

APPELLATE CIVIL.

Before Sir W. Morgan, C.J., and Mr. Justice Innes.

IMBICHI KOYA (1ST PLAINTIFF) APPELLANT *v.* KAKKUNNAT
UPÁKKI AND ANOTHER (5TH AND 6TH DEFENDANTS) RESPONDENTS (1).

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Judgment debtor—Section 246 of Act VIII of 1859—Limitation.

When the judgment debtor is not made a party to a proceeding under Section 246 of Act VIII of 1859, he is not bound by the law of limitation to sue to establish his right to the property within one year from an order under that section releasing it from attachment.

THE plaintiffs brought the suit out of which this appeal arose, to have set aside a kánam for Rupees 800 which the first to fourth defendants granted on the 11th Chingom 1044 (1868-69) to the fifth and sixth defendants on two parambas, Nos. 1 and 2. The plaintiffs alleged in their plaint that they and the first to fourth defendants belonged to the same tárvád, the first defendant being the mother of the plaintiffs and of the defendants 2 to 4; that paramba No. 1, in the plaint mentioned, was given to the said plaintiffs and to second, third and fourth defendants by their father, and that paramba No. 2 was the self-acquisition of the first plaintiff; that in 1041 (1865-66) the first plaintiff went to Singapore, having appointed the second defendant his agent, and did not return until Magarom 1050 (1874-75); that during his (first plaintiff's) absence the first, second, third and fourth defendants mortgaged (on kánam for Rupees 800) the lands in question to the fifth and sixth defendants; hence the cause of action.

The defendants 1 to 4 did not appear.

The fifth and sixth defendants alleged that the parambas in suit were the exclusive property of the first defendant; that the kánam in dispute was made to them by the first to fourth defendants, to enable them (the said defendants) to pay the amount of the razináma decree in Suit No. 77 of 1870, brought, in the Badagara Munsif's Court, on a bond executed by the plaintiffs and first and second defendants to one Kunhi Taruvai; that only the first and second defendants joined in the razináma decree because

(1) Second Appeal, No. 204 of 1878, against the decree of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 23rd November 1877, modifying the decree of the District Munsif of Tellicherry, dated 18th September 1876.

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the plaintiffs were absent in foreign countries; that the first defendant was competent herself to grant the kánam in dispute; that the first to fourth defendants joined in it at their (fifth and sixth defendants') request; that when the parambas in question were attached for the first plaintiff's judgment debt in Small Cause Suit No. 2002 of 1866, the first defendant preferred a claim (No. 931 of 1867) in the Badagara Munsif's Court, and that Court, on the 17th March 1868, allowed the claim, deciding that the parambas were the first defendant's exclusive property, and that, therefore, the suit was barred by limitation.

Upon the question of limitation the District Munsif said "Exhibit II shows that the two parambas in question and other lands were released on the 17th March 1868 from attachment for the judgment debt of the first plaintiff in Small Cause Suit No. 2002 of 1866, on a claim preferred by the first defendant. It is contended that as the first plaintiff did not bring a suit to establish his right to the plaint parambas within one year from the date of their release from attachment, his right is barred under Section 246 of the Civil Procedure Code and Article 45, Schedule II of the Limitation Act IX of 1871. In the first place this is not a suit to establish plaintiffs' right under the provisions of the latter part of Section 246. The procedure prescribed by the section was not strictly followed in the claim case, no notice having been served on the first plaintiff. The first order was simply 'claim to be proved in eight days.' The first plaintiff was at the time out of British India. He had no knowledge of the claim proceedings until his return to Malabar in the beginning of 1875." He further found that paramba No. 1 was the property of first defendant and paramba No. 2 the exclusive property of first plaintiff, and consequently set aside the kánam so far as it affected No. 2.

On appeal the Subordinate Judge reversed that part of the Munsif's decree which set aside the kánam on paramba No. 2, holding that first plaintiff was bound by the order in the claim proceedings.

The first plaintiff preferred a second appeal on the ground that the above finding was bad in law.

Mr. *Wedderburn* for the Appellant.

Mr. *Lascelles* for the Respondents.

The Court (Sir W. MORGAN, C. J., and INNES, J.) delivered the following

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JUDGMENT:—In a South Arcot case just disposed of by us, *Sābbarāyulu Naidu v. Venkatachella Naidu*, (1) we upheld the Lower Court's decision, which was to the effect that the plaintiff there (a judgment debtor) was, upon the facts of that case, a "party against whom the order" (under Section 246 of Act VIII of 1859) had been given, and therefore bound to sue within one year.

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We did so because it appeared that the plaintiff (or his father) came in and opposed the claim or objection there made. The contest there was between the decree holder and judgment debtor on one side (both making common cause) and the claimant on the other, and the order of release given in favor of the latter was an order given against the former.

In the present case the plaintiff (a judgment debtor) was in no sense a party to the proceedings under Section 246.

The proceeding 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 the claimant only. The power given by the section to summon the original defendant also shows this.

When the lands were attached in 1868 the plaintiff (the judgment debtor) was in foreign parts, and had no notice or knowledge of the proceeding, which was between the decree holder and the claimant merely. The order of release was not an order made against him, and the one year's limitation does not apply. The Subordinate Judge assumes that the plaintiff was a party, but this is an error.

The appeal is allowed, but only so far as relates to No. 2 paramba, as to which the case must be sent to the Subordinate Judge for adjudication on the merits. The Munsif has decided this portion of the case, but the Subordinate Judge has, upon the merits, expressed no opinion.

Suit remanded.

(1) Second Appeal No. 182 of 1878, not reported.