APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

1890. March 10, 27.

GURUVA (DEFENDANT No. 1), APPELLANT,

v.

SUBBARAYUDU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 283—*Party to execution proceedings—Limitation Act—Act XV of* 1877, *sched. II, art.* 11.

A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house:

Held, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 776 of 1888, reversing the decree of O. V. Nanjudayya, Acting District Munsif of Guntur, in original suit No. 128 of 1888.

Suit to declare the plaintiff's title to a certain house which defendant No. 2 purported to have mortgaged to defendant No. 1.

In original suit No. 281 of 1880 one Subba Reddi obtained a decree against the plaintiff and attached this house. Defendant No. 2 intervened and the property was released from attachment. Then Subba Reddi filed original suit No. 139 of 1881 to establish the title of his judgment debtor to the house. It was dismissed, but Subba Reddi filed appeal No. 105 of 1882 before the District Court and there obtained a decree. Second appeal No. 679 of 1883 was then made to the High Court by Subba Reddi. The present plaintiff did not appear, but defendant No. 2 appeared. Subba Reddi's decree being satisfied, the parties entered into a compromise and the High Court, by consent of the parties, passed a decision reversing the decree of the District Court and dismissing the suit.

The defendants contended that the order releasing the property from attachment on the petition of defendant No. 2 remained

* Second Appeal No. 890 of 1889.

good, and that under section 283 of Civil Procedure Code it was conclusive against plaintiff who did not bring a suit within a year.

The District Munsif held that the above plea should avail and dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and passed a decree as prayed observing with reference to the above plea :—

"The Full Bench decision in *Metietom Perengaryprom* v. "*P. Damodren Nambudry*(1) shows that such an order is binding "between the judgment-debtor and the intervening claimant, but "I understand that plaintiff's reply to this is that the Courts "must deal with this question in a manner similar to the mode of "dealing with *benami* transactions. Plaintiff says that in the "previous proceedings he and second defendant, who is his mother, "were in collusion to delay or defeat the satisfaction of the decree "held by the creditor Subba Reddi, and that their collusive pleas "even if successful then against the creditor ought not to prevent "an inquiry upon the merits into the present dispute between the "two parties who then colluded. I consider that there is much "force in this answer and that it must be allowed."

Defendant No. 1 preferred this second appeal.

Subba Rau for appellant.

Bhashyam Ayyangar and *Desika Charyar* for respondent.

JUDGMENT.—The District Munsif was clearly wrong in dismissing the suit on the ground that plaintiff is debarred from suing by the decree in second appeal No. 679 of 1883. In the first place, that was a decree by consent of the only parties who appeared in the appeal, viz., the plaintiff in that suit, Subba Reddi, and the present defendant No. 2. And the result was that there was no adjudication in that suit upon the rival titles of the present plaintiff and second defendant. The suit which Subba Reddi had brought to establish the title of his judgment-debtor, the present plaintiff, to the house in question as against the present defendant No. 2 was dismissed by consent of Subba Reddi and the present defendant No. 2 Subba Reddi's claim having apparently been satisfied. But it is argued for defendant No. 1, the appellant in this second appeal, that at least the result of the consent decree in second appeal No. 679 of 1883 dismissing the suit was to leave matters as they were before the suit was filed, viz., that the

(1) 4 M.H.C.R., 472.

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claim by the present defendant No. 2 in the execution proceedings against the present plaintiff had been allowed and Subba Reddi's attachment had been released; and it is further argued that the present plaintiff being a party to those execution proceedings is bound by them, not having brought a suit to establish his right within the one year prescribed by article 11 of schedule II of the Limitation Act. With the first part of this argument as to the result of the consent-decree dismissing the suit we agree, but not with the latter. Whether the present plaintiff is barred by article 11 of schedule II of the Limitation Act depends upon whether he was the party against whom the order allowing the present second defendant's claim was made within the meaning of section 283 of the Civil Procedure Code. It is contended that he was so, on the authority of the Full Bench decision of this Court in *Metietom Perengaryprom* v. *P. Damodren Nambudry*(1). That decision though doubted in *Arakel Kunhi Kuttiyali* v. *Imbichi Ammah*(2) and dissented from by the High Courts of Calcutta and Bombay in *Kedar Nath Chatterji* v. *Rakhal Das Chatterji*(3), and *Shivapa* v. *Dod Nagaya*(4) has never been overruled and is still binding on this Court; but it really amounts to no more than this, that a judgment-debtor may be the party against whom an order upon a claim in execution proceedings is made so as to be bound by the special rule of limitation prescribed for suits by such a party. Whether he is such a party or not must depend upon the facts of each case. It is obvious that in some cases he could not be the party against whom an order on a claim is made, for the order may be made without notice to him, and, even if he has notice, the order may not be one in any way affecting his title. For instance, the attachment might be released on the ground that the property was not at the time of the attachment in the possession of the judgment-debtor. It is, we think, for the person who sets up the special bar of limitation against the judgment-debtor to show that he was a party to the execution proceedings and that the order was an order against his interest. In the present case there is nothing to show whether the order releasing the attachment was against the interest of the judgment-debtor, the present plaintiff. Apparently it was not against his inclination

(1) 4 M.H.C.R., 472. (2) 6 M.H.C.R., 416.
(3) I.L.R., 15 Cal., 674. (4) I.L.R., 11 Bom., 114.

for he was found to be colluding with the claimant, the present defendant No. 2. We think it is not shown that plaintiff is barred by article 11 of schedule II of the Limitation Act. The District Judge finds on the evidence that the house is the property of plaintiff and not of his mother, defendant No. 2. That he says that his conclusion is the same as that of his predecessor in the Court does not make the finding on the evidence less binding in second appeal and upon that finding his decision is correct.

The fifth ground of second appeal appears to be founded on a mistake. We understand the case of the two brothers, the plaintiff in this suit, and the plaintiff in original suit No. 119 of 1888, to have been not that they divided the houses, but that they built the houses and that each took one as his share. But whether this be so or not, no question was raised by defendant No. 1 as to the plaintiff being only entitled to half of the house and we cannot allow that plea to be set up for the first time in second appeal.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SECRETARY OF STATE FOR INDIA (DEFENDANT No. 14), APPELLANT,

v.

KADIRIKUTTI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 4 AND 5), RESPONDENTS.*

1889. October 14. November 11. 1890. March 18.

Accretion—Alluvion—Tidal navigable river—Cause and nature of variation in high water line.

The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined with reference to the character of the river and the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage.

Accordingly, where a rapid variation in the natural high water line of a tidal navigable river in Malabar had been caused by acts unlawfully done by the tenants of the riparian owner:

Held, that the Crown was entitled as against the riparian owner to the accretion caused by such variation.†

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* Second Appeal No. 7 of 1889.

† Compare *North Shore Railway Company* v. *Pion*, L.R. 14, App. Cas., 612, [Reporter's note.]