

1877

EMPEROR OF
INDIA
v.
RAMENSHAR
KAR.

convicts him of an offence against property under chapter xvii of the Penal Code. He may then, or at the time, have entertained the idea that by placing it where he did, he would cause evidence to be found whereby he hoped that Sedari might be convicted of the theft of the property so concealed by him. But he nevertheless committed an offence under s. 414 of the Code against the property. Also he fulfilled the condition of the offence as defined in that section. It did not matter where he concealed it. He should not have concealed it at all, or caused it to be concealed voluntarily, either in Sadari's house or land, or elsewhere, if he knew or had reason to believe that it was stolen property.

In concealing it as he did in Sedari's field, with the intention found by the Magistrate, the prisoner committed another and distinct offence against public justice under chapter xi of the Penal Code, as he intentionally fabricated false evidence to be used in a judicial proceeding. He was punished under s. 193. The offence possibly was one more nearly coming under s. 195 of the Penal Code. There could be no doubt that in hiding the pins in Sedari's field intending that they might be found and that the circumstance of their being found in Sedari's field might appear in a judicial proceeding, and that this circumstance might lead the Magistrate to believe that he, Sedari, had been connected with the theft, under s. 192 would be and is fabricating false evidence, and is a distinct offence from the offence of voluntarily assisting in disposing of the stolen property. I see no reason to interfere, and dismiss the petition.

Petition dismissed.

FULL BENCH.

1877

April 12.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

BADRI PRASAD (PLAINTIFF) v. MUHAMMAD YUSUF AND ANOTHER
(DEPENDANTS).*

Adjudication of right—Binding on parties to proceedings—Act VIII of 1859, s. 245—Claimant—Conclusive order—Defendant in possession—Limitation—Objector—Suit to establish right—Title.

* Special Appeal, No. 423 of 1876, from a decree of H. M. Chase, Esq., Judge of Aligarh, dated the 8th March 1876, reversing a decree of Munshi Kishen Dyal, Munsif of Aligarh, dated the 22nd June 1875.

1877

BADRI PRA-
SAD
v.
MUHAMMAD
YUSUF.

In a suit brought by plaintiff to establish his right as auction purchaser to certain immoveable property sold in execution of a decree, under the provisions of s. 246 of Act VIII of 1859, disallowing the claim of the objector—represented by the defendant—and adjudging the property attached to be that of the judgment-debtor, represented by the plaintiff—the said order not having been set aside in a regular suit by the defendant. *Held*, (by a majority of the Full Court) that an order passed under the provisions of s. 246 of Act VIII of 1859, unless over-ruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it, and is conclusive.

(PEARSON, J., *per contra*), s. 246 of Act VIII of 1859 provides for an adjudication of proprietary right on the basis of possession, but the matter is not "*res judicata*" as to matters in dispute between decree-holder and claimant, unless the party against whom an order is passed under s. 246 of Act VIII of 1859 fails to bring a regular suit to establish his right. In the case mentioned in the order of reference as apparently conflicting with the above view, there had been no adjudication on the basis of possession, by the Court passing an order under s. 246 of Act VIII of 1859, and the defendant in possession was therefore, at liberty to assert his proprietary title against the lien set up by plaintiff under the said order, passed without jurisdiction on the miscellaneous side.

THE following are the matters of fact out of which the Full Bench ruling in this case arises. On the 8th March 1866 one Imam-ud-din got his name entered in the revenue records as half sharer of a grove near Aligarh, one Rahim Bakhsh claiming to be the other half sharer.

Subsequently Imam-nd-din's right to a half share of the grove was attached, and upon this attachment Rahim Bakhsh appeared as an objector under s. 246 of Act VIII of 1859, claiming the whole interest in the grove, and repudiating Imam-ud-din's right to, or possession of, any portion of the property.

The Munsif of Aligarh on the 30th April 1870, under s. 246 of Act VIII of 1859, disallowed Rahim Bakhsh's claim to the share of Imam-ud-din, in an order, of which the following is a translation.

"Whereas the Patwari has submitted the Nikasi papers of the year 1273 Fasli, wherein the name of Imam-ud-din, son Man-ul-la appears, though not very clearly, and whereas in support thereof it is proved by copies of documents, and the parol evidence of the Patwari, that the judgment-debtor, as representative of Man-ul-la, holds possession of half the grove in dispute which is under attachment; it is ordered that the claim preferred in respect to the matter in dispute, be disallowed with costs, to be borne by the objector."

The said share was, on the 30th May 1870, put up to sale and purchased by Badri Prasad, present plaintiff, and the auction-purchaser was put in possession, after confirmation of the sale, on the 4th July 1870.

1877

BADRI PRASAD
 v
 MUHAMMAD YUSUF.

