

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

NARASIMMA (PLAINTIFF), APPELLANT,

and

APPALACHARLU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1888.
Nov. 27.
Dec. 6.

Civil Procedure Code—Act VIII of 1859, s. 246—Limitation Acts—Act IX of 1871, sch. II, art. 15—Act XV of 1877, sch. II, arts. 11, 13—Objection to execution.

A petition under s. 246 of the Code of Civil Procedure of 1859, objecting to the execution of the decree by the attachment of certain land on the ground that the land was the property of the petitioner, was heard and dismissed in July 1875. In July 1877, within twelve years from the dispossession of the objector, he filed a suit against the decree-holder who had purchased at the execution sale, for the possession of the land held by him as purchaser at the execution sale :

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in appeal suit No. 337 of 1887, affirming the decree of K. Murtiraju, District Munsif of Yellamanchili, in original suit No. 364 of 1887.

This was a suit filed in July 1877 to recover a certain piece of land. The plaintiff claimed to be the undivided brother of the husband (deceased) of defendant No. 2. Defendant No. 1 had obtained a decree against defendant No. 2 on a bond in original suit No. 338 of 1874, and attached and purchased at the execution sale certain land in an agrapharam village, then in the possession of the plaintiff and his undivided father (since deceased), whom he ejected in November 1875. This land was subsequently exchanged for the land now sued for, on the redistribution of the agrapharam lands under a partition decree passed in original suit No. 222 of 1876. The plaintiff now impugned as collusive and fraudulent the proceedings in original suit No. 338 of 1874 and the bond sued on therein and claimed to eject defendant No. 1.

Defendant No. 2 was *ex parte*.

Defendant No. 1 pleaded, *inter alia*, that the plaintiff's claim was barred by limitation by reason of his having preferred an objection to the attachment in execution of the decree in original

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suit No. 338 of 1874, which objection was investigated and rejected on 20th July 1875.

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Both the District Munsif and the District Judge found that such an objection had been made under s. 246 of the Code of Civil Procedure of 1859, and held that the suit was accordingly barred by limitation.* The District Judge discussed this question as follows:—

“If that application had been under s. 278 of the present Civil Procedure and had been disallowed under s. 281, the present suit would be clearly barred by art. 11 of Act XV of 1877.

“But the application must have been under s. 246 of Act VIII of 1859. There is nothing in the Limitation Act IX of 1871 which obliges a suit like the present to be brought within one year from the date of the order disallowing the application.

“The plaintiff says that under art. 143 of the old Act and art. 142 of Act XV of 1877, he has twelve years from date of dispossession, which was November 1875. The suit was filed 13th July 1877.

“I consider that the case comes under art. 14a of Act IX of 1871, ‘a suit to set aside a sale in execution of the decree of a

* Act VIII of 1859, s. 246: In the event of any claim being preferred to, or objection offered against the sale of lands or any other immovable or movable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in s. 220. And if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was in possession of the party against whom execution is sought, as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.

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Civil Court,' and plaintiff has one year 'from the confirmation of the sale.' The suit is therefore barred."

The plaintiff preferred this second appeal.

Anandachari for appellant.

Mr. *Mitchell* for respondents.

The Court (Muttusami Ayyar and Parker, JJ.) delivered the following

JUDGMENT :—We accept the finding that the appellant preferred a claim under s. 246 of Act VIII of 1859, and that it was dismissed after investigation; but we do not consider that the suit is barred by limitation. In our opinion, it is a suit for possession by virtue of title not to set aside an order, nor merely to establish a right. The last sentence of s. 246, which directed that a suit should be brought within one year to set aside an order passed under it, was repealed in 1871(1) and it was not re-enacted in Act IX of 1871. Article 15 of that Act, like art. 13 of the present Limitation Act, refers to proceedings other than a suit, while art. 11 of the Act of 1877 is new, and applicable only to orders passed under the sections of the Code of Civil Procedure which are expressly mentioned in it. This case is governed by the principle laid down in *Ayyasami v. Samiya*(2). Nor can we treat the suit as one brought to set aside a sale in execution of a decree of Civil Court, for the appellant was not a party to the decree in original suit No. 338 of 1874, and he is not bound to set aside the sale held in its execution before he can recover upon his title.

We shall, therefore, reverse the decree of the Lower Appellate Court and remand the appeal to be heard on the merits. The costs will abide and follow the result.

(1) See Act IX of 1871, sched. I.

(2) I.L.R., 8 Mad., 82.