APPELLATE CIVIL.

Before Mr. Justice Darwood.

1928
May 7.

YAN LIN
v.
MYAT SAN.*

Decree-holder's liability—Wrongful attachment of stranger's property—Civil Procedure Code (Act V of 1908), s. 105 (2)—Whether ultimately appeal lies on findings on which remand order is based, where there is no appeal against remand order.

Held, that a decree-holder who wrongfully attaches the property of a stranger is a trespasser and wrong-doer, and is responsible for all damage. Hence where a decree-holder purchases at a Court sale cattle attached by him as his judgment-debtor's property and a claimant subsequently establishes his ownership of the cattle, the decree-holder is liable for their value including the value of an attached cow that has died through no fault of the decree-holder.

Held, also, that the grounds on which an order for remand which has not been appealed against cannot be attacked on a second appeal against the decree passed after the remand. Consequently if a District Court on appeal remands a suit for trial on the ground that it is not barred by limitation, and if no appeal is preferred against the order of remand, the question of limitation cannot be raised in the High Court in second appeal against the decree after the remand.

Bhugwan Dass v. *Maung Law Shin*, 2 U.B.R. (1897-1901) 429; *Goma Mahad* v. *Gokaldas*, 3 Bom. 74—*followed.*

Mussamat Subjan Bi v. *Sheikh Sariatulla*, 3 Bom. L.R. 413—*dissented from.*

Maung Po Kaing v. *Ma Tok*, 1 B.L.J. 231; *Syed Khan* v. *Syed Ebrahim*, 6 Ran. 169—*referred to.*

DARWOOD, J.—In the suit out of which this appeal arises, the respondent, Myat San, sued the appellant, Yan Lin, for the recovery of six head of cattle and for damages. The total claim amounted to Rs. 1,335.

The cause of action was the wrongful attachment of the cattle on the 24th March, 1923. The respondent applied for a removal of attachment, but, as that was refused, he sued for the declaration of his title. During the pendency of the suit, the cattle

* Civil Second Appeal No. 541 of 1927 against the judgment of the District Court of Myaungmya in Civil Appeal No. 28 of 1928.

were handed over to the appellant on his furnishing security. The declaratory suit was dismissed, but, on appeal, the present respondent was given a decree. Meanwhile, however, the appellant had sought execution of his decree by having the cattle sold through the Court and he became the purchaser. The respondent, therefore, brought this suit to recover the cattle, and he also claimed damages for the wrongful attachment.

The suit was dismissed by the trial Court as barred by limitation, but, on appeal, the District Court held on the 3rd November, 1926, that the suit was not barred and remanded it for trial on the merits. This trial resulted in the respondent obtaining a decree for Rs. 1,170, and costs, and this decree has been confirmed by the District Court on appeal.

As it is not disputed that the appellant was liable to pay damages to the respondent for the wrongful attachment, it is unnecessary to refer to any authorities for this well established principle. One of the cows, however, died while in appellant's custody, and he argues that, since this death was not the necessary consequence of the attachment, he is not liable to pay for its value. It may be mentioned here that the appellant had disposed of the rest of the cattle.

Appellant relies on the case of *Mussamat Subjan Bi* v. *Sheikh Sariatulla* (1), in support of his argument. In this case the High Court of Calcutta held that the defendants could not be made responsible for any damage to cattle not shown to have been occasioned by negligence or improper conduct on the part of the bailiffs while the cattle remained in their custody.

This decision was criticised by the Bombay High Court in *Goma Mahad Patil* v. *Gokaldas Khimji* (2).

(1) (1869) 3 Ben. L.R. 413. (2) (1878) 3 Bom. 74.

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The Court was of opinion that, where cattle were wrongfully attached, the wrong-doer was liable for their value unless he could show that some act of the owner had occasioned their death while in *custodia legis*, or that at the time of the wrongful seizure they were stricken by some fatal disease of which they afterwards died.

