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APPELLATE CIVIL.

*Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Telang.*GOPAL PURSHOTAM (*Original Plaintiff*), *Appellant v. BAIDIVALI*
(*Original Defendant*), *Respondent*.* [13th March, 1893.]*Civil Procedure Code (XIV of 1882), ss. 278 and 283—Decree—Execution—Attachment—Application by third party for removal of attachment—Order refusing to remove attachment—Omission by third party to bring subsequent suit to establish right to attached property—Subsequent withdrawal of attachment by attaching party—Effect of such withdrawal—Subsequent claim to property by the party who had failed to remove attachment.*

The plaintiff was the assignee of a mortgage decree dated the 2nd May, 1885. In 1888 he attached the mortgaged property in execution of the decree, whereupon the defendant intervened and applied to have the attachment removed, on the ground that prior to the attachment she had purchased the land under a registered deed of sale dated the 23rd June, 1888. Her application was rejected on the 27th September, 1888. Subsequently the judgment-debtors applied and obtained the Court's permission to sell the land by private contract, and on the 1st November, 1888, the plaintiff purchased it and withdrew his application for execution on the 20th November, 1888. In 1889 the plaintiff brought this suit against the defendant to obtain the removal of certain portions of a culvert erected by her on the land. The defendant pleaded that she was the owner of the property, having purchased it on the 23rd June, 1888.

The Subordinate Judge passed a decree for the plaintiff, on the ground that though the plaintiff's sale-deed was not entitled to preference over the defendant's, still as she had taken no steps to establish her right to the property in a regular suit after her application for the removal of the plaintiff's attachment had been rejected, effect could not be given to her purchase. On appeal by the defendant the decree was reversed, and the plaintiff preferred a second appeal.

Held, confirming the appellate decree, that when the plaintiff withdrew his attachment on the 20th November, 1888, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by s. 278 of the Civil Procedure Code (Act XIV of 1882), to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act, there was no longer an attachment or any [242] proceeding in execution on which the order could operate to the prejudice of the claimant, and, therefore, there was no necessity for her to bring a suit to set aside the order.

The defendant's title to the property having been acquired on the 23rd June, 1888, was superior to the plaintiff's, which was not acquired before November, 1888.

[*Diss.*, 1 C.L.J. 296 (300); F. 31 C. 228 (231); R., 26 M.L.J. 499; D., 29 M. 225 (229) = 16 M.L.J. 136.]

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad.

Two brothers named Jhalam Ratna and Maina Ratna were the owners of the land in dispute (Survey No. 61). They mortgaged it to one Lallu Gopal, who filed a suit against them on the mortgage and obtained a decree on the 2nd May, 1885. On the 4th May, 1885, this decree was assigned by Lallu Gopal to the plaintiff Gopal Purshotam, who in 1888 attached the mortgaged property in execution. The defendant Bai Divali intervened and applied for the removal of the attachment, alleging that on the 23rd June, 1888, before the property was attached, she had purchased it under a registered deed of sale. On the 27th September, 1888, defendant's application was rejected.

* Second Appeal No. 1034 of 1891.

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Subsequently the judgment-debtors Jhalam and Maina applied to the Court for permission to sell the land by private contract, and their application being granted, the plaintiff on the 1st November, 1888, privately purchased the land and on the 20th November, 1888, withdrew his application for execution.

In 1889 the plaintiff brought the present suit against the defendant for an injunction requiring the defendant to remove certain portions of a culvert erected by her on the land in question and for damages.

The defendant pleaded (*inter alia*) that the suit was time-barred and that she was the owner of the property.

The Subordinate Judge allowed the claim for the removal of the culvert, holding that though the plaintiff purchased the property with full knowledge of the defendant's prior registered purchase, nevertheless the defendant was not protected by her purchase, as she had not established her right to the property by a regular suit after the rejection of her application in the attachment proceeding. The rest of the plaintiff's claim was disallowed.

