

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Muttusami Ayyar.*

NARAYANA (DEFENDANT) APPELLANT,

v.

NARAYANA AND ANOTHER (PLAINTIFFS NOS. 3 AND 4),
RESPONDENTS.*

1889.
July 25, 26.
November 27.

*Civil Procedure Code, s. 244—Execution proceedings—Limitation Act—Act XV of
1877, sch. II, arts. 29, 61, 62, 97, 120.*

In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was affirmed on appeal, and the present defendant had the note sold in execution and drew out of the proceeds a sum for mesne profits for subsequent years; but an appeal was preferred in the execution proceedings to the High Court which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance: before that amount was paid to the present plaintiff the present defendant brought a suit against him in the District Court and there obtained a decree for mesne profits for the subsequent years and in execution drew the amount of the decree out of Court. In second appeal however the High Court on 26th September 1881 reversed the decree of the District Court, whereupon the present plaintiff applied for restitution under Civil Procedure Code, s. 583, which application was ultimately disallowed. The present suit was brought to recover the amount to which that application related:

Held, (1) that the suit was not barred by the provisions of Civil Procedure Code, s. 244.

(2) that Limitation Act, sch. II, art. 120, was applicable to the suit, which having been filed on 9th August 1887, was accordingly not barred by limitation.

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 26 of 1887.

Suit to recover a sum of money alleged to be due by the defendant under the following circumstances:—

In a suit of 1867 the zamindar of Kurupam, who was the defendant in the present suit, sued Kannam Dora and Appanna Dora to recover from them the village of Arnada with mesne profits for *fashi* 1276. He was declared entitled to the village and to Rs. 600 in respect of mesne profits for *fashi* 1276. No provision

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was made in the decree with regard to mesne profits for subsequent years. The decree was confirmed on appeal by the District Court and on second appeal by the High Court. Pending these appeals execution was stayed, one Sadasiva Parabrahmam depositing a Government promissory note for Rs. 15,000 as security for the due fulfilment of the decree to be passed.

On the decree of the High Court being known the zamindar had the note sold and received from the proceeds Rs. 11,175 which he represented as due to him under the decree for mesne profits of *fasli* 1276 and subsequent years. On appeal to the High Court these proceedings were set aside, on the ground that the decree was silent as to subsequent mesne profits and execution should not be in excess of the decree.

Thereupon Parabrahmam attached the village of Arnada, representing that Rs. 8,728 had been collected in excess from him and recovered that amount by sale. The Kurupam zamindar then filed original suit No. 11 of 1878 in the District Court of Vizagapatam against him to recover this amount, the decree in that Court was in favor of the zamindar, but it was on appeal to the High Court reversed on the ground that Parabrahmam had undertaken no liability for rents subsequent to *fasli* 1276. The sum of Rs. 8,728 realized by the sale of the Arnada village had, pending these proceedings, remained in deposit in the District Court. As soon as the decree of the District Court in original suit No. 11 of 1878 was given in his favor, the Kurupam zamindar drew Rs. 7,887 of it, the balance having apparently been taken by Parabrahmam, at whose instance the property had been sold.

On the passing of decree of the High Court reversing the decree in original suit 11 of 1878 was received Parabrahmam applied under section 583 of the Code of Civil Procedure to recover from the zamindar Rs. 12,294, the above sum with interest and costs. This was allowed by the District Court, but disallowed on appeal on the ground that the application was barred by the limitation (*Kurupam Zamindar v. Sadasiva*(1)).

Parabrahmam now sued to recover from the zamindar, with interest, the sum of Rs. 7,100 improperly drawn out of Court by him.

Among other pleas the defendants raised the plea of limitation. On this the District Judge said—

“Plaintiff’s vakil contends that the suit falls under articles “61, 62, or 97 of the Limitation Act and refers to *Bhawani Kuar v. Rikhi Ram*(1); these articles cannot apply. In *Jogesh Chunder Dutt v. Kali Churn Dutt*(2) it was held that a suit of this nature “must be brought within six years under Act IX of 1871, “sch. II, art. 118, which is the same as article 120 of the present “Act. I hold article 120 to apply.

“The defendant drew the Rs. 7,100 on 28th January 1881; “the High Court by reversing the District Court’s decree decided “on 26th September 1881 that he had no right to do so. The “present suit to recover the money so improperly drawn was filed “in July 1887. It was therefore within six years.”

The District Judge found the other issues also in favor of the plaintiff and he passed a decree as prayed.

The defendant preferred this appeal.

Subba Row for appellant.

Subramanya Ayyar for respondents who were the representatives of Parabrahmam, deceased.

JUDGMENT.—The appellant is the zamindar of Kurupam, and in original suit No. 10 of 1867 he obtained a decree against two persons—Kannam Dora and Appanna Dora. The decree awarded to him possession of a village, called Arnada, and mesne profits for one year, viz., fasli 1276. It was confirmed by the District Court on appeal and by the High Court on second appeal. Pending the appeals, execution of the original decree was stayed on the first plaintiff in the present suit, Sadasiva Parabrahmam depositing a Government promissory note for Rs. 15,000 as security for the satisfaction of the decree that might ultimately be passed. After the High Court confirmed the original decree, the appellant had the Government promissory note sold in execution, and drew Rs. 11,175 as due to him under the decree for mesne profits for fasli 1276 and for subsequent years. On appeal the High Court set aside this execution so far as it related to mesne profits subsequently to fasli 1276, on the ground that they had not been awarded by the decree. Thereupon Sadasiva Parabrahmam attached the village of Arnada and brought it to sale in

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(1) I.L.R., 2 All., 354.

