

Although, however, the authorities relied on by the District Judge do not really support the proposition laid down by him, we [259] think that proposition to be correct. In *Hellier v. Sillcox*(1) the tenant for life was in possession of certain premises, and the defendant lived with her in those premises until the death of the tenant for life, and continued to do so after her death without coming to any arrangement with the reversionary heir, the plaintiff. The plaintiff having subsequently brought an action for use and occupation, it was argued that the action should have been in ejectment and not for use and occupation. Lord Campbell, however, with the concurrence of the rest of the Court of Queen's Bench, said, after time taken to consider, that the action for use and occupation would lie, "as the defendant occupied the cottage by the plaintiff's permission. The plaintiff was the reversioner, and the defendant, who had married the daughter of the tenant for life, lived in the cottage with her and remained in possession of it after her death. Therefore he was not a trespasser, and he set up no adverse title to the premises." We think we should follow that decision and hold that in this case the District Judge's finding is correct in so far as it decides that after the death of Ramchandra the possession of defendant was not adverse, but permissive only until she expressly set up a title of ownership in the property.

It has, however, been argued for the defendant, that the plaintiff is not entitled to succeed in this case, on the ground of want of legal notice to quit. No doubt it has been held that this point may be taken in second appeal though not raised before—*Dodhu v. Madhavrao* (2). But in this case there is no tenancy, and no question of notice to quit, therefore, arises. Besides, there has been here a distinct repudiation of the plaintiff's title by the defendant (see Ex. 13), and under such circumstances the latter is not entitled to any notice to quit even if the relation between him and the plaintiff was taken to be that of landlord and tenant. We must, therefore, confirm the decree of the District Court with costs.

Decree confirmed.

18 B. 260.

[260] APPELLATE CIVIL.

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

HARISHANKAR JEBHAI (Original Plaintiff), Appellant v. NARAN KARSAN AND ANOTHER (Original Defendants), Respondents.*

[28th March, 1893.]

Decree—Execution of decree—Attachment—Order for removal of attachment—Suit for a declaration that the property was liable to attachment and sale—Suit to set aside an order removing attachment—Defendant's adverse possession—Section 246 of the Civil Procedure Code (Act VIII of 1859)—S. 283 of the Civil Procedure Code (Act XIV of 1882)—Article 15, sch. II of the Limitation Act (IX of 1871)—Article 11, sch. II of the Limitation Act (XV of 1877).

The plaintiff obtained a decree against one Ishvar, and in execution attached the property in dispute. The defendants intervened, and obtained an order for the removal of the attachment on the 11th August, 1888. On the 13th August, 1889, the plaintiff instituted this suit for a declaration that the property belonged to his judgment-debtor (Ishvar) and as such was liable to attachment and sale. The defendants pleaded that they had been in possession of the property for more than twelve years, prior to the institution of the suit, and that the suit was, therefore, barred. The Judge rejected the plaintiff's claim.

* Second Appeal No. 927 of 1891.

(1) 19 L.J.Q.B. (N.S.) 295.

(2) 18 B. 110.

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18 B. 260.

Held, reversing the decree, that the suit being brought under s. 283 of the Civil Procedure Code (Act XIV of 1882) it was a suit to set aside the order of 11th August, 1888, directing the removal of the attachment, and should be determined by ascertaining the rights of the parties at the date of that order. As the defendants had not at that date acquired a title to the property by adverse possession for twelve years, the plaintiff was entitled to a decree.

A suit brought under s. 283 of the Civil Procedure Code (Act XIV of 1882) is a suit to set aside an order within the meaning of art. 11 of sch. II of the Limitation Act (XV of 1877).

[F., 35 B. 79 = 12 Bom. L.R. 956 (968) = 8 Ind. Cas. 639; Appr., 25 Ind. Cas. 11 = 26 M.L.J. 449.]

SECOND appeal from the decision of M. P. Khareghat, Assistant Judge, Full Power, at Broach.

Suit for a declaration that certain property was liable to be attached and sold in execution of a decree.

The plaintiff obtained a decree against one Ishvar Jeykrishna, and in execution attached the property in question. On the 11th August, 1888, on the application of the defendants the attachment was ordered to be set aside.

On the 13th August, 1889, the plaintiff filed this suit praying for a declaration that the property in question belonged to his [261] judgment-debtor Ishvar, and as such was liable to attachment and sale in execution of his decree.

The defendants pleaded that the property had been in their possession for more than twelve years before suit, and that the plaintiff's claim was, therefore, barred.

