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dence, p. 682. The defendant, no doubt, might have pleaded in 1877 that the plaintiff could not foreclose, unless he formally abandoned his claim to be repaid the second advance when due. His omission, however, to do so cannot now deprive him of his right to insist that the foreclosure decree, passed in 1878, either precludes the plaintiff's suing on the second debt, or, at any rate, that the foreclosure should be re-opened.

We must, therefore, reverse the decree, and dismiss the plaint, unless the plaintiff decide, within a month from date, to have the foreclosure re-opened, in which case the plaint should be treated as one for foreclosure, and decided as such. Plaintiff to pay defendant's costs throughout up to date.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886. *September* 14.

SHIV'APA', (ORIGINAL DEFENDANT), APPELLANT, *v.* DOD NAGAYA, (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Civil Procedure Code (XIV of 1882), Secs. 13, 278, and 283—Suit by a judgment-creditor to establish his judgment-debtor's right to property so as to make it subject to attachment in execution of his decree—Dismissal of such suit—Judgment-debtor not represented by judgment-creditor in such suit—Subsequent suit by judg-ment-debtor to recover the same property—Such subsequent suit not barred—Second appeal, point taken for the first time on.

A judgment-creditor of the plaintiff having obtained a decree against the plaintiff, attached the house in dispute. The defendant intervened in 1878, and set up a previous purchase of the house by himself from the plaintiff. The attachment was removed. The judgment-creditor brought a suit against the defendant for declaration that the property belonged to the plaintiff, and, as such, was liable to be attached and sold in execution. At the hearing of this suit the judgment-creditor did not appear. The defendant appeared, and produced a sale deed, which the Court found proved, and dismissed the judgment-creditor's suit. The plaintiff now brought the present suit against the defendant to recover possession of the house. The defendant contended *(inter alia)* that the dismissal of the former suit, brought by the plaintiff's judgment-creditor, operated as *res*

* Second Appeal No. 406 of 1884.

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judicata under section 13 of the Civil Procedure Code (Act XIV of 1882). Both the lower Courts disallowed the defendant's contention, holding that the suit was not barred. On appeal by the defendant to the High Court,

Held, confirming the lower Courts' decree, that the dismissal of the former suit did not operate as *res judicata* in the absence of any evidence to show that the judgment-creditor, in point of fact, represented the plaintiff so as to constitute him a party to the suit.

It was contended for the defendant that the plaintiff, as the judgment-debtor, might, at any rate, be regarded as a party against whom the order in the execution proceedings in 1878 was made, and that the present suit was, therefore, barred by limitation.

Held, that the plaintiff could not be regarded as a party to those proceedings. Whether a judgment-debtor is to be regarded as a party to an investigation under section 278 of the Code, must depend upon the facts of each case. As the question of limitation was raised for the first time in second appeal it could not be decided against the plaintiff.

THIS was a second appeal from the decision of A. C. Watt, District Judge of Dhárwár.

In execution of a money-decree obtained by the Kárwár Company against the plaintiff, the house in question was attached in 1878. The defendant thereupon intervened, and set up a previous purchase of the house by himself from the plaintiff, and the attachment was removed. The Kárwár Company then brought a suit No. 886 of 1879) against the defendant to have it declared that the house belonged to the plaintiff, and as such was liable to attachment under their decree. At the hearing of the suit the Kárwár Company did not appear, and that suit was accordingly dismissed in March, 1880, the sale to the defendant having been proved.

In 1882 the plaintiff brought the present suit to recover possession of the house from the defendant.

The defendant *(inter alia)* contended that the present suit was barred, as *res judicata*, under section 13 of the Civil Procedure Code (Act XIV of 1882) by reason of the dismissal of the former suit brought by the Kárwár Company for the purpose of establishing the plaintiff's right to the house.

Both the lower Courts held that the suit was not barred.

The defendant preferred a second appeal to the High Court.

