BENSON AND SUNDARA AYYAR, JJ.

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might be held not to amount to effective possession. These decisions might be perfectly right on the particular facts on which they were passed, but if they intend to lay down that a tenant-trespasser is as a matter of law bound to prove that his trespass was known to his landlord, we must say that we prefer the rule laid down by MARKBY, J. We can see no basis for a presumption that a tenant when he encroaches on his landlord's lands intends to hold possession purely for the benefit of the landlord. We are therefore of opinion that on the finding arrived at by the District Judge the plaintiffs must fail. We may add that it is almost impossible to believe that during the period of about thirty years that the defendants were cultivating the lands prior to 1904 their landlords were ignorant of the fact. The result of the finding is that the decrees of the lower courts must be reversed and the suit dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr Justice Ayling.

1911 January 26.

T. UNNI KOYA (PLAINTIFF), APPELLANT,

v.

A. P. UMMA (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), s. 273—Where decree attached the decree-holder cannot take any steps to execute the decree.

Section 273 of the Code of Civil Procedure prohibits the holder of a decree which has been attached in execution from applying for execution of the decree attached and any such application by him will be infructuous as it could not be granted and will not have the effect of saving limitation.

The only person competent to execute will be the attaching creditor, who will be liable in damages if he allows the decree to become barred by limitation *Adhar Chandra Dass* v. *Lal Mohan Das* [(1897) I. L. R., 24 Calc., 778], not followed.

APPEAL under section 15 of the Letters Patent against the order and judgment of the Honourable Mr. Justice SANKARAN NAIR in Civil Revision Petition No. 687 of 1908 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of T. V. Ananthan Nair, Subordinate Judge of South Malabar at Calicut, in Small Cause Suit No. 262 of 1908.

K. P. M. Menon for appellant.

* Letters Patent Appeal No. 1 of 1910.

C. Madhavan Nair for respondent.

The facts for the purpose of this case are sufficiently set out in the judgment.

JUDGMENT.—The suit was instituted for recovery of damages on the ground that the defendant who attached in execution of his decree against the plaintiff, a decree for money, which the plaintiff held against a third person, allowed a decree by his negligence or by collusion with the judgment-debtor of the plaintiff to lapse by efflux of time. The defendant has realised the amount of his decree from the properties of the plaintiff. The Subordinate Judge gave a decree to the plaintiff finding the facts in his favour.

SANKARAN NAIR, J., in revision has set aside the judgment of the Subordinate Judge on the ground that the plaintiff, the holder of the attached decree, could have executed the decree in spite of the attachment, and in support of this proposition the learned Judge relies on three cases *Patumma* v. *Idivi Beari* (1), *Sami Pillai* v. *Krishnasami Chetti* (2) and *Adhar Chandra Das* v. *Lal Mohan Das* (3). It is contended on behalf of the plaintiff who appeals against his judgment that section 273 of the Civil Procedure Code (Act XIV of 1882) expressly lays down that, when a decree is attached, execution of it shall be stayed by the Court which passed the decree, unless and until the Court which issued the notice of attachment cancels the notice, or the judgment-creditor at whose instance the attachment was made applies for execution of the decree so attached.

We think this contention is well founded. It is urged on behalf of the respondent that the words "stay the execution" in section 273 must be understood to mean only the taking of the proceeds of the execution, and that the section does not preclude the holder of the attached decree from taking all the necessary steps for its execution short of actually receiving the amount.

We think that such a construction would be entirely artificial. As regards the authorities, it would appear that, so far as the case of *Patumma* v. *Idivi Beari* (1) is concerned, the learned Judges who decided the case did not wish that their decision,

(1) (1903) 13 M. L. J., 265. (2) (1898) I. L. R., 21 Mad., 417.
(3) (1897) I. L. R., 24 Calc., 778.

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should be used as a precedent for the general proposition which is now relied upon on behalf of the respondent. In *Adhar Chandra Dass* v. *Lal Mohun Das* (1), there is no doubt a general dictum of MACLEAN, C.J., that attachment of a decree does not prevent the holder of that decree from executing it; but BANERJI, J., does not go so far, and he limits his judgment to another ground. MACLEAN, C.J., if we say so with respect, does not attempt to show how the words of section 273 are compatible with his construction but proceeds on what appears to us to be general grounds of expediency. The case of *Sami Pillai* v. *Krishnasami Chetti* (2) has no relevancy to the present question.

If the holder of the attached decree could not execute it, then any application made by him for that purpose would have been infructuous in the sense that it would not be competent for the Court to grant it and it would further follow that such an application if made would have been useless to save limitation (see *Manawar Hussain* v. *Jani Bijai Shankar* (3), *Purna Chandra Mandal* v. *Radha Nath Dass* (4), and *Gurupadápa Basápá* v. *Virbharápá Irsángápá* (5).

We are therefore of opinion that the defendant, the attaching judgment-creditor, was the only person who could have executed the attached decree.

The judgment of SANKARAN NAIR, J., must be reversed and that of the Subordinate Judge restored. Each party will bear the costs of this appeal and before SANKARAN NAIR, J.

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(1) (1897) I. L. R., 24 Calc., 778.
(2) (1898) I. L. R., 21 Mad., 417
(3) (1905) I. L. R., 27 All., 619.
(4) (1906) I. L. R., 33 Calc., 867.
(5) (1883) I. L. R., 7 Bom., 459 at p. 464.