[243] Both the parties appealed to the District Judge, who reversed the decree and rejected the plaintiff's claim on the following grounds:—

"It has been contended that because Bai Divali brought no suit within one year to set aside the order of the Subordinate Judge, she is now barred from setting up a claim to the land. I am of opinion that this is erroneous; when the plaintiff withdrew his application on 20th November, 1888, he practically cancelled all the proceedings which had taken place in consequence of his application, and the parties returned to the *status quo ante*. If plaintiff had allowed his application to remain on the file for a year and then withdrawn it, the defendant meanwhile having done nothing, the plaintiff's plea would be good. But another point appears in favour of the defendant; the summary proceedings do not appear to extinguish the defendant's title, but only her right to possession (cf. *Parashram v. Rakhma*, I. L. R., 15 Bom., 299). If, then, my opinion on this point be not erroneous, it follows that the defendant's sale-deed must have priority over the plaintiff's, and the present suit must fail."

The plaintiff preferred a second appeal.

Goverdhanram M. Tripathi, for the appellants (plaintiff).

Chimantlal H. Setalvad, for the respondent (defendant).

JUDGMENT.

SARGENT, C. J.—We agree with the lower appeal Court that, when the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by s. 278, Civil Procedure Code, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act on 20th November, 1888, there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and, therefore, no necessity for bringing a suit to set aside the order. This is apparently the broad view on which the Court proceeded in *Ibrahimhai v. Kabulabhai* (1).

Under these circumstances, as s. 283 of the Civil Procedure Code does not operate as a bar to the present suit, and the [244] defendant's

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title to the property, which was acquired on 3rd June, 1888, is superior to the plaintiff's, which was not acquired before November, 1888, the plaintiff has failed to establish his right to an injunction, and his claim was, therefore, properly rejected.

Decree must be confirmed with costs.

Decree confirmed.

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APPELLATE CIVIL.

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

FAKI GULAM MOHIDIN AND OTHERS (*Original Plaintiffs*), Appellants
v. SAJNAK BIN PANDNAK AND OTHERS (*Original Defendants*),
Respondents.* [22nd March, 1893].

Khoti Settlement Act (Bombay Act I of 1880), ss 17, † 20, † 21, † 22 † and 37—Settlement Officer's decision—Dhara lands—Suit for a declaration that lands were khoti lands—Decree of a Civil Court—Adverse possession—Art. 14, sch. II of the Limitation Act (XV of 1877)—Six years' limitation.

A survey settlement officer decided in the year 1882 that certain lands situate at the *khoti* village of Tadiil, in the Ratnagiri District, were *dhara* lands of S. and [245] another, but the entry in the survey register that they were *dhara* lands was not made till 1889.

In the meanwhile, F. and others, who were the *khots* of the village, made an application to the special survey officer to revise the decision of the settlement officer of the year 1882, and the special settlement officer having rejected this application in 1885, they brought the present suit in 1887 against S. and others for a declaration that the lands were their *khoti*.

The Judge dismissed the suit on the ground that the settlement officer's decision being final under ss. 20 and 21 of the *Khoti Settlement Act (Bombay Act I of 1880)*, and it having not been set aside within one year from its date, the suit was time-barred under art. 14, sch. II of the *Limitation Act (XV of 1877)*.

* Second Appeal, No. 595 of 1891.

† Sections 17, 20, 21, 22 and 37 of the *Khoti Settlement Act (Bom. Act I of 1880)*:—
17. The other records prepared under the said section (that is, s 16) shall specify the nature and amount of rent payable to the *khot* by each privileged occupant according to the provisions of s. 33 of this Act, and any entry in any record duly made under this section shall be conclusive, and final evidence of the liability thereby established.

20. If it shall appear to the survey officer who frames the said register or other record that there exists any dispute as to any matter which he is bound to record, he may, either on the application of any of the disputant parties or of his own motion, investigate and determine such dispute and frame the said register or other record accordingly.

21. In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

22. No suit shall lie against the said survey officer, or against Government, to set aside any such decision of a survey officer; but the record shall from time to time be amended by the said survey officer, or when the survey settlement is concluded, by the Collector, in accordance with any such decree as aforesaid which the parties may obtain *inter se* on an application accompanied by a certified copy of such decree, being duly made to the said survey officer, or to the Collector, for that purpose.

37. Existing survey settlements of the land revenue of any village to which this Act extends, made, approved and confirmed under the authority of the Governor in Council, shall be deemed to have been lawfully made, and, except as is hereinafter otherwise provided, shall continue in force for the terms for which they have been respectively guaranteed, subject to all the provisions of law which would be applicable thereto if this Act had not been passed, and anything in this Act which is inconsistent with any of the said provisions shall be deemed not to apply to such settlements.