

APPELLATE CIVIL.

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

ORR AND OTHERS (DEFENDANTS), APPELLANTS,

1893.
Dec. 12, 22.

v.

SUNDRA PANDIA (PLAINTIFF), RESPONDENT.*

*Limitation—Limitation Act—Act XV of 1877, s. 28—Limitation in relation to
persons in undisturbed possession.*

The law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. Section 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession.

SECOND APPEAL against the decree of T. Weir, District Judge of Madura, in appeal suit No. 16 of 1892, reversing the decree of Venkata Rengaiyar Avergal, Subordinate Judge of Madura (East), in original suit No. 38 of 1890.

The plaintiff in this suit sued for possession of a certain village which he alleged had been leased to him by the zemindar in 1883. The defendants, the lessees of the zemindari, alleged that the lease had been obtained by fraud. The Subordinate Judge dismissed the plaintiff's suit, but the District Judge reversed the decree and gave a decree in favour of the plaintiff, on the ground that the zemindar, from whom the defendants derived their rights, had failed to obtain the cancellation of the plaintiff's lease on the ground of fraud within three years of its execution, and that the defendants were barred by the Limitation Act from contesting the suit on the ground of fraud.

Hence this appeal by the defendants.

Bhashyam Ayyangar for appellant.

Mr. K. Brown for respondent.

JUDGMENT.—The District Judge has disposed of the appeal on a point of law without deciding the issues of fact which are raised. Assuming that the execution of the lease by the late zemindar

* Second Appeal No. 406 of 1893.

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in the plaintiff's favour was obtained by fraud, he has held that, with reference to the fifth issue, it is not open to the defendants now to raise the plea of fraud, because a suit by them to set aside the plaintiff's lease would be barred by limitation.

The case cited by the District Judge certainly furnishes some authority for the view adopted by him (*Jugaladas v. Ambashankar*(1), *Hargovandas Lakhmidas v. Bajibhai Jijibhai*(2), and *Sundaram v. Sithammal*(3)). In our opinion, however, this view (involving the proposition that a party in possession may be affected prejudicially by the law of limitation is unsound and cannot be maintained.

The Act XV of 1877 is an Act relating to the limitation of suits and does not in terms refer to defences. Section 28 presupposes a person who by force of limitation has already lost his remedy by suit for possession, for such a person it declares that his right to the property shall be extinguished. To persons who are in possession and have had no occasion to sue for recovery of it, the section can have no application. If it was intended that the right to property should be lost in all cases where the time for enforcing the remedy had expired, section 28 would have been unnecessary or would have been differently worded. In addition to the circumstance that defences are not generally brought within the scope of the Act (see *In re Marshfield*(4), the case of set off being an exceptional one, the principles on which the law of limitation is founded do not justify its extension to a case like the present (*Edmunds v. Waugh*(5)). Generally the law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. One of the main objects of the law is to quiet long-continued possession and to obviate the injustice which may ensue upon the enforcement of stale demands. Here the defendants, who for the purposes of this judgment may be identified with the zemindar, are in possession. Being in full enjoyment of the property, and not being attacked by the plaintiff, they had no occasion to seek for the judicial cancelment of the lease under which the plaintiff claims. If either party can be said to have been guilty of delay in prosecuting his remedy, it certainly was not the defendants, and it is they, rather than the plaintiff, who are likely to suffer by the lapse of time for the burden of

(1) I.L.R., 12 Bom., 501. (2) I.L.R., 14 Bom., 222. (3) I.L.R., 16 Mad., 311.
(4) L.R., 34 Ch. D., 721. (5) L.R., 1 Eq., 418.

proving the fraud, and thereby displacing the plaintiff's title rests on the defendants. The construction which it is sought to put on the Limitation Act would tend to defeat the policy of the Act and to disturb rather than quiet possession (see remarks of JARDINE, J., in *Hargovandas Lakhmidas v. Bajibhai Jijibhai*(1)). In our opinion the defence which the defendants raise is not affected by the Act of Limitation and therefore the appeal must be remanded for trial on the merits. We must point out that the acts of the zemindar after the execution of the lease to the defendants can have no material bearing on the case. The question is whether after having notice of the fraud and before executing that lease, he elected to avoid the lease to the plaintiff or not to avoid it. If he made no election, the right to rescind remained to him (*Clough v. London and North-Western Railway Company*(2) and *The Lindsay Petroleum Company v. Hurd*(3)). The decree must be reversed and the appeal remanded. Costs to abide result.

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APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
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BRANSON (PLAINTIFF), APPELLANT,

v.

APPASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1894.
Feb. 22, 23.

Infant—Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority.

A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them.

Assuming that the legal proceedings were in the nature of necessities, the next friend is the person responsible to the solicitor. *Walkins v. Dhunoo Baboo* (4) distinguished.

APPEAL against the decree of Mr. Justice Wilkinson sitting on the original side of the High Court in civil suit No. 126 of 1891.

(1) 1 L.R., 14 Bom., 222.

(2) L.R., 7 Ex., 35. (3) L.R., 5 P.C., 221.

(4) 1 L.R., 7 Calc., 140.

* Original Special Appeal No. 16 of 1893.