APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913. July 16 and 17.

P. PARASURAMAYYA (PLAINTIFF), APPELLANT IN BOTH CASES,

v.

V. RAMACHANDRUDU (DIED) AND TEN OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 28, art. 47—Suit to recover possession of lands—Magistrate, order of, under Criminal Procedure Code (Act V of 1898), sec. 145—Order passed without proper inquiry—Notice not legally served on the plaintiff—Plaintiff aware of proceedings—Order not without jurisdiction—Applicability of article 47—Tenant for a term—Landlord treating tenant as a trespasser after the expiry of the term—Subsequent registered notice to quit—Cause of action, when.

Article 47 of the Limitation Act (IX of 1908) is applicable to a suit for recovery of possession of lands in respect of which an order had been passed by a Magistrate acting under section 145 of the Code of Criminal Procedure, although the Magistrate might not have made the proper inquiries which he ought to have made before he passed the order, if the plaintiff had notice of the proceedings though the notice was not served on the plaintiff in accordance with law.

Gangadaram Aiyar v. *Sankarappa Naidu* (1891) 9 M.L.T., 91, followed.

Where the defendants were tenants for a term under the plaintiff and continued in possession of the lands after the expiry of the term but the plaintiff did not treat the defendants as tenants holding over but as trespassers after the date of the expiry of the term, and the magisterial order under section 145 of the Code of Criminal Procedure was passed in the defendants' favour subsequent to the said date:—

Held, that the suit for recovery of possession of the lands brought by the plaintiff more than three years after the said order was barred under article 47 of the Limitation Act.

Tukaram v. *Hari* (1904) I.L.R., 28 Bom., 601 (F.B.), *Bapu bin Mahadaji* v. *Mahadaji Vasudeo* (1884) I.L.R., 18 Bom., 348 and *Wise* v. *Ameerunnissa Khatoon* (1879) 7 I.A., 73, referred to.

Bolai Chand Ghosal v. *Samiruddin Mandal* (1892) I.L.R., 19 Calc., 646, distinguished.

SECOND APPEALS against the decrees of T. VARADARAJULU NAYUDU, the temporary Subordinate Judge of Masulipatam, in Appeals Nos. 480 and 522 of 1910, preferred against the decrees of A. Venkataramayya Pantulu, the District Munsif of Gudivada in Original Suits Nos. 108 and 109 of 1909.

* Second Appeals Nos. 1548 and 1549 of 1911.

The material facts appear from the judgment of SADASIVA AYYAR, J.

V. C. Seshachariar and *O. P. Venkataraghavachariar* for the appellant.

V. Ramadoss for the respondents Nos. 2 to 8.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant before us. He sued for recovery of possession of lands which had been let to the defendants in fasli 1312 for that particular fasli and which the defendants had been holding over without the plaintiff's consent in the subsequent faslis before suit. There were proceedings instituted by the Magistrate at the instance of the defendants under section 145 of the Criminal Procedure Code on account of the plaintiff's attempt to eject the defendants in the beginning of fasli 1313. The Magistrate took a statement from the plaintiff and then passed orders under section 145 declaring the defendants to be entitled to retain possession till they were ousted by the decree of a Civil Court. That order was passed in August 1903.

The present suit for possession was brought in March 1909, more than three years from the date of the Magistrate's order declaring the defendants to be entitled to retain possession and prohibiting the plaintiff from ejecting them till they were ousted by an order of a Civil Court.

The question is whether the suit is barred by article 47 of the Limitation Act. The appellant's learned Vakil Mr. Seshachariar contends firstly, that the order of the Magistrate under section 145 of the Criminal Procedure Code was passed without jurisdiction and hence it is not a binding order, and that article 47 of the Limitation Act provides for limitation of three years from the date of the order of the Magistrate only if such order was a binding order passed with jurisdiction. Secondly, he contends that the plaintiff had no right to possession as against the defendants during the pendency of the proceedings before the Magistrate, that he acquired such title only by virtue of a notice to quit given by him in December 1903 and that under such circumstances article 47 has no application.

As regards the first branch of the argument, I am not prepared to hold that the Magistrate acted without jurisdiction in passing the order for possession under section 145. He might have acted illegally and irregularly in the exercise of his

PARASU-RAMAYYA v. RAMACHAN-DRUDU

SADASIVA AYYAR, J.

jurisdiction under section 145. He might not have made the proper enquiries which he ought to have made before he passed the order, but the record seems to show that the plaintiff had notice of the proceedings and though the notice may not have been served on him in accordance with law, he appeared and put in a statement before the Magistrate. I cannot hold, on the strength of a few general expressions in some of the Calcutta cases, that a Magistrate who merely acts against law or irregularly under section 145 also acts without jurisdiction in passing such an order under the section. I have perused the printed records in *Gangadaram Aiyar* v. *Sankarappa Naidu* (1) out of which the decision *Gangadaram Aiyar* v. *Sankarappa Naidu*(1) arose. In that case also, there seem to have been illegalities and irregularities alleged against the order passed by the Magistrate but the learned Judges held that the Magistrate could not be said to have acted without jurisdiction by reason of the illegalities and irregularities he was alleged to have committed. They applied article 47 (second schedule) and section 28 of the Limitation Act and held that the second defendant's title in that case was barred by article 47. I am unable to distinguish that case from the present. Mr. Seshachari also relies upon *Tukaram* v. *Hari*(2). So far as I understand the decisions pronounced in that case, they seem to have proceeded upon the ground that all orders made by a *mamlatdar* under the Bombay Mamlatdars Act do not come within the meaning of the phrase " order respecting the possession of immovable property " used in article 47, that such orders passed by *mamlatdars* under the Mamlatdars Courts Act may be classified under three different heads and that only orders coming under the first head which positively declare or award possession to a particular party or prevent another party from disturbing the possession of one of the parties could come within the meaning of the phrase in article 47, above referred to. So far as orders under section 145 of the Criminal Procedure Code, clause 6, are concerned they are more analagous to the first class out of the three classes of orders which can be passed by a mamlatdar than to the other two classes of orders. *Tukaram* v. *Hari*(2), does not dissent from *Bapu bin Mahadaji* v. *Mahadaji Vasudeo*(3) where

(1) (1911) 9 M.L.T., 91. (2) (1904) I.L.R., 28 Bom., 601 (F.B.).
(3) (1884) I.L.R., 8 Bom., 348.

it was held that article 47 would apply where a *mamlatdar* passed a positive order for possession.

