

is no reported case of this Court on the point, we think we ought to follow these decisions. We must accordingly give effect to the preliminary objection and dismiss this appeal with costs.

It has been suggested that we might deal with the appeal as an application under section 622, but that will carry the appellant no further, because that of which he complains is, if erroneous—a point on which we express no opinion—an error of law not falling within section 622 of the Civil Procedure Code.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

KRISHNAJI BAPPAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. KASHIBAI, WIDOW OF VISHNU MAHADEO (ORIGINAL DEFENDANT), RESPONDENT.*

1905.
August 1.

Civil Procedure Code (Act XIV of 1882), Chapter XIX, Division H—Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession—Limitation.

On the 1st June 1839 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vithal, Vithal's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs, thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant under section 331 of the Civil Procedure Code (Act XIV of 1882), Chapter XIX, Division H.

Held, reversing the decree of the lower Appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior

* Second Appeal No. 509 of 1904.

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to the 20th March 1890, by reason of the proceedings under Division H of Chapter XIX of the Code of Civil Procedure, initiated on the 22nd of January 1902.

SECOND appeal from the decision of Vaman M. Bodas, First Class Subordinate Judge of Sátára with appellate powers, reversing the decree of H. A. Mohile, Second Class Subordinate Judge of Khatáv.

One Vishnu Mahadev Gosavi, the husband of the defendant, sold certain land to Vithal Krishna Fadnis on the 1st June 1889 and continued in possession of it under a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the rent-note the vendor Vishnu, and after his death his widow, the defendant, remained in possession. In the meanwhile the land having been sold to the plaintiffs, they brought a suit, No. 38 of 1892, against Narhar, Vithal and others, the sons of Vishnu Mahadeo, deceased, for recovery of possession and obtained a decree. While the decree was being executed, Kashibai, the widow of Vishnu Mahadeo, caused obstruction to the delivery of possession on the 23rd December 1901. The plaintiffs, thereupon, applied on the 22nd January 1902 for the removal of her obstruction, and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882). The first Court after inquiry passed a decree awarding possession to the plaintiffs.

On appeal by the defendant the Judge reversed the decree and dismissed the suit on the ground that as it was brought on the 26th July 1902, that is, more than twelve years after the expiry of the rent-note on the 20th March 1890, it was time-barred.

The plaintiffs having preferred a second appeal, it was at first rejected, but subsequently the plaintiffs having applied for review, it was admitted.

S. R. Bakhle appeared for the appellants (plaintiffs):—We filed our application to remove the obstruction caused by the defendant under section 328 of the Civil Procedure Code on the 22nd January 1902. On that day the defendant's adverse

possession for twelve years had not been completed and ripened into a title. The Court ordered the application to be numbered and registered as a suit on the 26th July 1902. The period between January and July was taken up by the Court and we are not responsible for it. Our suit should be taken as instituted on the day the application was made as no fresh presentation of the plaint has to be made under section 331 of the Civil Procedure Code, but the application itself is registered as a suit. At any rate from the date of the presentation of the application the character of the defendant's possession ceased to be adverse to us.

M. B. Chaubal appeared for the respondent (defendant):— Under section 4 of the Limitation Act, a suit is said to be instituted when the plaint is presented to the proper officer. The period occupied in disposing of the application cannot be taken into consideration, for under section 3 of the Act a suit does not include an application. The plaintiffs could have filed a regular suit within the period of limitation. They had that remedy open, and if they failed to resort to it and waited till the decision on the application they must take the risk.

Under section 331 of the Civil Procedure Code, "the claim" is to be numbered as a suit and that expression is used for the claim the defendant or the obstructor makes. In the present case that claim is not treated as a suit, but the plaintiffs' application is so treated. Our possession, therefore, continued to be adverse till the 26th July 1902, when the application was ordered to be numbered and registered as a suit, and had ripened into a title by that time. We are, therefore, entitled to resist plaintiffs' suit under article 144 of the Limitation Act, counting the time down to the institution of the suit.

Bakhle, in reply.

JENKINS, C. J.:—This is an appeal arising out of proceedings in execution of a decree.

It has been held by the lower Appellate Court reversing the decision of the first Court that the decree-holders are barred as against the respondent before us.

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The plaintiffs obtained a decree for possession of land and in the execution of that decree the officer charged with the execution of the warrant was resisted or obstructed by the respondent.

This led to proceedings under division (H) of Chapter XIX of the Civil Procedure Code, and the claim was numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant in pursuance of an order passed on the 26th of July 1902. At that date the claimant had been in adverse possession of the property for more than 12 years, and if the rights of the parties had to be determined by reference to that date, then under section 28 of the Limitation Act, the interest of the decree-holders would be extinguished.

But in our opinion that is not the crucial date. The twelve years of adverse possession expired in March 1902 and prior to that the proceedings had been taken under division (H) of Chapter XIX of the Code of Civil Procedure.

It seems to us, therefore, impossible to say that the claimant is entitled as against the decree-holders to count the time up to the 26th of July 1902 as the period of his adverse possession; for it had ended prior to the 20th of March 1890, and so within the period of limitation.

We accordingly reverse the decree of the District Court and send back the case that it may be restored to the file and heard in the ordinary course.

The appellants must bear the respondent's costs of the review, but the rest of the costs in this Court will follow the result.

Decree reversed.

G. B. R.
