SRI RAJAH SOBHANADRI APPA RAO BAHADUR v. SRI RAJAH VENKATA-NARASIMHA APPA RAO BAHADUR.

upon, but, as already observed, his right to do so was implied in his plea that he had resumed and it was his duty then to establish that right if he wished to invalidate the leases. Being declared valid in that suit and running as they do for a term of thirty years they must be held good for that period as a matter that is *res judicata*. This suit, so far as the leases go, is therefore premature.

There are two minor points to be noticed to make this judgment complete. The first is the first defendant's plea that he received no notice to quit. We agree with the Subordinate Judge that he had due and reasonable notice. The other point is that raised in the memorandum of objections put in by the plaintiff that the mesne profits awarded by the Subordinate Judge are not sufficient. We agree with the Subordinate Judge's finding on the point, and accordingly dismiss the memorandum of objections with costs, as well as upon the ground that it must fail as the appeal succeeds. The appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. December 2, 9, 10.

RAJAH OF VENKATAGIRI (PLAINTIFF), APPELLANT,

v.

ISAKAPALLI SUBBIAH AND OTHERS (DEFENDANTS NOS. 1 TO 36, 38 TO 43, 45 TO 68), RESPONDENTS.*

Limitation Act—XV of 1877, *ss.* 23, 28, *sched. II, arts.* 120, 142, 144—*Attachment by Magistrate under s.* 146, *Criminal Procedure Code—Cross-suits for declaration of right to possession—"Continuing wrong"—Limitation.*

Certain lands were attached by a Magistrate, in 1886, under section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some

* Appeal Suits Nos. 149 and 150 of 1900 presented against the decrees of T. M. Swaminadha Ayyar, District Judge of Nellore, in Original Suits Nos. 20 and 26 of 1897.

income from them. Both claimants instituted, in 1897, suits in which each claimed the lands as his own, and sought to obtain a declaration of title to them, as well as to the accumulated income, with a view to obtaining possession of the lands and money from the Magistrate. On the question of limitation being raised:

Held, that in so far as the suits were for declaration of title to immoveable property and the profits therefrom, they were governed by article 120 of schedule II to the Limitation Act.

Articles 142 and 144 were not applicable, the suits not being for the recovery of immoveable property, within the meaning of either. The actual or physical possession was with the Magistrate, who was not and could not be made a party to the suits. With regard to article 142 the Magistrate could not be regarded as having dispossessed either party nor could either party be regarded as having discontinued possession. The attachment by the Magistrate operated, in law, for purposes of limitation, simply as a detention or custody, pending the decision by a Civil Court, on behalf of the party entitled. For the purposes of limitation the seizin or legal possession was, during the attachment, in the true owner.

Goswami Ranchor Lalji v. *Sri Girdhariji*, (I.L.R., 20 All., 120), commented on.

With regard to article 144, it was still less applicable, as each plaintiff claimed as the true owner and as being in legal possession (by the possession of the Magistrate), and the legal possession for purposes of limitation was constructively in the person who had the title at the date of the attachment, and such title could not be extinguished by the operation of section 28, however long the attachment might continue.

The right to sue accrued on the date of the attachment. The cause of action for the declaratory suit was the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession, and the procuring by such denial the attachment by the Magistrate. There was no continuing wrong, within the meaning of section 23 of the Limitation Act, so as to give a fresh starting point for limitation at every moment of the time during which the attachment continued.

Chukkun Lal Roy v. *Lolit Mohan Roy*, (I.L.R., 20 Calc., 906 at p. 925), commented on.

Though the suits were barred in so far as they were for a declaration of right to the lands, that bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner to the property. The operation of section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for possession of property. The right of the true owner to lands cannot be extinguished, however long such an attachment may continue; nor can lands attached under section 146 of the Code of Criminal Procedure be ever forfeited to Government.

SUITS for declarations of title to land, and to recover possession of them.