As regards the second branch of the appellant's contention, the allegations in the plaint and the proceedings before the Magistrate under section 145 seem to show that the plaintiff did not treat the defendants as tenants holding over after the expiry of the prescribed term but treated them as trespassers after that date. If so, his right to possession as against the defendants accrued on the 1st July 1903 before the magisterial proceedings under section 145 arose. The notice to quit possession against the defendants, which notice was given in December 1903, did not therefore in any way create or perfect the plaintiff's title to possession as against the defendants, and the principle of the decision in *Bolai Chand Ghosal* v. *Samiruddin Mandal*(1), cannot therefore apply to this case.

In the result, the Second Appeal is dismissed with costs.

Second Appeal No. 1549 of 1911 follows.

TYABJI, J.

TYABJI, J.—I agree. The question for decision is whether the suit out of which the present appeal arises was barred by operation of article 47 of the Limitation Act. It was argued before us that the proceedings under section 145 of the Criminal Procedure Code must be considered as not having been taken at all because of their having been *ultra vires* (this is the expression employed in the memorandum of appeal to the Lower Court). I entirely agree with what my learned brother has said to the effect that there is nothing in support of the allegations on which this argument is founded and we must proceed therefore on the footing that the order under section 145 of the Criminal Procedure Code is binding on the appellant.

The next point, which seems to me to be the only important point in the appeal, is whether article 47 of the Limitation Act applies to a suit based on an alleged title to the ownership of the property or whether the application of that article must be restricted to suits asking merely for possession of the property without basing the claim on any title to own it. It seems to me that there is a good deal of substance in the argument that the legislature cannot be taken to have cut down the period of limitation for the purpose of establishing title to immovable

(1) (1892) I.L.R., 19 Calc., 646.

PARASU-RAMAYYA v. RAMACHAN-DRUDU.

TYABJI, J.

property, which as a general rule, is twelve years, unless there is something very definite to bring one to that conclusion. It must be admitted, that the law is not as clearly laid down in the enactments as might be desirable, and whatever decision we may come to, a certain amount of anomaly in the law must result. The difficulties may well be considered in connection with the decisions in *Tukaram* v. *Hari*(1) and *Wise* v. *Ameerunnissa Khatoon* and *Wise* v. *Collector of Backergunge*(2).

In the former decision a Full Bench of the Bombay High Court held that where the proceedings had consisted of an application to the Court under the Mamlatdar's Courts Act, and had resulted in the *mamlatdar* rejecting the plaint presented to him, the period of limitation was not governed either by article 47 of the Limitation Act or section 21 of the Mamlatdars Courts Act. But on an examination of the judgments in that case, it appears that the reasoning on which the decision was based was that the proceedings taken under the Mamlatdars Courts Act in that case were not such as to bind any party with reference to the possession of the property in question : they resulted merely in that the *mamlatdar* rejected the plaint. The Bombay High Court therefore held that there was no order having reference to the title to the property within the terms of article 47 of the Limitation Act inasmuch as it did not bind any person with respect to the possession of any immovable property. On the other hand in the case of orders under section 145 of the Criminal Procedure Code, though the proceedings are in the first instance concerned with the preservation of peace and not with the title to the property, yet by reason of the 6th sub-section of section 145 there is an order respecting the possession of the property binding the parties. So that in regard to this point the proceedings under section 145 of the Criminal Procedure Code, are distinguishable from such proceedings under the Mamlatdars Courts Act as had to be considered by the Full Bench in *Tukaram* v. *Hari*(1).

The difficulty suggested by the other decision to which I have referred namely *Wise* v. *Ameerunnissa Khatoon* (2), is that the Privy Council lays down that the lapse of three years (which

(1) (1904) I.L.R., 28 Bom., 601 (F.B.).
(2) (1879) 7 I.A., 73 ; s.c., 6 C.L.R., 249.

in accordance with article 47 is the period of limitation for instituting suits) does not suffice for founding a title by prescription, so that, though one of the two claimants may be precluded from setting up any title to the land by reason of the lapse of the three years contemplated by article 47, yet the opposing claimant is not entitled to rely upon the lapse of the same period in order to base thereon his title to the ownership of the land. This no doubt creates an anomaly in the law. But it seems to me that the anomaly is less flagrant than that which could be created if we were to hold that article 47 refers merely to a possessory suit, inasmuch as the law relating to possessory suits as laid down in the Specific Relief Act, section 9, gives a period merely of six months for instituting a suit, and it would have to be held (were the appellant's contention before us accepted) that taking proceedings under the Criminal Procedure Code, section 145, increases the period of limitation from six months to three years: but the policy of the law seems to be to shorten and not to enlarge the period of limitation when there have already been judicial proceedings between the parties with reference to the rights in question or to allied rights.

For these reasons, not without a certain amount of hesitation, I have come to the same conclusion as my learned brother and agree that this appeal should be dismissed with costs.