Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley. 1885

GEND LALL TEWARI AND ANOTHER (PLAINTIFFS) *v.* DENONATH RAM TEWARI AND OTHERS (SOME OF THE DEFENDANTS.)* *June* 11.

Civil Procedure Code (Act VIII of 1859), *s.* 246—*Civil Procedure Code (Act XIV of* 1882), *ss.* 281, 283—*Limitation Act (XV of* 1877), *Sch. II, Art.* 11—*Limitation—Act (IX of* 1871), *Sch. II, Art.* 15—*Suit for possession—Estoppel.*

In certain execution proceedings land was attached, but before the sale the judgment-debtors, with the permission of the Court, sold the land to the plaintiffs. Previous to this sale, certain persons had come forward in the execution proceedings, and had claimed the land as having been sold to them by the father of the judgment-debtors; this claim was disallowed in November 1876. In 1881 the plaintiffs, alleging that they had been dispossessed by certain persons, amongst whom were the claimants in the execution proceedings, brought a suit to recover possession of this land against these persons; this suit was decided against the plaintiffs in the lower Appellate Court, on the ground that they had failed to prove that they had been in possession of the land 12 years before suit.

On appeal to the High Court the plaintiffs, appellants, contended that the claim of the defendants in the execution proceedings having been rejected, and they not having brought a regular suit within one year from the order of rejection to establish their right to possession, the defendants were prevented by that order from contending that the plaintiffs had not been in possession at the time of that order.

Held, that the order did not operate as an estoppel against the defendants; and even if it could so operate, it would not do so until the time had run out, within which they could have brought a suit to establish their right to possession, and that such time had not expired.

THIS was a suit to recover possession of 38 bighas of land, from which the plaintiffs alleged they had been dispossessed; and for a certain sum for mesne profits.

The plaintiffs stated that a four-anna share in Mouzah Phulwaria originally belonged to Tika Ram Tewari and Janki Ram Tewari (defendants 14 and 15); and that in execution of a decree obtained in 1876 by Denonath Ram Dobey against these persons, this four-anna share in Mouzah Phulwaria was attached and directed to be sold; that previously to the sale taking place the judgment-

* Appeal from Appellate Decree No. 2501 of 1883, against the decree of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 12th of July 1883, reversing the decree of Baboo Sadanand, Munsiff of Hazaribagh, dated the 27th of June 1882.

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debtor (having obtained the leave of the Court under s. 305 of Act X of 1877) sold on the 16th August 1878 to the present plaintiffs the four-anna share in this mouzah and put them in possession thereof: that previous to this sale, and at a time when the property was attached, certain persons, defendants 1 to 11, and defendants 12 and 13, had filed objections to the attachment, alleging that parts of the land attached belonged to them, having been sold to them by the plaintiffs' vendor's father; these objections were, however, disallowed on the 23rd November 1876, and no suit was brought by them to establish their right to possession within one year from this order: that on the 15th Assar 1937 Sumbut the plaintiffs went to the mouzah for the purpose of making settlements with their tenants, but were opposed by the defendants 1 to 13, and forcibly dispossessed by them. The plaintiffs, therefore, brought this suit to recover possession.

The defendants put in the same defence to the suit as they had brought forward in the execution case; and their evidence being disbelieved, the Munsiff gave the plaintiffs a decree for possession. Defendants 1 to 6 appealed to the Subordinate Judge, and the main point discussed was that of the onus of proof; the defendants contending that it was for the plaintiffs to prove their possession or the possession of their vendors within 12 years immediately preceding the suit; whilst the plaintiffs, respondents, contended that, as the defendants admitted the title of the plaintiffs' vendors, it was for the defendants to prove their right to the land, and that assuming the plaintiffs failed to show their possession within 12 years, yet they were still entitled to succeed, inasmuch as the claim made by the defendants in the execution preceeding, had been disallowed, and no suit had been brought by them within one year for that date. The Subordinate Judge held that the onus was on the plaintiffs, and that they had failed to show that they or their vendors had ever been in possession, the defendants having been in possession when the plaintiffs came to settle the lands; and that the fact that the defendants had not brought a regular suit within one year from the rejection of their claim in the execution department, would not relieve the plaintiffs from the onus of proof of possession; he therefore reversed the decision of the Munsiff.

