

APPELLATE CIVIL.

Before Mr. Justice Bhaskyam Ayyangar and Mr. Justice Moore.

AKKINERI SREERAMULU AND TWO OTHERS (MINORS) BY THEIR
NEXT FRIEND MULLAPUDI RATNAM (PLAINTIFFS), APPELLANTS,

1902.
February 4.

v.

MULLAPUDI RAMAYYA AND EIGHT OTHERS (DEFENDANTS
Nos. 2, 11, 3 AND 5 TO 10), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 129—Alienation by widow—Subsequent suit to set it aside—Withdrawal of suit without permission to bring a fresh suit—Confirmation of original alienation—Fresh cause of action to sons of the daughters.

V, who was possessed of lands, died in 1868, leaving a widow and three daughters him surviving. In 1874, the widow alienated the land. In 1892, the daughters sued to have that alienation set aside, but withdrew the suit, on the ground that the alienation was valid, without obtaining leave to sue again. In 1895, the daughters' sons instituted the present suit for a declaration that neither the original alienation nor its confirmation by the withdrawal petition in the suit should be effective as against them. On the plea of limitation being raised :

Held, that the withdrawal of the suit of 1892 on the ground that the alienation was valid, without permission to bring a fresh suit, was a confirmation of the alienation of 1874, and gave a fresh cause of action, and that the suit was not barred.

SUIT to set aside alienations of land made by plaintiffs' grandmother (since deceased) and for a declaration that they were void as against plaintiffs. Veeranna, plaintiffs' grandfather, who was possessed of lands, died in or about the year 1868, leaving his widow Meenamma and three daughters (defendants Nos. 3, 4 and 5), him surviving. First plaintiff was the son of the elder daughter (defendant No. 3) and plaintiffs 2 and 3 were children of the second daughter (defendant No. 4). Defendants 6 to 10 were the sons of the third daughter (defendant No. 5). In 1874, Meenamma alienated some of her late husband's lands to the father of defendants Nos. 1 and 2. In 1892, her two daughters, the present defendants Nos. 3 and 4, the mothers of the present plaintiffs instituted Original Suit No. 57 of 1892, to have that alienation set aside, but withdrew it, on the ground that the alienation was valid,

* Second Appeal No. 499 of 1900 against the decree of J. H. Munro, Acting District Judge of Górávari, in Appeal Suit No. 280 of 1899, presented against the decree of E. J. S. White, District Munsif of Ellore, in Original Suit No. 85 of 1898.

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without obtaining permission to bring a fresh suit. Plaintiffs set out these facts in their plaint and alleged that the withdrawal of Original Suit No. 57 of 1892 had been effected in collusion with the alienees of the property; they claimed that neither the original alienation nor the withdrawal of the suit affected their rights; and prayed for a declaration that the original alienation of 1874 and its confirmation by the application for withdrawal should not affect the reversionary interests of the plaintiffs. Defendants Nos. 3, 4 and 5 remained *ex parte*. Defendants Nos. 1 and 2 (sons of the alienee) denied that there had been any collusion and set up the further defence of limitation. The other defendants supported plaintiffs' case.

The District Munsif declared the alienation of 1874 to be invalid as against plaintiffs. On the issue relating to the withdrawal of Original Suit No. 57 of 1892, he held that any collusion on the part of defendants 3 and 4 did not effect plaintiffs' right to bring the present suit, as plaintiffs did not claim through their mothers, and had not been parties to the previous suit. He considered it "unnecessary to dwell much upon this issue." On appeal, the District Judge held that so far as the alienation of 1874 was concerned, the suit was barred by limitation. He continued: "An attempt is made to show that even if a suit for a declaration regarding the alienation of 1874 is barred, the present suit is not wholly barred, because there is also a prayer to set aside the alienation made by the third and fourth defendants, mothers of plaintiffs, by the withdrawal application in the suit for declaration regarding the same alienation of 1874, brought by them in 1892. There is, no doubt, a prayer to this effect, but it has not been granted by the lower Court's decree and the plaintiffs have not appealed against that decree. As it seems clear that the suit is barred by limitation it is unnecessary to record findings on the remaining issues." He allowed the appeal and dismissed the suit.

Plaintiffs preferred this second appeal.

P. Nagabhushanam for appellants.

C. Ramachandra Rau Sahib for first and second respondents.

JUDGMENT.—The Judge is right in holding that in so far as the alienation of 1874 is concerned, this suit is barred by limitation. There is, however, also a further prayer in the plaint that the alienation made by way of confirmation of the prior alienation, by the (withdrawal) application put in, in 1892 by the third and fourth

defendants should be set aside. As to this the Judge holds that there was no doubt a prayer to this effect in the plaint, but that it had not been granted by the District Munsif and that the plaintiffs have not appealed against that decree in so far as it omitted to grant that prayer. As the decree of the District Munsif was in favour of the plaintiffs, there was nothing for them to appeal against. The judgment of the District Munsif, moreover, shows he did not disallow this prayer. We must hold that the withdrawal of the suit of 1892 on the ground that the alienation was valid without permission to bring a new suit is a confirmation of the alienation of 1874 and gives a fresh cause of action and it follows that the present suit is not barred by limitation. As the District Judge has decided the appeal upon a preliminary point which has been set aside on second appeal, we must refer the appeal back to him for disposal on the merits. Costs will follow the result.

MULLAPUDI
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v.
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APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

PUTHIA VALAPPIL BARGA *alias* KUNHUNHA UMMA,
(DEFENDANT No. 2), APPELLANT,

1902.
February 13.

v.

VELOTH ASSENAK AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 411—Court fees—First charge on subject-matter of suit—Purchase of portion of subject-matter at sale to recover Court fees—Subsequent purchase in execution under another decree—Validity.

A suit was filed *in formâ pauperis* and a decree passed, in December 1893, awarding the plaintiff therein certain land. A portion of that land was, in 1896, put up for sale in order to recover the amount due to Government as stamp fees in connection with the pauper suit, and the present plaintiff bought it. The same land was attached, in 1899, in execution of another decree, which was passed in March 1894. Plaintiff made a claim, which was rejected, and the land was sold to the second defendant, in execution of that other decree, in September 1899. Plaintiff now sued for a declaration that the land was not liable to be sold in satisfaction of the other decree :

* Second Appeal No. 1193 of 1900 against the decree of M. J. Murphy, Acting District Judge of North Malabar, in Appeal Suit No. 283 of 1900, presented against the decree of M. Mundappa Bangera, District Munsif of Tellicherry, in Original Suit No. 380 of 1899.