

*Govardhanram M. Tripathi*, appeared for the opponent Nana to show cause.—We take a preliminary objection, and submit that this application cannot be entertained under s. 622 of the Civil Procedure Code, inasmuch as s. 591 has provided a remedy in case of orders such as the one now in question—*Chattar Singh v. Lekhraj* (1); *Farid Ahmad v. Dulari Bibi* (2); *In re Nizam of Hyderabad* (3).

*Ganesh Krishna Deshamukh*, for the applicant, in support of the rule.—Interlocutory orders such as the one in question can be interfered with under s. 622 of the Civil Procedure Code—*Dhapi v. Ram Pershad* (4). The exercise of the extraordinary jurisdiction is discretionary, the true interpretation of s. 622 being that, in case of orders which are appealable, the High Court cannot interfere, and that, in the case of those which are unappealable, the High Court has a discretion to interfere, which will be exercised with regard to the circumstances of each case.

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### JUDGMENT.

[37] SARGENT, C. J.—The expression “case” in s. 622 of the Code of Civil Procedure may be, as stated by the Court in *Dhapi v. Ram Pershad* (4), wide enough to include an interlocutory order. But a word of such general import must be controlled by due regard to the purpose with which s. 622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court, when there would otherwise be no remedy. In the case of those interlocutory orders (such as the present one), against which no immediate appeal lies, a remedy is still supplied by s. 591, which provides that the order may be made ground of objection in the appeal against the final decree. We may remark that the Madras and Allahabad High Courts in *In re Nizam of Hyderabad* (3) and *Chattar Singh v. Lekhraj* (1), differing from the Calcutta High Court, take this view of the section.

We must, therefore, discharge the rule, with costs.

*Rule discharged.*

18 B. 37.

### APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*

NAMDEV (*Original Defendant*), Appellant v. RAMCHANDRA GOMAJI MARWADI (*Original Plaintiff*); Respondent.\* [5th December, 1892.]

*Decree—Execution—Auction-purchaser—Symbolical possession—Judgment-debtors remaining in actual possession—Subsequent attempt by purchaser to take possession—Obstruction—Application to remove obstruction—Application converted into a suit under s. 331 of Civil Procedure Code (XIV of 1882)—Limitation—Adverse possession—Limitation Act (XV of 1877), s. 3, and sch. II, arts. 138, 144, 167—Civil Procedure Code (XIV of 1882), ss. 328, 329, 331.*

The plaintiff purchased the property in dispute at an auction sale in execution of a decree, and on the 14th August, 1877, he took formal possession, but the judgment-debtors remained in actual possession. On 18th September, 1889, the plaintiff proceeded to take possession, but was obstructed by the defendant, who alleged that he had purchased the property from the judgment-debtors in

\* Second Appeal No. 863 of 1891.

(1) 5 A. 293.

(2) 6 A. 293.

(3) 9 M. 256.

(4) 14 C. 763 (780).

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1888. The plaintiff [38] then applied for the removal of the defendant's obstruction, and his application was registered as a suit under s. 331 of the Civil Procedure Code (XIV of 1882).

*Held*, that the plaintiff's claim was barred by limitation. When his application was converted into a suit under s. 331, the rights of the parties had to be determined as if an ordinary suit for possession had been instituted against the defendant, and either art. 138 or art. 144 of the Limitation Act (XV of 1877), applied. In either case the defendant could avail himself of the judgment-debtors' possession, which was adverse to the plaintiff.

[F., 8 Ind. Cas. 236=70 P.L.R. 1910=58 P.W.R. 1911; R., 21 B. 392 (393); 3 Bom. L.R. 832 (834); 12 C.L.J. 378=6 Ind. Cas. 467 (471); D., 19 A. 499 (501)=17 A.W.N. 127.]

SECOND APPEAL from the decision of Dr. A. D. Pollen, District Judge of Poona.

