APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KARSAN (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* GANPATRAM AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1897. *August* 16.

Civil Procedure Code (Act XIV of 1882), *Sec.* 283—*Order passed in attachment proceedings not binding on judgment-debtor if not a party—Order passed without investigation—Suit to set aside the order—Limitation Act (XV of* 1877), *Art.* 11.

One Asha was in possession of certain land as plaintiff's tenant and in his life-time mortgaged it with possession to the first defendant. After Asha's death, defendant No. 1 obtained a money decree against Asha's heirs and in execution attached the land. Thereupon the plaintiff sought to raise the attachment on the ground that Asha was merely a tenant-at-will whose interest ceased at his death. Defendant No. 1 contended, on the other hand, that Asha was a permanent tenant and that his interest, as such, had descended to his heirs and was liable to attachment. On the 20th February, 1892, the Court ordered the attachment to be removed without deciding the question raised by the parties which it held could not be determined in such a proceeding. Defendant No. 1 did not bring any suit under section 283 of the Code of Civil Procedure (Act XIV of 1882) to set aside the order and establish his right to the land. In 1894 the plaintiff filed the present suit against the first defendant and the heirs of Asha to recover possession of the land. The Subordinate Judge passed a decree in his favour against the first defendant, holding that the order in the attachment proceedings was conclusive against the latter, no suit having been filed by him within a year under section 283 of the Civil Procedure Code. He, however, refused to pass any decree against the heirs of Asha, inasmuch as they had not been parties to the attachment proceedings and, moreover, were not in possession of the land. On appeal, this decree was confirmed. The first defendant appealed to the High Court.

Held (reversing the decree of both the lower Courts) that the case must be remanded and tried on the merits.

By PARSONS, J., on the ground that although the order in the attachment proceedings had become conclusive as against the first defendant, it did not affect Asha's heirs, who had not been parties to it. As against them, therefore, the plaintiff had to prove his title, and if he failed to do so he could not recover. The first defendant being in possession might set up this *jus tertii* and might plead the title of the other defendants.

* Second Appeal, No. 470 of 1897.

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BY RANADE, J., on the ground that the order in the attachment proceedings having been passed without investigation of the question there raised by the parties, it did not become conclusive against the first defendant notwithstanding his failure to bring a suit within twelve months to set it aside, and that he was not precluded from raising his defence in the present suit.

SECOND appeal from the decision of the First Class Subordinate Judge, A. P., of Broach.

Suit to recover possession of land. The first defendant pleaded that the land had been in the possession of one Asha; that he (defendant No. 1) held it as mortgagee of Asha; and that the plaintiff was not entitled to recover it without paying off the mortgage.

Defendants Nos. 2 to 6 were Asha's heirs and did not defend the suit.

It appeared that the land was originally in possession of Asha as the plaintiff's tenant. Asha mortgaged it to the first defendant, who after Asha's death obtained a money-decree against his (Asha's) heir (defendant No. 2) and in execution attached the land. The plaintiff intervened and sought to raise the attachment on the ground that the deceased Asha was his tenant-at-will; that his tenancy had terminated at his death, and that no interest had devolved upon his heir liable to attachment. The first defendant contended that Asha was a permanent tenant and that, as such, he had an interest which came to his heir and was liable to attachment.

Asha's heirs were not parties to these attachment proceedings.

The Subordinate Judge on the 20th February, 1892, made the following order raising the attachment:—

"Upon these admitted facts I am of opinion that the land under attachment should be released from it. The judgment-debtor's possession and that of his representative in interest are admitted to be as tenants of the petitioners. Whether that possession was that of a permanent tenant and whether the deceased had a saleable interest in the land attached, are mixed questions of fact and law, very intricate and complicated. They cannot be inquired into and decided in the miscellaneous proceeding. Under this view I order that the attached land shall be released from attachment."

The first defendant did not file any suit under section 283

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of the Civil Procedure Code (Act XIV of 1882) to establish his right to the lands.

In 1894 the plaintiff filed the present suit against the first defendant and Asha's heirs (defendants Nos. 2 to 6) to recover possession.

The Subordinate Judge passed a decree against the first defendant, holding that the above order in the attachment proceedings was conclusive against the first defendant as between him and the plaintiff, no suit having been brought under section 283 of the Civil Procedure Code. As against the other defendants, he refused to pass any decree, inasmuch as they had not been parties to the attachment proceedings and were not in possession of the land.

This decree was confirmed, on appeal, by the First Class Subordinate Judge of Broach, A. P.

Thereupon defendant No. 1 preferred a second appeal to the High Court.

Manekshah Jehangirshah for appellant.

C. H. Setalvad for respondent.

The following authorities were cited in argument:—*Bukshi Ram* v. *Sheo Pergash Tewari* [1]; *Venkapa* v. *Chenbasapa* [2]; *Chandra Bhusan* v. *Ram Kanth* [3]; *Badri Prasad* v. *Muhammad Yusuf* [4]; *Sardhari Lal* v. *Ambika Pershad* [5]; *Khub Lal* v. *Ram Lochun* [6]; *Kedar Nath* v. *Rukhal Das* [7].