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The plaintiffs appealed to the High Court on the ground that the claim of the defendants having been rejected in the execution department, and they having brought no regular suit for possession within one year from that order rejecting their claim, the Court should have held that the plaintiffs' vendors had been in possession of the property in 1876, and that the defendants were debarred by the order of the 23rd November 1876 from contending that the plaintiffs were not then in possession.

Mr. *Amir Ali* and Baboo *Taraknath Sen*, for the appellants, in support of the contention cited the case of *Krishnaji Vithal* v. *Bhaskar Rangnath* (1).

Mr. *Sandel* and Baboo *Jogendra Chundra Ghose* for the respondents.

The judgment of the Court (GARTH, C.J., and BEVERLEY, J.) was as follows:—

This was a suit brought by the plaintiffs to recover possession of certain lands, which, on the 16th of August 1878, they had purchased from the defendants 14 and 15.

In the first Court they obtained a decree; but on appeal to the Judicial Commissioner, he held that neither the plaintiffs, nor those under whom they claimed, had been in possession of the land in question within 12 years before suit. For this reason the suit was dismissed.

On appeal to this Court it has been contended that the lower Appellate Court was wrong upon this ground.

In the year 1876, before the plaintiffs' purchase, one Denonath Ram Dobey obtained a decree against the defendants 14 and 15, and under that decree attached in execution the lands which are now in dispute, as being the property of those defendants. Upon this, the defendants 1 to 13, claiming the lands as their own, objected in the execution proceedings under s. 246 of the Procedure Code of 1859, that the lands should be released from attachment. That claim was heard and rejected.

After this, in the year 1878, by permission of the Court, the lands attached were sold by the present defendants, 14 and 15, (the judgment-debtors in the former suit) to the plaintiffs in this suit. Nothing further was done by the present defendants 1

(1) I. L. R., 4 Bom., 611.

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to 13 to prevent the sale to the plaintiffs, nor to renew their claim to the attached property.

Under these circumstances the present plaintiffs contend that, as between them and the defendants 1 to 13, the order which was made in the execution proceedings in 1876 debars those defendants from contending that the defendants 14 and 15 were not in possession of the lands in question at the time when the order was made. It is said that, having regard to the terms of s. 246, the claim of the defendants 1 to 13 would not have been disallowed, unless it had been found by the Court that the lands attached were in the possession of the judgment-debtors; and that whatever the form of the order may have been, it could but have had that meaning; and as the defendants 1 to 13 did not bring any suit to establish their right within a year from the date of the order, the effect of it cannot be disputed now.

In support of this contention we have been referred to several authorities, and, amongst others, to a case of *Krishnaji Vithal* v. *Bhaskar Rangnath* (1). In that case one V had obtained a decree against Waman and had attached certain lands as being Waman's property. In this state of things Waman's five brothers applied to remove the attachment under s. 246 of the Code. Their application was rejected on the 24th of July 1875; and the property was sold by the Court to K on the 17th of February 1876. Waman's brothers (the plaintiffs) then brought the suit on the 17th of March 1877, against V and K (the judgment-creditor and the auction-purchaser) claiming the lands as the ancestral property of themselves and their brother, (the judgment-debtor in the former suit), and praying that they should be confirmed in possession of their shares of the property, inasmuch as it was not liable to be sold in execution for their brother's private debts.

The Subordinate Judge held that their suit not having been brought within one year from the date of the order of the 24th of July 1875, was barred by Art. 15 of the Limitation Act of 1871, which imposes a limitation of one year upon suits to set aside an order of a Civil Court in any proceeding other than a suit.

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The District Judge on appeal held that the suit was not brought to set aside the order of 1875, but the sale of the property, which took place in 1876; and as that sale was not confirmed within one year before the suit was brought, he considered that the suit was not barred, and ordered it to be tried on the merits.

The case was then appealed to the High Court, and it was held by the Chief Justice and Mr. Justice Melvill, [in accordance with other cases decided in the Bombay Court, and with *Settiappan* v. *Sarat Singh* (1)] that the effect of the last clause of s. 246 of the old Code of 1859 was to exclude a party to an investigation under that section from any other remedy than the one thereby provided for him, namely, a regular suit to be brought to establish his right within a year of the time when the order is made against him in the execution proceedings.