The following statement of facts is taken from the judgment of the High Court:—

"These are cross-suits between the agraharamdars of

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Daggavolu on the one hand and the Rajah of Venkatagiri on the other—the proprietor of the villages of Vakyam and Kadagunta adjoining Daggavolu. The lands which form the subject-matter of the suits were attached by the Sub-Divisional Magistrate of Naidupet on the 5th May 1886, under section 146 of the Criminal Procedure Code, in consequence of certain disputes between the agraharamdars of Daggavolu and the ryots of Vakyam in regard to the possession of these lands. It does not appear clearly whether the Magistrate acted under section 146 because he was satisfied that neither of them was then in possession or because he was unable to satisfy himself as to which of them was then in possession. The Magistrate has since continued to be in management of the lands and at the date of the suit there was in deposit a sum of Rs. 207 (or Rs. 267 ?), being the net income realized by him therefrom. The plaintiffs in the two suits claim the lands respectively as their own and seek to obtain a declaration of his or their title to the lands and the amount in deposit above referred to, with a view to producing such adjudication before the Sub-Divisional Magistrate and obtaining from him possession of the lands and payment of the sum in question. There is also in each suit a prayer for an injunction restraining the other party from taking possession of the lands and from interfering with the enjoyment of the lands by the plaintiffs. This last is an unintelligible prayer, the injunction sought for being really to restrain the other party from prosecuting his suit successfully and applying to the Sub-Divisional Magistrate to obtain possession of the lands and from interfering with the plaintiff's enjoyment thereof, after he or they obtain possession of the lands from the Magistrate. It is probably in consequence of this prayer for an injunction that *ad valorem* Court fee was paid, instead of a fixed fee of Rs. 10 for a mere declaration."

The District Judge found in favour of the agraharamdars regarding the lands claimed by them, and to the rents and profits therefrom held in deposit. He dismissed the Rajah's suit—20 of 1897.

Plaintiff in Original Suit No. 20 of 1897 preferred this appeal.

S. Subrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—[After setting out the facts already printed.]

As on the face of the plaint, the suits seem to be merely of a declaratory character, neither party being in actual possession, the preliminary question was argued as to whether the suits were or were not barred by the six years' rule of limitation, prescribed by article 120 of the second schedule to Act XV of 1877, article 47, which prescribes a period of three years, being applicable only to a case in which a Magistrate, under sub-section 6 of section 145, Criminal Procedure Code, confirmed the possession of either party, and not to a case, like the present, when, acting under section 146, he attached the property (*Akilandammal* v. *Periasami Pillai*(1), *Goswami Ranchor Lalji* v. *Sri Girdhariji*(2)). In the Madras case, the suit was brought within six years from the date of the Magistrate's order of attachment. But in the Allahabad case, the suit was apparently brought more than six years after the Magistrate's order and the lower Appellate Court dismissed it as barred under article 120. The High Court, however, in second appeal, after holding that article 47 was inapplicable, held, without assigning any reasons therefor, that 'the article applicable is either 142 or 144'—both of which relate to suits for 'possession' of immoveable property, the former prescribing a period of twelve years from the date of the plaintiff's dispossession or his discontinuance of possession, and the latter, twelve years from the date when the possession of the defendant becomes adverse to the plaintiff. Both the present suits were brought more than 10 years after the date of attachment and it is therefore to the interest of each of the contesting parties to rely upon the above decision of the Allahabad High Court and contend that the period of limitation applicable to the suit is twelve years and not six. With all deference to the learned Judges who took part in the above decision of the Allahabad High Court, we are unable to regard either of these suits as a suit for possession of immoveable property within the meaning of either article 142 or article 144. The actual or physical possession is with the Magistrate, who is not and cannot legally be made a party to the suits. So far as article 142 is concerned, the Magistrate cannot be regarded as having dispossessed either party nor can either party be regarded as having discontinued possession. If no other person

(1) I.L.R., 1 Mad., 309. (2) I.L.R., 20 All., 120.

