Mozoomdar (1) and *Maidin Saiba* v. *Nágápá* (2) show that a party, who cannot by his admission plead prescriptive title in regard to general ownership, may rely on it in regard to a subsidiary interest claimed by him. We dismiss this second appeal with costs.

HUTCHINS, J.—I agree with my learned colleague that adverse possession for twelve years of a limited interest in immovable property is a good plea to a suit for ejectment to the extent of that interest. In this case, the kánamdárs have held the land under a kánam for more than twelve years, and it has not been alleged that the existence or terms of the kánam have been fraudulently concealed from the family. The transfer of possession put the family on enquiry as to the terms on which such possession was given: respondents Nos. 2 and 3 first came into possession under the demise on which they now rely. They are either trespassers or kánamdárs, and their possession for the statutory period in either capacity, adversely to the family, is a bar to their ejectment.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Hutchins.

RÁMAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

HASSAN (DEFENDANT NO. 2) AND OTHERS, RESPONDENTS.*

1885. Nov. 4, 10.

Regulation IX of 1822, s. 5—Sale of land to recover fine imposed by Collector—Title of purchaser.

A sale of land, under the provisions of s. 5 of Regulation IX of 1822 does not convey to the purchaser a title free from prior incumbrances.

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, modifying the decree of J. A. deRozario, Acting District Munsif of Vytheri, in suit 119 of 1883.

The plaintiffs, Ráman Náyakan and his brother, sued (1) Govindan Náyar and (2) Hassan Sahib Ravuthan for a decree, declaring that plaintiffs had a lien for Rs. 1,000 over certain land

(1) 12 B.L.R., 274. (2) I.L.R., 7 Bom., 96.

* Second Appeal 450 of 1885.

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under a panayam or mortgage-deed executed by defendant No. 1 in 1881 in favor of plaintiffs and to recover Rs. 555, interest due on the bond for two years.

Defendant No. 1 having been found guilty of malversation as a public servant (*Menon*) and a judgment having been passed against him by the Collector for payment of a fine imposed under s. 5 of Regulation IX of 1822, the land was sold at auction and purchased by defendant No. 2 on the 11th of October 1882 and he was in possession.

Defendant No. 1 admitting the bond denied plaintiffs' right to recover the debt, except by sale of the land hypothecated.

Defendant No. 2 pleaded that he purchased at a Government sale without notice of plaintiffs' claim.

The Múnsif decreed payment of Rs. 555 by defendant No. 1, and, in default of payment, that the land should be sold, and declared plaintiffs' right to a lien on the land for Rs. 1,000.

On appeal, the District Judge cancelled the decree so far as it directed the sale of the land and declared plaintiffs' lien.

Plaintiff appealed.

Sankaran Náyar for plaintiffs.

Sadagópáchárydr for defendant No. 2.

The facts appear sufficiently from the judgment of the Court (Kernan, Offg. C.J., and Hutchins, J.).

JUDGMENT.—We overrule the preliminary objection that the appeal is barred by limitation. The application for a review of judgment seems to have been a *bonâ fide* one and not at all designed to gain an extension of the appeal time. It was made and prosecuted with reasonable diligence, and the appeal presented as soon as possible after its rejection. The appeal is within time if the days during which the review petition was pending are deducted.

The hypothecation of the property in dispute to the appellants was made in 1881, and it has been found to have been granted *bonâ fide* and for valuable consideration. The question is whether it is not binding on defendant No. 2, the contesting respondent who purchased in 1882 at a sale ordered by the Collector for recovery of a fine imposed under Regulation IX of 1822 on the appellants' mortgagor. The District Judge held that defendant No. 2 bought free of the incumbrance because the Collector's judgments, under the Regulation, are to be executed in the same

manner as decrees of Courts, because s. 287 of the Code expressly requires that every incumbrance shall be specified in the sale proclamation, and because the appellants' incumbrance was not so mentioned.

It is clear that this decision cannot be maintained. In the first place, all that the Regulation (s. 5, cl. 3) says is that the Collector's judgment shall be executed in the same *manner* as decrees: this merely settles the procedure to be followed. In the next place, although s. 287 requires every incumbrance to be stated as fully and accurately as possible, the non-mention of any incumbrance will not avoid it as against the auction-purchaser. The appellants had not the conduct of the sale and cannot be prejudiced by the Collector's omission or refusal to recognize and give notice of their hypothecation right.

It has been urged, on behalf of defendant No. 2, that the debt for which the Collector sold the property was due to the Crown and paramount to appellants' incumbrance. This matter was considered in the case of *Rámáchandra* v. *Pitchaikanni*,(1) but in this case as in that it is not necessary to decide the point. The Collector's judgment was one imposing a fine and not passed until the year after appellants obtained their hypothecation. It is not pretended that the Menon had executed any prior bond to Government, and, as observed in the case just quoted, "even in England the lien of the Crown attached only from the time when the owner of the land became a debtor to the Crown" and did not avoid prior incumbrances.

The only other point is with regard to interest, whether on the true construction of the deed of hypothecation the interest is charged upon the land pledged for the principal. The Judge held that the debtor was personally liable for the interest but not the property, and he was under the impression that the Múnsif had taken the same view. But neither before the Múnsif nor in his appeal did defendant No. 2 ever contend that the interest was not intended by the deed to be secured upon the property. The only contention on that point was one raised by the debtor who maintained that he was not personally liable.

The decree of the District Judge is reversed and that of the Múnsif restored, except so far as it directs the sale of the property

(1) I.L.R., 7 Mad., 434.

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for the payment of interest and costs. The principal was not due when the suit was brought, and if there is to be a sale under the mortgage, it should be for the entire debt. Defendant No. 2 must bear the costs of this appeal as well as of his own appeal to the District Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. Dec. 4, 9.

HARIHARA (DEFENDANT), PETITIONER,

and

SUBRAMANYA (PLAINTIFF), RESPONDENT.*

Small Cause Court—Act XI of 1865—Jurisdiction—Civil Procedure Code, s. 295—Suit for refund of assets paid in execution of decree.

A suit under s. 295 of the Code of Civil Procedure to compel refund of assets paid in execution of a decree to a person not entitled thereto is cognizable by a Court of Small Causes constituted under Act XI of 1865.

Shahi Ram v. *Shib Lal* (I.L.R., 7 All., 378) dissented from.

THIS was an application, under s. 622 of the Code of Civil Procedure, to set aside the decree of V. P. deRozario, Subordinate Judge at Palgat, in a Small Cause suit on the ground that the Court had no jurisdiction to entertain the suit.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

Srinivása Rán for petitioner.

Rámachandra Ayyar for respondent.

JUDGMENT:—The question before us is whether a suit under the penultimate clause of s. 295 of the Code of Civil Procedure to compel the refund of assets paid to a person not entitled to receive the same is cognizable by a Court of Small Causes. It is pointed out to us that the Allahabad High Court has held that such a suit is not cognizable—*Shahi Ram* v. *Shib Lal.*(1)

Section 295 of the Civil Procedure Code has been made applicable to Courts of Small Causes so far as it relates to the distribution of assets in the execution of decrees, but the question here is whether a suit for the refund of such assets paid to a wrong

* Civil Revision Petition 290 of 1885.

(1) I.L.R., 7 All., 378.