The same Court also considered that the Subordinate Judge was right as to the period of limitation for such a suit, although by the Limitation Act of 1871, the last clause of s. 246 was repealed, they held that Art. 15, relating to suits *to set aside an order of a Civil Court*, was substituted for the special limitation in s. 246, which had been repealed; and consequently that any suit by a party defeated in the execution proceedings *"to establish his right"* must be brought within a year from the date of the order.

The result of this decision, and of others to the same effect, seems to be that any suit of any description, which may be brought by any party to execution proceedings under s. 246 of the Civil Procedure Code of 1859 "to establish his right," must of necessity be a suit *"to set aside an order"* within the meaning of Art. 15 of the Limitation Act of 1871.

This view of the law is opposed to a long series of reported cases in this Court, which have decided that a suit brought by a party defeated in execution proceedings under s. 246 of the old Code, is not a suit, or at any rate, not necessarily a suit to set aside "an order of a Court" within the meaning of Art. 15 of the Limitation Act of 1871, and that the proper period of limitation in such case depended upon the real nature of the suit itself, as provided for by other articles in the Limitation

(1) 3 Mad. H. C., 220.

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Act. See *Koylash Chunder Paul Chowdhry* v. *Preo Nath Roy Chowdhry* (1); *Luchmi Narain Sing* v. *Assrup Koer* (2); *Gopal Chunder Mitter* v. *Mohesh Chunder Boral* (3); *Bessessur Bhugut* v. *Murli Sahu* (4); and *Brojomohun Bhutto* v. *Radika Prosunno Chunder* (5). We are of course bound by those authorities here, and we entirely agree with them. *If the present plaintiffs or their vendors, the defendants* 1 to 13, were bound to bring a regular suit under s. 246 for the purpose of establishing their title, and so relieving themselves from the effect of the order of 1876, there is still ample time for bringing such a suit.

But the plaintiffs, appellants, say that the mere fact of the order having been obtained operates as a *res judicata* as between them and the defendants 1 to 13, and estops those defendants from denying that the defendants 14 and 15, the plaintiffs' vendors, were in possession of the property in question at the time when the order was made.

We think that the order can have no such effect. Even in the view which other High Courts appear to have taken of s. 246, the order would not operate as an estoppel against the defendants 1 to 13, until the time for bringing a suit *to establish their right*, (whatever that expression may mean) had elapsed, and that time, we have seen, according to the authorities decided in this Court, has not yet arrived.

But, apart from this question of limitation, there is nothing, as far as we can see in the order itself, which could create any estoppel of the kind.

There are certainly some authorities in this as well as the other High Courts which seem to favor such a view of the section, but I cannot help thinking that this subject has not been sufficiently considered, and that in any question which may arise under the corresponding sections of the present Act (278 to 288) which are somewhat differently worded from s. 246 of

(1) I. L. R. 4 Calc., 610.
(2) I. L. R. 9 Calc., 43.
(3) I. L. R. 9 Calc., 230; 11 C. L. R., 363.
(4) I. L. R., 9 Calc., 163; 11 C. L. R., 409.
(5) 13 C. L. R., 139.

the old Act, it may be well to consider what the words "suit to establish the right to the property" really mean.

I cannot help thinking that the construction which has sometimes been put upon s. 246 of the old Code may not only have been productive of injustice but may have tended to defeat the intention which the Legislature had in passing the section.

I presume the object was to induce persons who have any claim to property which has been attached to come forward at once and dispose of their claims in the execution proceedings, instead of lying by and allowing the property to be sold, and then afterwards to bring suits against the auction-purchaser.

Unless a purchaser sees his way to buying property at auction with a fairly good title, he is naturally indisposed to bid anything like its full value, and hence the very general complaint that property at execution sales is too often sold at a frightful sacrifice.

But if, when a claim is made in execution, and the claimant fails, he is driven to the inconvenience of having to bring a suit to establish his right, within a year from the time of his failure, instead of having his 12 or some other number of years within which to bring his suit, as he would have had if he had made no claim at all, it would be folly, in the great majority of cases, to make any claims in execution proceedings.

Such claims are often very imperfectly tried, and the more so, because they are not subject to appeal. A claimant, therefore, runs great risk in trying them in that way, besides subjecting himself unnecessarily to the inconvenience of the one year's limitation.

In the present case we see our way very clearly, and dismiss the appeal with costs.

Appeal dismissed.