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has taken possession of the property as his own or if the so-called possession of another person is mere detention or possession on behalf of the true owner, there can have been no dispossession or discontinuance of possession in law and article 142 is inapplicable. In *Smith* v. *Lloyd*(1) Parke, B., in delivering the judgment of the Court stated as follows:—(at page 572). "We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under the 3 William IV, cap. 27, sections 2 and 3, for we are clearly of opinion that that statute applies, not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute." This principle was approved of and followed by the Judicial Committee in the *Trustees & Agency Company* v. *Short*(2) in which it was held that limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession before the expiration of the statutory period and that possession so abandoned by the intruder leaves the rightful owner in the same position in all respects as he was in before the intrusion took place. Both these cases were recently followed by the Privy Council in an appeal from India (*The Secretary of State for India* v. *Krishna Moni Gupta*(3)) in which it was held that in order to sustain a claim to land by limitation under the Indian Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him and that if, before title has been perfected by limitation, there is dispossession of the intruder by the *vis major* of the floods, it will be an interruption to his possession, and the constructive possession of the land would, during its submergence,—however long it may continue—be in the true owner, and the decision of the Calcutta High Court in *Kally Churn* v. *Secretary of State*(4) in which a contrary view was taken, viz., that the possession of the trespasser must be deemed to have continued in law, while the lands were under water and to have revived on their being reformed, was overruled.

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(1) 9 Exch., 562.
(2) L.R., 13 App. Cas., 793.
(3) L.R., 29 I.A., 104.
(4) I.L.R., 6 Calc., 725.

In the present case the Magistrate acted in due course of law and, either because he found that neither party was in possession or because he was unable to satisfy himself as to which of them was then in possession, he has simply attached the property. Such attachment operates in law for purposes of limitation simply as detention or custody of the property by the Magistrate who, pending the decision by a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled, whether he be one of the actual parties to the dispute before him or any other person. For purposes of limitation the seizin or legal possession will, during the attachment, be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner, or to his discontinuing possession.

In each of the present suits, the plaintiff claims as the true owner and as being in legal possession—the physical possession by the Magistrate being one on behalf of the true owner—and prays for a declaration of his title, as against the defendant (the plaintiff in the other suit) who denies his title and claims the property as his own. Under section 146, Criminal Procedure Code, the Magistrate is bound to continue the attachment and have statutory possession of the lands for purposes of continuing the attachment until a competent Civil Court determines the rights of the parties to the dispute before him or the person entitled to the possession of the lands and he cannot deliver the property to any of the parties or other person without an adjudication by a Civil Court. During the continuance of the attachment, the legal possession for purposes of limitation will constructively be in the person who had the title at the date of the attachment and such title cannot be extinguished by the operation of section 28 of the Limitation Act, however long such attachment may continue.

In the above view article 144 will be even less applicable to the suit than article 142.

The suits, therefore, are essentially suits for declaration of title to immoveable property and the profits thereof which are in deposit, the plaintiffs respectively claiming to be in legal possession thereof and the period of limitation applicable is therefore the period of six years prescribed by article 120 of the second schedule to Act XV of 1877, which period is to be reckoned from the time when the right to sue accrued (*Pachamuthu* v.

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Chinnappan(1), *Puraken* v. *Parvathi*(2) and *Muhammad Bagar* v. *Mango Lal*(3). In this view it is immaterial whether the Rajah of Venkatagiri (the plaintiff in Appeal No. 149) was or was not actually a party to the dispute before the Magistrate in 1886. The right to sue certainly accrued on the date of the attachment, the 5th May 1886, which is rightly given as the date of the cause of action in both the suits. The alleged wrongful denial, by the defendants in each case, of the plaintiff's title and possession and the procuring by such denial of the attachment by the Magistrate, is the cause of action for the declaratory suit and it is impossible to hold that there is a 'continuing wrong' within the meaning of section 23 of the Indian Limitation Act, during the time that the attachment continues so as to give for the purpose of reckoning the period of limitation a fresh starting point at every moment of the time during which the attachment continues. If the ruling of the Calcutta High Court in *Chukkun Lal Roy* v. *Lolit Mohan Roy*(4) —which decision was reversed on appeal (*Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*(5)) by the Privy Council on another point—be that a suit for a declaration of title to immoveable property cannot be held to be barred so long as the plaintiff's right to such property is a subsisting right and that for purposes of limitation, the right to bring such a suit is "a continuing right" so long as the right to the property in respect of which declaratory relief is prayed for is not extinguished, we are unable to concur in it. The criterion is not whether the '*right*' is a 'continuing' one but whether the '*wrong*' is a continuing one. The actual decision in that case, however, was that the suit having been brought within six years from the time of (the widow) Rajeshwari's death—when alone the plaintiffs (as reversionary heirs) became entitled to possession or other consequential relief—the suit was amply within time. But on what principle the starting point under article 120 was taken to be the time of Rajeshwari's death does not appear.

