs. 2,000 from the defendant as a contributory of the plaintiffs' bank.

In this case the summons, addressed to the defendant, Mahomed Ibrahim Parkar, had been served, not upon the defendant, but upon one Mahomed Ibrahim Parkar valad Lootfooddeen Parkar, by affixing a copy on the door of his house. He thereupon filed a written statement denying his liability, and alleging that he had never held shares in the plaintiffs' bank. In the last clause of the written statement he stated that "the description given of him in the title of the plaint was altogether wrong and erroneous." The written statement was signed by him in full in the usual manner.

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* Suit No. 518 of 1876.

(1) 5 B.H.C.R.A.C.J. 139.