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BÁLKRISHNA GOPÁL v. BÁL JOSHI SADÁSHIV JOSHI.

Against this order the defendant (appellant) appealed to the High Court.

Ghanashám Nílkanth Nádkarni for the appellant.

Mahádev Chimnáji Apte for the respondents.

WEST, J.:—The view of the law taken by the Assistant Judge is opposed to Full Bench decisions of the other High Courts (see *Udit Nárain Singh* v. *Harogouri Prosád*(1) and to the practice of this Court. The case of *Lakshmibái* v. *Bálkrishna*(2) says that the analogy of the ordinary rules as to supplying the place of defendants is to be applied to respondents, but this does not necessarily imply that the same rule of time applies to the two cases; and the express provisions of the Limitation Act (XV of 1877) as amended, Schedule II, articles 171—171 B, show that the analogy was not meant to be thus extended. We, therefore, reverse the order of the Assistant Judge with costs.

Order reversed.

(1) I. L. R., 12 Calc., 590. (2) I. L. R., 4 Bom., 654.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1886. *June* 24.

LA'DJI NA'IK, (ORIGINAL DEFENDANT), APPELLANT, *v.* MUSA'BI AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act (XV of 1877), Sch. II, Arts. 28, 29, 62, 109—Suit for money received by defendant to plaintiff's use.

Under section 8 of the Vatandárs' (Bombay) Act III of 1874 the Collector passed an order, that a contribution should be paid by the holders of a part of the *shetsandi vatan* towards the annual emolument of the office-holder. As payment was not made, he caused the defaulters' moveable property to be sold on the 18th May, 1881, as for an arrear of land revenue, and part of the sale-proceeds to be paid over to the office-holder. The defaulters had, in the meantime, appealed to the Revenue Commissioner, who eventually on the 17th December, 1881, amended the Collector's order by reducing very considerably the amount of contribution to be paid to the office-holder. Thereupon the defaulters filed a suit on the 9th April, 1884, to recover from the office-holder the difference between what he had received under the Collector's order and what he ought to have received according to the Revenue Commissioner's order.

* Miscellaneous Appeal, No. 10 of 1886.

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Held, that the suit was one for money had and received by the defendant to the plaintiffs' use, and, as such, governed by article 62 of Schedule II of the Limitation Act (XV of 1877).

APPEAL from the order of remand made by F. L. Johnstone, Acting District Judge of Dhárwár, in Appeal No. 101 of 1885.

The plaintiffs sued to recover Rs. 339-11-7 under the following circumstances, as stated in their plaint. One Alli Náik, (the husband of plaintiff No. 1), and the second plaintiff, Nábi Náik were brothers. The defendant, Ládji Náik, was their eldest brother's son. Their family were the *ṣhetsandi vatandárs* of the village of Annigeri, and their *vatan* property consisted of five fields, two of which were held by the plaintiffs, and the other three by the defendant. In 1879, the defendant, who was the office-holder, applied to the revenue authorities, praying that the two fields held by the plaintiffs should be put into his possession. And thereupon the Assistant Collector passed an order, on the 19th November, 1879, directing the plaintiffs to pay to the defendant Rs. 200 per annum as rent of the two fields, which he held to be the defendant's property. This decision was affirmed by the Collector.

As the plaintiffs refused to make any payment, the Collector ordered the amount to be recovered by sale of the plaintiffs' goods and chattels, and paid over to the defendant. The sale took place on the 18th May, 1881.

In the meantime the plaintiffs had appealed to the Revenue Commissioner, who on the 17th December, 1881, amended the Collector's order by directing that the plaintiffs should pay to the defendant only Rs. 76 per annum.

Thereupon the plaintiffs filed the present suit on the 9th April, 1884, to recover Rs. 339-11-7, being the difference between the amount which the defendant had received under the Collector's order and the sum which he ought to have received according to the Revenue Commissioner's order.

The defendant pleaded *(inter alia)* that the suit was barred by limitation.

The Subordinate Judge was of opinion, that the suit was one for compensation for "irregular distress" or "wrongful seizure

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under legal process" and, therefore, falling under article 28 or 29 of Schedule II of the Limitation Act XV of 1877. He, therefore, held that the suit was barred by the lapse of more than one year from the time when the cause of action had arisen.

In appeal, the District Court held that the amount levied by the sale, and paid over to the defendant, might be regarded as profits of land wrongly received by the defendant, and, therefore, article 109 was applicable. The Subordinate Judge's decree was, therefore, reversed, and the case was remanded for trial on the merits.

Against this order of remand, the defendant appealed to the High Court.

Náráyan Ganesh Chandávárkar for the appellant.

Shámráv Vithal for the respondents.