Subsequently, Rahim Bakhsh's alleged rights in the whole grove were attached in execution of another decree. The said rights were, on the 19th July 1870, purchased at a court sale by the defendants, who were put in possession on the 25th February 1871. On the 20th September following, the plaintiff, Badri Prasad, petitioned the Munsif's Court, pointing out that he had been put in possession as auction purchaser of Imam-ud-din's share in the grove under a Court certificate, and urging that, therefore, the defendants as subsequent auction purchasers of Rahim Bakhsh's alleged rights in the whole grove, ought not to be certified to hold possession under the said sale of more than half the grove, or what constituted Rahim Bakhsh's real rights therein. The Munsif passed an order on the said petition recording that, Badri Prasad's possession by right of purchase of Imam-ud-din's share, prior to sale of Rahim Bakhsh's interests, could in no wise be affected by the purchase made of the alleged rights of Rahim Bakhsh. The defendants, having realised the rent of the grove, succeeded in getting the Settlement Officer, on the 26th May 1874, to record their actual possession over the whole grove, qualifying the defendants' possession as to half by the mention that it was held on behalf of Badri Prasad, who was referred to the Civil Court to obtain enjoyment of his right.

Badri Prasad, accordingly, sued in the Munsif's Court to establish his right, among other things, to possession of half of three bighas out of the four bighas and six biswas, the area of the grove. The defendants pleaded in answer to the suit, that the whole estate was owned and possessed by Rahim Bakhsh and sold in execution of the decree obtained against him, that defendants being the auction purchasers under that decree, the plaintiff could not succeed in disturbing defendants' possession without suing to set aside the said auction sale, and that such suit would be barred by limitation, more than a year having elapsed between the date of auction sale and date of suit; that the suit was also beyond time by reason of Imam-ud-din's never having had any interest in, or possession of, the property,

1877

BALURI PRA-
SAD
v.
MUHAMMAD
YUSUF.

and finally, that the order of the 30th April 1870 was neither binding on defendants, nor conclusive, because it was based on mere entries in revenue records without regard to actual possession, and because defendants had obtained possession of the whole rights purchased, before the said order had become final. The Munsif held that the order was final and conclusive, unless set aside in a regular suit brought within a year by Rahim Bakhsh, or his representatives, and that no such suit having been brought, it was not open to the defendants to question the adjudication of right involved in the said order, as between the parties to the present suit. On the merits, the Munsif found that Imam-ud-din had been in proprietary possession of half the grove, and that the plaintiff as his representative was entitled to the property in suit.

On appeal by defendants, the District Judge of Aligarh held that, the plaintiff having merely purchased the alleged rights of Imam-ud-din in the land, and having sued for a declaration of right and possession, the plaintiff was bound to prove his title to the property, which, as against the defendants, who were in possession, was not conferred by the Munsif's order, the Judge allowed nevertheless that such an order on the miscellaneous side would be binding, unless reversed in a regular suit, on a party not in possession, the fact of possession constituting an exception to the rule, and the Judge accordingly decreed the defendant's appeal, and remanded the case under s. 351 of Act VIII of 1859 to the Court of first instance, for a finding as to the nature and extent of Imam ud-din's rights, purchased by the plaintiff.

The plaintiff, thereupon, appealed to the High Court on the principal ground that, the Judge had erred in his construction of the effect of an order passed under s. 246 of Act VIII of 1859, upon the rights of parties to such miscellaneous proceedings.

The Division Bench of the High Court (Stuart, C. J. and Turner, J.) referred the question contained in the subjoined order of reference, to the Full Bench :—“ We are inclined to think that when a Court executing a decree has investigated a claim under s. 246, and determined it against an objector, the decision is final, and binds the objector's right, unless, within the time limited, he sues to establish his right. As such a ruling would

apparently conflict with the decision in special appeal No. 751 of 1874, we refer the question to the Full Bench."

Babus *Aprokash Chander Mukerji*, *Jogendro Nath Chaudhri*,
Pandit *Ajudhia Nath* and *Lala Ram Prasad* for appellants.

Messrs. *Ross, Mahmud*, the *Junior Government Pleader*, (*Babu Dwarka Nath Banerji*), *Munshi Hanuman Prasad*, and *Pandit Bishambhar Nath* for respondents.

The following judgments were delivered by the Court:—

TURNER, J. (STUART, C.J., SPANKIE and OLDFIELD, JJ. concurring).

The 246th section of the Code of Civil Procedure declares that when a claim is made to immoveable property attached in execution of a decree as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate it, and if it shall appear that the property was in the possession of the party against whom execution is sought, as his own property, at the time when the property was attached, the Court shall disallow the application. This follows the clause out of which the question before the Court arises. The order which shall be passed by the Court under this section, shall not be subject to appeal, but the party against whom the order may be given, shall be at liberty to bring a suit to establish his right, and the Limitation Act prescribes that such a suit must be brought within one year from the date of the order.

Two questions were principally raised at the hearing, one as to the effect of the order, the other as to the pertinency of the enquiry, whether the order was passed on a correct decision of the issue as to possession.

Now it appears to us that when an enquiry has been duly held under s. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code, it is as final and conclusive on all persons who are parties to it, any other final order or decree of a Court of Justice.

1877

BADRI PRA-
SAD
v.
MUHAMMAD
YUSUF.