In the case of *Bhugwan Dass* v. *Maung Law Shin* (1), it was held that one who wrongfully attaches the property of a stranger is a trespasser and wrong-doer and is liable for all damages.

I have no doubt that the appellant is liable both for the cattle or their value as well as for any damages which reasonably flowed out of the wrongful attachment.

The defence to the suit was based on many grounds of which, however, it is only necessary to refer to two for the purposes of this appeal.

The first is the question of limitation, and the second is the value of the cattle and the *quantum* of damages sustained by the respondent.

Primâ facie, the suit would appear to be barred under Article 29 of the Limitation Act, and the Subdivisional Judge held in fact that it was barred and dismissed the suit on the 13th July 1926. The respondent, however, appealed against this decree which was set aside by the District Court on the 3rd November, 1926. The case was remanded for trial by the original Court. No further appeal was filed. The Court of first instance heard the suit and pronounced judgment in favour of the respondent for Rs. 1,170, and costs. The aforesaid sum included the value of the six head of cattle. This decision was confirmed on appeal by the District Court.

(1) II U.B.R. (1897-1901) 429.

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The main ground of appeal is that the suit was barred by limitation. On this point it is unfortunate that the appellant did not file an appeal from the decision of the District Court of the 3rd November, 1926, in which it was held that the suit was not barred by limitation. The question is whether that ground of appeal can be raised at this stage of the case. Under section 105, clause (2) of the Civil Procedure Code, where any party aggrieved by an order of remand . . . . from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. As the order of remand of the 3rd November, 1926, was an appealable one, the provisions of section 105, clause (2), apply to the case. But, though the appellant is precluded from disputing the correctness of the order of remand, the question is whether he is also debarred from disputing the correctness of the finding on which the order is based. To permit him to do so would result in the stultification of the restriction. If the grounds on which an order of remand which has not been appealed against, are liable to be attacked on a second appeal against the decree passed after the remand, then the prohibition against disputing the correctness of the order of remand becomes meaningless. The order is merely based on the reasons for making it, and an attack on the order implies an attack on the reasons therefor. If, therefore, the correctness of the order cannot be challenged, the grounds on which it was based seem equally immune from attack.

No authorities were referred to during the argument of this case, but there is one ruling of the Judicial Commissioner, Upper Burma, on the subject, *Maung Po Kaing* v. *Ma Tok* (1), in which it was held that where the provisions of section 105, clause (2), Civil

(1) 1 B.L.J. 231.

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Procedure Code applied, the parties aggrieved could not question the correctness of the order or of the finding on which it was based. This ruling supports the view set out above.

Reference may also be made to the case of *Syed Khan* v. *Syed Ebrahim* (1), in this connection.

In view of the plain terms of section 105, clause (2), of the Civil Procedure Code, I am of opinion that the appellant is precluded now from going into the question of limitation.

Though there are concurrent findings as to the value of the cattle attached and the damages sustained by the respondent for their wrongful attachment, the appellant urges that the lower Courts failed to appreciate the real evidence and to base their conclusions on hypotheses and opinions which are not evidence.

[His Lordship held that the plaintiff-respondent was entitled to Rs. 910 only and costs on that amount.]

APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Doyle.

1928

May 21.

MAUNG BA THWIN

v.

MAUNG PO HTI.*

Buddhist Law—Child of divorced parents—Absence of arrangement for custody and disposal of children—Filial conduct when necessary to be proved.

Held, that where a Buddhist couple on divorcing each other have come to an agreement as to the disposal of the children in a manner not opposed to the principles of natural justice (and which agreement would have the effect o giving away the children in adoption), the children are bound thereby.

Held, therefore, that where a child by agreement or acquiescence of the parents at the time of the divorce is allotted to one or other of the separating parties, the child must be regarded in law as having severed filial relations with the other; and where that child sets up a subsequent claim to the estate of the

(1) (1928) 6 Ran. 169.

* Civil Second Appeal No. 630 of 1927.