WEST, J. :—In the present case the Collector passed an order under section 8 of the Vatandárs' Act (Bombay) III of 1874, that a contribution should be paid by the holders of *shetsandi vatan*, or a part of it, towards the annual emolument of the office-holder. As payment was not made, he caused the amount for two years to be levied by sale of the defaulters' moveable property, as for an arrear of land revenue, and paid over to the office-holder. The defaulters had, in the meantime, appealed to the Revenue Commissioner, and he eventually cut down very considerably the amount of contribution to be paid by them. The defaulters, then, as plaintiffs in the present suit, sought to recover from the office-holder the difference between what he had received under the Collector's order and what ought to have been received according to that by which it was amended. The suit for this purpose was brought after one year, but within three years from the date of the sale under the Collector's order. The Subordinate Judge thought that the suit was one falling under either article 28 or article 29 of Schedule II of the Limitation Act XV of 1877, the former relating to an irregular distress, and the latter to a wrongful seizure under legal process. Hence he concluded the suit was barred by the lapse of more than one year from the time when the cause of action had arisen.

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In appeal, the District Judge thought that article 109 of Schedule II was applicable, and, therefore, reversed the order of the Subordinate Judge, and directed him to try the case on its merits. Article 109 relates to the wrongful receipt of the profits of land by the defendant, and by analogy or indirectly the District Judge thought the sum realized and paid to the defendant through the process we have decribed might be regarded as profits of land wrongly received by the defendant.

The defendant has appealed against this decision, and to us it appears that money levied by the Collector by a sale of the plaintiffs' goods and chattels cannot reasonably be regarded as profits of immoveable property, so as to make the application of article 109 possible. But neither do we think that article 28 or 29 is, in any degree, more applicable. It has been suggested that article 12 may be applied, and that clause (*b*) of that article imposes a limitation of one year on a suit to set aside a sale in pursuance of an order of a Collector. Were the suit really one to set aside the sale, we might have to consider, with reference to *Sakhárám Vithal Adhikári* v. *The Collector of Ratnágiri*[1], whether the "order" in this case is one to which the rule is meant to apply; but, in fact, the plaintiffs do not attack the sale. What they seek is the money they have paid in excess under compulsion of the Collector. Their suit is of precisely the same character as if, when the sale was about to commence, they had paid the money, in order to prevent it. The reason for the payment or the levy, they say, ceased when the Collector's order was superseded, and now they seek to recover what was wrongly received to their loss by the defendant. Such a suit seems to be one for money received by the defendant to the plaintiffs' use. The defendant, according to the case urged by the plaintiffs, is bound to restore it, and for such a suit, we think, article 62 of Schedule II of the Limitation Act prescribes the legal limitation.

The suit, on this view, was in time, and we confirm the District Court's order with costs. Our decision rests, in great measure, on the intrinsic nature of the case. If, in the investigation of the case on its merits, it should appear that the suit is of one or

(1) 8 Bom. H. C. Rep, 219, A. C. J.

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another legal character, and that such legal character makes this or that provision of the limitation law applicable to it, we are not to be understood by this judgment as to the provision *primâ facie* applicable to pronounce in any way conclusively upon the nature of the cause as it may become apparent upon a full examination of the merits.

Order confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886. *June* 24.

PURSHOTAM BA'PU, (ORIGINAL PLAINTIFF), APPELLANT, *v.* DATTA'TRAYA RA'YA'JI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Tenant setting up a permanent lease—Notice to quit —Ejectment suit.

The plaintiff sued for possession of certain land which had been demised to him by the first defendant. The fourth defendant set up a previous purchase from the third defendant, who, he alleged, was a permanent lessee from the first defendant's father, and he contended *(inter alia)* that his vendor not having been served with a notice to quit, he could not be ejected. The lower Appellate Court held that the plaintiff could sue the defendant No. 1 only for specific performance, and could not eject the former tenants with or without notice. On appeal by the plaintiff to the High Court, it was contended for him that the defendant No. 4, having set up a permanent lease, had denied the landlord's title, and was not, therefore, entitled to any notice to quit.

Held, confirming the lower Appellate Court's decree, that the plaintiff could not recover, in ejectment, without previous notice to quit. By his statement, that his alienor (defendant No. 3) was a permanent tenant and had not received notice to quit, the defendant pleaded an alternative defence he was entitled to make, and could not, therefore, be regarded as having consented to the contract of yearly tenancy, (which was alleged by the plaintiff), being treated as cancelled.

THIS was a second appeal from the decision of G. Jacob, Acting Assistant Judge of Ratnágiri.

On the 2nd December, 1882, the plaintiff obtained from the first defendant a permanent lease of the land in dispute, alleged to have been in possession of the second and third defendants as yearly tenants under a former lease of 1838. The plaintiff brought the present suit to obtain possession. The first defendant admitted the lease, and did not object to the delivery of possession. The

* Second Appeal, No. 324 of 1884.