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Macpherson (*Shámráv Vithal* with him) for the appellant:—The present suit relates to the same property as the former one by the Kárwár Company, and under section 13 of the Civil Procedure Code (Act XIV of 1882) is barred. The dismissal of the former suit cannot be regarded as a dismissal under section 102 of the Code of Civil Procedure. The plaintiff should be regarded as having been represented by the Kárwár Company in the former suit. A judgment-creditor represents his judgment-debtor, and the proceedings by the creditor are binding upon the debtor, who must be deemed to be a party to those proceedings—*Netietom Perengaryprom* v. *Tayanbarry Parameshwaren*(1). See, also, *Bábáji Vithal Sávant* v. *Káji Abdul Rahiman*(2). The plaintiff may be regarded as a party to the former proceedings, and his omission to set aside the order bars the suit.

Branson (*Náráyan Ganesh Chandávarkar* with him) for the respondent:—A judgment-creditor seeking to establish a title to the property of his debtor cannot bind the debtor by an order passed against him—*Lalu Mulji* v. *Káshibái*(3); *Appáshet* v. *Saguná* (4); *Moro Bálkrishna* v. *Shek Sáheb Kamble*(5); *Imbichi Koya* v. *Kakkunnat Upakki*(6); *Mannu Lál* v. *Harsukh Dás*(7). Section 283 of the Civil Procedure Code makes it incumbent on the party to the proceedings, against whom an order is passed, to bring a suit within one year from the date of the order. A judgment-debtor is not necessarily a party to his creditor's suit, and, therefore, an order passed against the creditor, either under section 246 of the former Code or section 283 of the present Code, is not binding upon the debtor. The doctrine of *res judicata* does not apply to such a case.

SARGENT, C. J.—In this case, the Kárwár Company had obtained a decree against the plaintiff, Nagaya, and, in execution, had attached the house in question. The defendant, Shivápá, intervened in 1878, under section 246 of the Code of Civil Procedure (Act VIII of 1859), alleging that he had purchased the house from Nagaya, and obtained an order removing the attach-

(1) 4 Mad. H. C. Rep., 472.
(2) Printed Judgments for 1873, p. 159.
(3) Printed Judgments for 1886, p. 43.
(4) Printed Judgments for 1878, p. 279.
(5) 5 Bom. H. C. Rep., 199, A. C. J.
(6) I. L. R., 1 Mad., 393.
(7) I. L. R., 3 All., 235.

ment. The Kárwár Company then brought Suit No. 886 of 1879 against Shivápá, praying for a declaration that the house belonged to Nagaya, and was liable to sale. The Subordinate Judge having found Shivápá's document of sale proved, and neither the plaintiff or his witnesses appearing afterwards, and nothing being done in the suit, dismissed the suit. It has been contended that the dismissal of that suit operates as *res judicata* in the present suit by the judgment-debtor to recover possession of the property. The District Judge, confirming the Subordinate Judge, held that the suit was not barred under section 13 of the Civil Procedure Code.

There is some conflict of authority as to whether the judgment-debtor is bound by proceedings under section 246 of the Civil Procedure Code of 1859. In the case of *Bábáji Vithal Sávant* v. *Káji Abdul Rahiman*[1], decided by Melvill and West, JJ., it was held that "the intention of the law was that an attaching creditor proceeding under section 246 of the Code of Civil Procedure of 1859 should be held to represent the judgment-debtor's interest," and that the judgment-debtor was consequently bound by an order made under that section. We have not found any other authority for this particular view of the section. In *Netietom Perengaryprom* v. *Tayanbarry Parameshwaren*[2], the Madras High Court, with an expression of doubt by Mr. Justice Innes, held that the judgment-debtor must be deemed to have been a party to the investigation, and, therefore, to be bound by the order, on the ground that the section provides that the Court is to proceed as if the claimant had been originally made a party to the suit. However, great doubt was thrown on this last decision by Morgan, C. J., and Holloway, J., in *Cheriyarakel* v. *Vayka Parambath Imbichi Ammah*[3]. They say: "We should, but for the case referred to, have had great difficulty in saying that the judgment-debtor was a party to the order at all; but we think this case may be decided without touching the ground of that decision."