1877

BADRI PRA-
SAD
v.
MUHAMMAD
YUSUF.

has been over-ruled in a regular suit, brought in virtue of the permission expressly given by the code, no Court is at liberty afterwards to go behind the order, and inquire whether the Court, which disallowed the objection, had correctly appreciated the evidence as to possession, or had come to the conclusion erroneously, that possession was with the judgment-debtor. Consequently, at the hearing, we expressed our opinion that it was immaterial to the determination of the question submitted to us, whether or not the Court which had investigated the claim, had formed an erroneous judgment on the question of possession.

The effect of the order cannot be affected by the propriety, or otherwise, of the decision at which the Court, which investigated the claim, arrived as to the fact of possession.

We proceed, then, to consider what is the effect of the order. Inasmuch as the code declares that, in the suit brought to contest it, the claimant must prove his *right*, we understand the Legislature to have intended that the order, until reversed, is conclusive as to right.

It is not a novelty in Indian law that possession, which is *prima facie* evidence of title, should be accepted as justifying a record of title unless, and until, the record is amended in pursuance of a decree obtained in a regular suit, brought within a limited time.

Thus Settlement Officers, when engaged in preparing the record of rights under Regulation VII of 1822, were directed to enquire into present or very recent possession, and to frame their record in accordance with the result of that enquiry, and if the parties affected appear before them, and an award is made, that award is final and conclusive, unless, within three years from the date of the award, the party who is aggrieved by it, institutes a regular suit to question it. We are unable to distinguish the principle on which the case cited at the argument was decided, from the principle which should guide the Court in determining the point now before it. It appears not unreasonable that, to give some little security to titles which, in this country, are exposed to much peril, as titles derived from auction sales in execution of a decree, the Legislature should have required any person who makes a claim to attach property;

1877

 BADRI PRA-
 SAD
 V.
 MUHAMMAD
 YUSUF.

to come in within a limited time, and vindicate his rights if he have any, or thereafter to be barred from asserting them.

The argument that limitation does not apply to a defendant, is not in our opinion pertinent. The question is, whether or not the defendant is not bound by an order which he did not contest within the time allowed by law. In our judgment, having failed to prove his right within that time, he is precluded from asserting it, by an order which has become final.

PEARSON J.—“The finding of the Court, under s. 246 of Act VIII of 1859, whether the attached property is in the possession of the party against whom execution of decree is sought, as his own property and not on account of any other person, or is in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, or whether it is not in his possession or in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators paying rent to him, or that being in his possession, it is not so on his own account, or as his own property, but on account of, or in trust for, some other person, appears to me to be an adjudication of proprietary right on the basis of possession. The order which may be passed on such finding is declared not to be subject to appeal, and would not, I conceive, be contestable at all, but for the express permission which is given by the concluding words of the section, to the party against whom an order may be given, to bring a suit to establish his right. Those words show that the matter in dispute between the decree-holder and the claimant is not, by reason of the finding and order under s. 246, so absolutely a *res judicata*, as not to be open to re-adjudication in a suit brought by the party against whom the order was passed, to establish his right. But in the event of no such suit being brought, the matter in dispute must be held to have been finally disposed of by the finding and order under s. 246, and to be absolutely a *res judicata*.”

The learned Judge then distinguished the circumstances of the present case from those in special appeal No. 751 of 1874, in which as the judgment continued “there had been no adjudication on

1877

BADRI PRA-
SAD
v.
MUHAMMAD
YUSUF.

the basis of possession, in respect of the proprietary right in the property, which therefore could not be regarded as a *res judicata*; while the order disallowing the claim on the ground of a lien, was beyond the scope of the Munsif's jurisdiction under the section."

The DIVISION BENCH, STUART, C.J., and TURNER, J., made the following order:—In accordance with the ruling of the majority of the Full Bench of this Court, we must allow the appeal, and reversing the decree of the lower appellate Court, restore that of the Court of first instance, with costs.

Decree reversed.

APPELLATE CIVIL.

1877

April 20.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

AGRA SAVINGS BANK, LIMITED (DEFENDANT) v. SRI RAM MITTER
(PLAINTIFF).*

Act XXIII of 1861, s. 11—Barred suit—Excess payment made by mistake in execution of decree—Jurisdiction—Small Cause Court—Suit in nature of damages.

Where the plaintiff sued defendant in a civil Court for recovery of a sum alleged to have been paid by plaintiff to defendant under a mistake, in excess of the sum due in satisfaction of a decree of the Small Cause Court—*Held by STUART, C.J., Pearson J. dissenting, that such a suit was in the nature of one for damages cognizable by the Court of Small Causes, and was not barred by the terms of s. 11 of Act XXIII of 1861, the question involved in the claim not being one which could properly arise in execution proceedings, that must be confined to matters embraced in the decree passed between the parties to the suit.*

THE plaintiff in this case sued the defendant for the recovery of a sum realized by defendant in excess of the decree against plaintiff which defendant had executed in the Small Cause Court; the cause of action alleged in the plaint was the discovery by plaintiff of the mistake he had made in paying interest not provided for in the decree. The Munsif dismissed the suit on the ground

* Special Appeal, No. 1408 of 1876, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 6th September 1876, reversing a decree of Babu Mritonjoy Mukerji, Munsif of Allahabad, dated the 21st June 1876.