

We were referred to the case of *Gangubái Kom Sidhápá v. Bámanná bin Bhímánná* (1).

1877.
July 23.

But apart from the fact that on the question involved in that case, viz., the right of one of several coparceners in a joint family to alienate interests in family property without consent of the other sharers, this Court has all along differed from the views taken by the High Courts of Calcutta and Bombay [see *Villa Butten v. Yamenamamma* (2)], the question in the present case stands on a widely different footing. For though the husband's right has devolved upon his brother, Rukmani's interest (had she died without alienation) would not have survived to her husband's brother, but would have gone by succession to her own right heirs, her husband's family possessing in it no reversionary rights. We shall dismiss both appeals. Plaintiff is entitled to Rukmani's interest, but on the construction of the documents he is entitled to no more.

MADAVA-
RA'YYA
v.
TIRTHA SA'MI.

Each appeal should be dismissed with costs.

APPELLATE CIVIL.

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

AKILANDAMMÁL (PLAINTIFF) APPELLANT v. PERIASÁMI
PILLAI (DEFENDANT) RESPONDENT. (3).

1877.
December 19.

Act XXV of 1861, Cap. XXII—Attachment—Act IX of 1871, Sch. II, Cl. 46—Limitation.

A dispute having arisen between plaintiff and defendant as to the ownership of certain landed property, the Magistrate being informed of the dispute held an inquiry under the provisions of Chapter XXII, Act XXV of 1861, and finding himself unable to "determine who was in actual possession of the lands" placed them in charge of the Sub-Magistrate. *Held* that this was not an order respecting "the possession of property" but an attachment proceeding recorded because the Magistrate was unable to determine which party was in possession. The limitation of three years prescribed by the 46th clause of Schedule II of Act IX of 1871 was therefore inapplicable.

(1) 3 Bom. H. C. R. (A. C. J.), 66.

(2) 8 Mad. H. C. R., 6.

(3) Appeal No. 116 of 1877 from the decree of D. Irvine, Acting Judge of the Small Causes Court of Cuddalore (on the Subordinate Judge's side), dated 1st August 1877.

1877.
December 19.

AKILANDAM-
MA'I.
v.
PERIASAMI
PILLAI.

THE suit was brought for the recovery of 101½ acres of nanja and punja land, for mesne profits, subsequent profits and interest thereon.

The facts of the case were—The plaintiff's deceased husband and the defendant were sons of brothers. The former died in 1871, and a dispute arose between the plaintiff and defendant as to the property in question. The Joint Magistrate, hearing of this dispute, held an inquiry under the provisions of Chapter XXII of Act XXV of 1861, and finding himself unable to decide which party was in actual possession of the property, attached it under Section 319 of that Act. The order was dated 27th May 1871.

Neither party took any steps until November 1874, when the present defendant brought a suit in the Cuddalore Subordinate Court, asserting himself to be the undivided cousin of the plaintiff's husband, and asking for a decree declaratory of his right to possession of the attached property.

The plaintiff asserted a division between her husband and the remainder of his family, but the Subordinate Court decided against the alleged division, and gave a declaratory decree as prayed.

Having obtained this decree, the defendant applied to the Joint Magistrate, who handed over the property to him in April 1875.

Subsequently the plaintiff appealed to the High Court and obtained a decree reversing the decision of the Lower Court and on that decree plaintiff brought the present suit.

Defendant pleaded that as the plaintiff did not sue within three years from the date of the Magistrate's order, her suit was barred. The Subordinate Court held that the plaintiff's suit was barred by Clause 46 of Schedule II of Act IX of 1871, and accordingly dismissed the suit.

The plaintiff appealed on the grounds that her claim was not barred by lapse of time. That the 46th clause of Schedule II of Act IX of 1871 had been misconstrued and did not apply to the present case. That even if that clause were applicable, the plaintiff's cause of action arose in April 1875, when the Magistrate passed his final order delivering over possession of the property to the defendant; and that the non-institution of a suit by the plaintiff, to establish her right to succeed to her husband's property within three years from the date of the order

of attachment by the Magistrate in May 1871, could not extinguish her right to succeed to those properties.

T. Rāma Rāu for the Appellant.

The *Advocate General* for the Respondent.

The Court delivered the following

JUDGMENT:—The suit is for the recovery of the property comprised in the Magistrate's "Proceedings" in writing, bearing date 27th May 1871; and if the writing is in effect "an order respecting the possession of property made under Act XXV of 1861, Chapter XXII," within the meaning of the clause of the Limitation Act of 1871 (clause 46 of the 2nd Schedule), the suit is barred, the plaintiff being a person bound by such an order. In his "Proceedings," the Magistrate states that, "being unable to determine who is in actual possession of the lands * * * I proceed to attach the same and place the same in charge of the Sub-Magistrate of Manargudi."

This attachment by reason of the Magistrate's inability to ascertain the previous possessor operates merely to place the Sub-Magistrate in charge until a competent Court shall have determined the right. It is not an order respecting "the possession of property," but an attachment proceeding recorded because the Magistrate was unable to determine which party was in possession. The limitation of three years prescribed by the 46th clause is inapplicable to the case. The order of dismissal will be set aside. The appellant is entitled to her costs both of this appeal and in the Court below.

The case will be remitted for trial.

Suit Remanded.

1877.
December 19.

AKILANDAM-
MA'L
v.
PERIASA'MI
PELLAI.