The Subordinate Judge held that the suit was not barred, and made the declaration sought for.

On appeal by the defendants the Assistant Judge reversed the decree. He held that the defendants had been in possession since June, 1877, and that as this suit was not filed until August, 1889, the plaintiff's claim was barred.

The plaintiff filed a second appeal.

Gokuldas Kahandas Parekh, for the appellant (plaintiff):—Unless the defendants had acquired a title by adverse possession for twelve years at the time the plaintiff attached the property, his claim in this suit is not barred. The object of this suit is to show that he was then entitled to attach the property; therefore, the date of the attachment is the date at which the defendants' title is important. If the plaintiff proves that the defendants had then no title, he must succeed. If he gets a decree, his attachment is restored. For the purpose of limitation the possession of the defendants cannot be adverse to the plaintiff subsequently to the application for attachment. The present suit must be determined by taking into consideration the rights of the parties at the time of the attachment. According to the finding of the lower Court, the defendants had not, as against the plaintiff, acquired title by adverse possession at that time. Our suit is, therefore, not barred by limitation.

Manekshah J. Taleyarkhan, for the respondents (defendants):—As found by the Judge, our adverse possession began in or about the month of June 1877. The present suit was filed in August, 1889. We have, therefore, acquired a complete title by twelve years' adverse possession.

JUDGMENT.

SARGENT, C.J.—In this case the plaintiff seeks to have it declared that the property in dispute which he had attached belonged to his

judgment-debtor Ishvar Jeykrishna, and was [262] liable to the attachment. The attachment had been removed by order of the Court on defendants' application on 11th August, 1888, and the present suit was filed on 13th August, 1889.

The Court below held that the property belonged to Ishvar, but that the suit was time-barred, as it found that defendants' father came into possession during the rainy season of 1877, and that plaintiff had not shown that Ishvar had been in possession later than June, 1877, and, therefore, not within twelve years before the date of this suit.

Mr. Gokuldas has contended before us that the object of the present suit, which was brought under s. 283 of the Civil Procedure Code (XIV of 1882), is to determine the rights of the parties at the time of the attachment and not when the suit was instituted, and that the real question was whether the defendants had been in possession within twelve years preceding the date of the order of 11th August, 1888.

The object and effect of a suit to establish the right as contemplated by the corresponding s. 246 of the Civil Procedure Code of 1859 has undergone considerable discussion by the several High Courts. The result of the decisions is to show that the suit has uniformly been regarded by the High Courts of this Presidency and of Madras and Allahabad as a suit to "set aside" the order made with respect to the claim to attached property, and on this ground cl. 15 of the Limitation Act IX of 1871 was held to apply in the case of orders made under the Civil Procedure Code of 1859—*Settiappan v. Sarat Singh* (1), *Krishnaji Vithal v. Bhaskar Rangnath* (2) and *Badri Prasad v. Muhammad Yusuf* (3). The soundness of those decisions was indeed disputed in *Luchmi Narain Singh v. Assrup Koer* (4) and *Bessessur Bhugut v. Murlì Sahu* (5), but apparently only on the ground that cl. 15 of Act IX of 1871 and art. 11 of the Limitation Act XV of 1877 did not apply to orders made under art. 246 of the Civil Procedure Code of 1859. However, in *Gend Lall Tewari v. Denonath Ram Tewari* (6) it was expressly held by Sir R. Garth, C. J., [263] and Beverley, J., that a suit to establish his right under s. 246 was not necessarily a suit to set aside an order which must be brought within a year from the date of the order; and indeed Sir R. Garth, C. J., expressed an opinion that it would not be so even under the corresponding ss. 278 to 282 of the Civil Procedure Code of 1882. Notwithstanding this opinion of the late learned Chief Justice of Bengal we see no sufficient reason for doubting the soundness of the above rulings of the other High Courts which have been regarded as settled law for so many years, and must, therefore, as their necessary consequence, hold that Mr. Gokuldas was right in his contention that as the suit is one to set aside the order of August, 1888, it must be determined by the rights of the parties at that time. As the defendants had not, according to the finding of the Court below, at the date of the order, acquired a title by adverse possession for twelve years, we must reverse the decree of the Court below and declare that the property in question was the property of Ishvar Jeykrishna and was liable to the plaintiff's attachment in execution of the plaintiff's decree. Plaintiff to have his costs throughout.

Decree reversed.

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

(2) 4 B. 611.

(3) 1 A. 381.

(4) 9 C. 43.

(5) 9 C. 163.

(6) 11 C. 673.