The present suits, therefore, so far as they pray for a declaration of right to the lands in question are barred by the law of

(1) I.L.R., 10 Mad., 213.
(2) I.L.R., 16 Mad., 138.
(3) I.L.R., 22 All., 90.
(4) I.L.R., 20 Calc., 906 at p. 925.
(5) L.R., 24 I.A., 76.

limitation; but such bar affects only the remedy or relief by way of declaration and does not extinguish the right and title of the true owner to the property, the operation of section 28 of the Limitation Act being limited to cases in which the bar of limitation applies to suits for the possession of property, and for the reasons already stated neither suit can be regarded as a suit for the possession of property. The right of the true owner, therefore, to the lands cannot be extinguished, however long the attachment may continue; nor can lands attached under section 146, Criminal Procedure Code, be ever forfeited to Government and be at its disposal, as in the case of the properties of proclaimed offenders and absconding witnesses whose properties have been attached under the Code of Criminal Procedure.

In cases in which by the operation of the law of limitation the right of the true owner to the property is at the determination of the period of limitation extinguished, such extinguishment takes effect retrospectively and the consequence therefore is that the true owner cannot maintain a suit for the recovery of any rents and profits derived by the trespasser from the land before the extinguishment of the right, though such profits may be due for a period within three years before the date of the suit. But where the right is not so extinguished and the title is still subsisting, though a suit for declaration thereof may be barred, the owner's right and remedy in respect of the rents and profits derived from the property remain unaffected. In the present case, it clearly appears from paragraph 5 of the plaint in Appeal No. 150, that out of the amount in deposit the greater portion, *i.e.*, Rs. 139, represents the profits received by the Magistrate within six years before the date of the suit and the suit, therefore, so far as it seeks for a declaration of right to this amount, is not barred, article 120 being applicable to suits for declaration of right to moveable property also (*Mahomed Riusat* v. *Hasin*(1)), and the right to sue within the meaning of the third column of the article having accrued only from time to time as the profits were received.

Bearing in mind that the right to the property attached continues though the declaratory relief prayed for in respect of it

(1) I.L.R., 21 Calc., 157.

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has been barred, it will not, in a case like this, be a sound exercise of discretion to refuse to give a declaratory decree in respect of the greater portion of the amount in deposit when, in respect of such portion, relief by way of declaration is not barred by limitation. The granting of this relief will of course necessarily involve the determination of the title to the land under attachment, though if the plaintiffs in either case establish his or their title, the *decree* will have to be limited only to a declaration of right to the said portion of the amount in deposit. But the finding, in the *judgment* on the issue of title, will have the force of *res judicata* and for the purposes of section 146, Criminal Procedure Code, practically operate as a determination of the right of the successful plaintiffs to the lands under attachment as well as to the balance of the amount in deposit.

We have therefore heard the appeals on the merits, and we agree with the conclusion of the District Judge.

[Their Lordships then dealt with the evidence.]

We uphold the finding of the Judge as to the right of the agraharamdars to the lands claimed by them in their plaint, and to the rents and profits thereof in deposit, but, for the reasons already given, declaratory relief will have to be limited to the amount realized during the six years immediately preceding the suit, viz., Rs. 139.

The decree in Appeal Suit No. 150 will be modified accordingly and the appellant therein must pay the respondents' costs. Appeal Suit No. 149 is dismissed with costs.