Again in *Imbichi Koya* v. *Kakkunnat Upakki*[4], the Madras Court, consisting of Morgan, C. J., and Innes, J., says: "The pro-

(1) Printed Judgments for 1873, p. 159.
(2) 4 Mad. H. C. Rep., 472.
(3) 6 Mad. H. C. Rep., 419.
(4) I. L. R., 1 Mad., 393.

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ceeding under that section is apparently regarded by the Subordinate Judge as a proceeding which must necessarily include the judgment-debtor. But this is not so. The material fact for inquiry is, whether the claimant held possession, and the fact of possession may be investigated in a proceeding between the decree-holder and claimant only. The power given by the section to summon the original defendant also shows this." In that case the evidence showed that the judgment-debtor was, as a matter of fact, in foreign parts at the time, and had no notice or knowledge of the proceeding under the section. The decision in *Mannu Lal* v. *Harsukh Dás*[1] is to the same effect.

These are all decisions under section 246 of the Code of 1859. The corresponding section 278 of the present Code does not provide expressly for the judgment-debtor being summoned, but directs the Court "to proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit." This expresses, in somewhat clearer language than section 246 of the Code of 1859, the intention of the Legislature, that the investigation is to be conducted as one arising in the suit, to which this claimant is for the nonce to be regarded as a party, but otherwise it leaves the legal aspect of the question under consideration unchanged.

Now, doubtless, the judgment-creditor litigates, both in the investigation under section 278 and in the suit contemplated by section 283, under the judgment-debtor's title; but we think there is great difficulty in holding that he represents the latter in those proceedings on the proper construction of the above sections. The circumstance that the judgment-creditor in most cases is ignorant of the judgment-debtor's affairs, and unfit to represent him in a question of disputed right between him and the claimant, forbids the supposition, in the absence of clear words, that this was the intention of the Legislature. The contrary intention is rather to be inferred from the provisions contained in the sections of both the Codes under consideration for the investigation proceeding as if the claimant was a party

(1) I. L. R., 3 All., 233.

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to the suit, the object of which would seem to be that the matter should be investigated in the presence both of the judgment-debtor and claimant if necessary. We think, therefore, that the lower Courts were right in holding that the decree in Suit 886 of 1879 did not operate as *res judicata*, there being no evidence to show that the judgment-creditor, in point of fact, represented the plaintiff so as to constitute the judgment-debtor a party to the suit.

It was urged before us that, at any rate, the plaintiff must be deemed to have been a party against whom the order was made, and that the present suit is, therefore, barred by the Statute of Limitations; but we agree with the reasoning in *Imbichi Koya* v. *Kakkunnat Upakki*(1) and *Mannu Lal* v. *Harsukh Dás*(2), that a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but that it must depend upon the facts of each case. And as the question of the statute of limitations is now raised for the first time in second appeal, this Court cannot decide that question against the plaintiff. We must, therefore, confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 1 Mad., 391. (2) I. L. R., 3 All., 233.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

PAREKH RANCHOR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I VAKHAT AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1886. *September* 16.

Limitation Act XV of 1877, *Sch. II, arts.* 12, *cl. (a), and* 95—*Suit by reversioner to establish his title to property sold in execution of decree obtained against a widow as representative of her deceased husband's estate—Fraud—Collusion—Remarriage of widow—Act XV of* 1856, *Sec.* 2.

The plaintiff, as the nearest heir of one Odhav Tuljá, who died intestate in 1873, sued to set aside a sale of certain immoveable property belonging to the estate of the deceased, which had been sold on the 3rd November, 1875, in execution of a money decree obtained by the defendant, Jagannáth, against Bái Vakhat, the widow of Odhav Tuljá. Bái Vakhat had married a second time in 1876, and her second

* Appeal No. 107 of 1883.