(2) I.L.R., 3 Cal., 30.

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order to recover back by way of restitution the amount collected by the appellant in excess of the amount decreed in his favor. Before the sum of Rs. 8,728 realized by the sale was paid out to the surety, the appellant brought original suit No. 11 of 1878 to recover subsequent mesne profits from the former and obtained an order for the amount being held by the Court in deposit pending the disposal of his suit. Subsequently the District Court decreed his claim and he drew out of the amount in deposit Rs. 7,887 in execution of that decree on 20th January 1881. On appeal, however, the decree was reversed by the High Court and original suit No. 11 of 1878 was dismissed, the surety being considered not liable for mesne profits subsequent to fasli 1276. The High Court passed its decree on the 26th September 1881, and the surety applied to enforce his claim to restitution under section 583, Civil Procedure Code. His application was allowed by the District Court, but disallowed by the High Court as barred by article 178 of the Act of Limitations. Thereupon the surety, Sadasiva Parabrahman, brought the present suit on the 9th August 1887, and claimed Rs. 7,100 as repayable by the appellant and Rs. 5,563 as interest due thereon at 12 *per cent. per annum* from 20th January 1881 to 31st July 1887.

It was contended for the appellant, first, that the claim was *res judicata*; secondly, that it was barred by limitation; thirdly, that the right to sue was personal to the surety, and, as he died after suit, it did not survive to his legal representatives, the respondents before us. He filed his written statement on the 13th October 1887, and his pleader argued at the final hearing on the 23rd January 1888, four days before the date of the original judgment, that the suit was also barred by section 244 of the Code of Civil Procedure. The Judge observed that the question did not arise upon the written statement, but referring to the Full Bench Ruling of the Calcutta High Court (*Jogesh Chunder Dutt v. Kali Churn Dutt*(1)) considered that section 244 did not bar the suit. As regards limitation he held that article 120 of the Act of Limitations applied, and that articles 61, 62, or 97 did not apply and relied on the decision of the High Court at Calcutta already mentioned. He disallowed the plea of *res judicata* and decreed the principal sued for with interest thereon at 6 *per cent. per annum*.

(1) I.L.R., 3 Cal., 30.

from the 28th January 1881 to date of payment. The defendant appeals, and it is contended for him (i) that the suit cannot be maintained under section 244, (ii) that it is barred by limitation, and (iii) that no interest was claimed in the plaint subsequent to 31st July 1887. The objection regarding interest is not pressed at the hearing. Though no subsequent interest was in terms claimed in the plaint, yet it prayed for such further and other relief as the Court might deem just and equitable, and the Judge, whilst reducing the past interest claimed by the plaintiff from 12 per cent. to 6 per cent., considered it fair to award future interest also at the reduced rate. Neither is section 244 a bar to this suit. The Privy Council said in *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery*(1)—“ There is no doubt that according to the Law of England (and their Lordships see no reason for holding that it is otherwise in India) money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehend, upon this ground, viz., that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded, by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is whether the decree or judgment under which the money was originally recovered has been reversed or superseded.” In the case before us the decree in original suit No. 11 of 1878 under which the money in deposit was drawn was reversed by the High Court on appeal. Reading section 244 in the light thrown by the principle laid down by the Privy Council it must be taken to relate to decrees which are still subsisting and in force and which have not been superseded in appeal and to be no bar to the institution of a suit for restitution after the decree has been reversed. The only question then which remains for us to consider is that of limitation. In its nature the suit is one for restitution or to be restored to the *status quo ante*. Under color of a decree since superseded, the appellant intercepted the money which the surety

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(1) 10 M.I.A., 203.

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had realized by summary process instituted under section 583, Civil Procedure Code. There is no article in the schedule attached to the Act of Limitations which expressly prescribes a period of limitation for such suits. We consider that the Judge was right in holding that article 120 applied. The surety was not in a position to claim a refund until the decree was superseded and neither article 61 or 62 applies as time runs under it from the date on which the money was paid or received. There was a subsisting decree when the money was paid to the appellant, and its receipt cannot be regarded as a wrongful seizure of moveable property as mentioned in article 29. Article 97 refers to contracts in which the consideration has failed. None of the specific provisions suggested by the appellant's pleader appear to us to contemplate a suit like the one before us.

We are therefore of opinion that this appeal cannot be supported, and we dismiss it.

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Before Mr. Justice Shephard and Mr. Justice Handley.

ANNAJI (PLAINTIFF), APPELLANT,

v.

SUBRAMANYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Local Boards Act—Act V of 1884 (Madras), ss. 128, 156—Suit for malicious prosecution against officers of panchayat union—Notice of suit.

A suit was brought against the chairman and accountant of a panchayat union for damages for malicious prosecution more than six months after the close of the criminal proceedings:

Held, (1) that the defendants were liable for torts committed by them, and notwithstanding Local Boards Act, s. 128, the plaintiff was not confined to his remedy against the Taluk Board;

(2) that Local Boards Act, s. 156, was not applicable unless it were proved that the act complained of was done by servants of the Taluk Board within the scope of their authority as such, acting or purporting to act under the Act.

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 144 of 1888, confirming the

* Second Appeal No. 1024 of 1889.