One Gangadhar Keshav Bhat obtained a decree (No. 1628 of 1876) against four brothers, Hari, Narayan, Rama and Vithu. In execution of that decree the property in dispute was sold by auction and was purchased by the present plaintiff, Ramchandra Gomaji Marwadi, on the 14th August, 1877, who took formal possession through the Court, but the judgment-debtors remained in actual possession. Subsequently, *viz.*, in the year 1889, the plaintiff having himself obtained a decree (No. 126 of 1889) against the four brothers, sold the same property in execution and purchased it. On the 18th September, 1889, he proceeded to take possession, but was obstructed by the defendant Namdev, who alleged that on the 3rd January, 1888, he had purchased the property from the judgment-debtors. The plaintiff in October, 1889, presented an application for the removal of the defendant's obstruction, and the application was registered as a suit under s. 331 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge found that the defendant acquired no right to the property in dispute under his purchase, because his vendor's right, title and interest had been already purchased by the plaintiff in the Court sale on the 14th August, 1877, under Gangadhar Keshav Bhat's decree. He, therefore, allowed the plaintiff's claim.

On appeal by the defendant the Acting District Judge (T. Hart-Davies) sent down the following issue for trial:—

"Is the claim time-barred?"

The finding of the Subordinate Judge on the above issue was in the negative, on the ground that as the plaintiff's application [39] for the removal of the defendant's obstruction was made within thirty days from the date of the obstruction, the claim was not barred under art. 167, sch. II of the Limitation Act (XV of 1877).

On appeal the District Judge, concurring with the Subordinate Judge, confirmed his order.

The defendant preferred a second appeal.

*Mahadev Bhaskar Chavbal*, for the appellant (defendant).—The plaintiff's claim now to take possession is barred. He got symbolical possession in August, 1877, and his present application was made in October, 1889, *i.e.*, more than twelve years subsequently. The plaintiff allowed the judgment-debtors to remain in possession, and they sold the property to the defendant. The possession of the judgment-debtors was adverse to the respondent (the plaintiff) and we claim through them. The suit was, therefore, clearly barred.

*Gangaram B. Rele*, for the respondent (plaintiff).—The point of adverse possession is raised for the first time in second appeal. It was

not raised in the written statement, nor was it raised in either of the lower Courts.

[SARGENT, C. J.—The issue sent down by the Acting District Judge includes the point.]

Neither of the lower Courts understood the issue to mean whether the claim was barred by adverse possession. It was after the issue was sent down that the Subordinate Judge came to the conclusion that the claim was not time-barred, being filed within thirty days from the date of obstruction. It was not suggested, in appeal, that the Subordinate Judge did not understand the issue, nor did the defendant raise any objection to the Subordinate Judge's finding. The District Judge also understood the issue to mean whether the suit was filed within thirty days from the date of obstruction. The appellant should not be allowed, in second appeal, to raise a point which he did not raise, and never urged, in either of the lower Courts.

#### JUDGMENT.

SARGENT, C. J.—We think both the Courts below have misapplied the Statute of Limitations in disposing of the first issue [40] sent down on remand. Article 167 of the second schedule of the Statute of Limitations required that the application contemplated by s. 329 of the Civil Procedure Code (XIV of 1882) should be brought within thirty days from the obstruction, but when that application was converted into a suit, the rights of the parties had to be determined as if an ordinary suit for possession had been instituted by the decree-holder against the defendant. The issue as to the Statute of Limitations must, we think, have been intended by Mr. Hart-Davies to be determined in its double aspect, and that being so, either art. 138 or art. 144 would be applicable to the case. See *Lakshman v. Bisansing* (1) and *Lakshman v. Moru* (2). It is not a matter of importance which article is applied, as in either case the defendant will be able to avail himself of Hari's possession, which, after the petition by plaintiff, became adverse to the latter. Assuming art. 144 to apply, the defendant would have acquired possession from Hari, which was the cause of "his liability to be sued" in the present suit, and would, therefore, fall under the definition of a defendant in s. 3 of the Statute of Limitations.

The plaintiff's suit is, therefore, barred, and we must reverse the decree of the Court below and dismiss the plaint with costs throughout on the plaintiff.

*Decree reversed.*