PARSONS, J.:—The plaintiffs brought this suit in ejectment to recover possession of a certain field, Survey No. 1243, with mesne profits for three years, alleging that it was their land, let to their tenant Asha, and that on his death in 1888 (Samvat 1994) the lease determined and they became entitled to the possession of the land. They sued the heirs and representatives of Asha (defendants Nos. 2 to 6), and the mortgagee of Asha (defendant No. 1).

Defendant No. 1 alone appeared and contested the claim on the ground that Asha was not the tenant-at-will of the plaintiffs,

(1) I. L. R., 12 Cal., 453.
(2) I. L. R., 4 Bom., 21.
(3) I. L. R., 12 Cal., 108.
(4) I. L. R., 1 All., 381.
(5) I. L. R., 15 Cal., 521.
(6) I. L. R., 17 Cal., 260.
(7) I. L. R., 15 Cal., 674.

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but a permanent tenant who had mortgaged to him his occupancy rights and placed him in possession.

The Judge of the lower appellate Court refused to enter on the merits of the case, as he was of opinion that the contention of the defendant No. 1 was *res judicata* by reason of his omission to file a suit within a year of an order passed against him under section 280 of the Code of Civil Procedure. It appears that the defendant No. 1 had obtained a decree against Asha's heirs for a debt due to him by Asha, and in execution of the decree he attached this property. The plaintiffs objected to the attachment on the ground that Asha had no attachable interest in the property, as he, when alive, only held the property as their tenant. The defendant asserted the permanent nature of Asha's tenancy. The Subordinate Judge passed the following order: –

"Upon these admitted facts I am of opinion that the land under attachment should be released from it. The judgment-debtor's possession and that of his representative in interest are admitted to be as tenants of the petitioner. Whether that possession was as a permanent tenant and whether the deceased had a saleable interest in the land attached are mixed questions of fact and law, very intricate and complicated. They cannot be enquired into and decided in the miscellaneous proceeding. Under this view I order that the attached land shall be released from attachment."

It must, we think, be taken that this was an order passed under section 280, releasing the property from attachment, though it did not decide the point at issue between the parties. The defendant, therefore, was bound to bring a suit to establish the right he claimed within a year from the date of the order. (See *Surdhari Lal* v. *Ambika Pershad*[1]; *Khub Lal* v. *Ram Lochan*[2].)

The question is, what was the right that the defendant claimed. It was argued that it was merely the right to attach and sell the property in execution of his money decree, and that so far only the order was binding upon him, and *Bukshi Ram* v. *Sheo Pergash Tewari*[3] was cited in support of the argument. It may be doubted if the argument is sound. The right the defendant claimed was the right to attach and sell Asha's equity of

(1) I. L. R., 15 Cal., 521. (2) I. L. R., 17 Cal., 260.
(3) I. L. R., 12 Cal., 453.

redemption of this property. He asserted that Asha had this saleable interest, while the plaintiffs asserted that Asha being dead, no interest at all survived to his representatives or assigns. The Subordinate Judge decided in favour of the plaintiffs, leaving the defendant free to establish his case by a regular suit. It would seem, therefore, that the first defendant not having brought the suit within the time allowed by law, is bound by the order.

We do not, however, see how the order can be binding upon the other defendants, who are the heirs and representatives of Asha. They were not parties to the proceedings in which the order was passed, and they were not bound to bring any suit to establish their title. (See *Kedar Nath* v. *Rakhal Das* (1) in which this point is fully discussed.) They, therefore, in this suit are free to set up the title of Asha and their own title as his representatives in bar of the plaintiffs' claim to possession of the property, and the plaintiffs, who sue in ejectment, are bound to prove their title as against them. If the plaintiffs fail to prove their title, or if, in other words, the defendants, who are the representatives of Asha, prove that Asha was a permanent tenant, then the plaintiffs would not be entitled to the possession of the land. The decree in that case should be in favour of the defendants Nos. 2 to 6. It has always been held that a person in possession can plead *jus tertii*, and, therefore, in this case, the defendant No. 1 can plead the title of the other defendants in support of his possession under a mortgage, the legality of which was never questioned in the execution proceedings. We think, therefore, that the lower Courts were wrong in disposing of the case on the preliminary point of *res judicata* and in not raising and disposing of an issue as to the title of the plaintiffs as against the defendants Nos. 2 to 6. We, therefore, reverse the decrees of both the lower Courts, and remand the case to the Court of first instance for trial on the merits. All costs to be costs in the cause.

RANADE, J.:—The chief point for consideration in this appeal is whether the order in the execution proceedings (Exhibit 6) had the effect of estopping the appellant from pleading the defence raised by him in this suit. Both the lower Courts have held

(1) I. L. R., 15 Cal., 674.

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that as that order was passed against the appellant, and he took no steps to set it aside under section 283, he was shut out from urging his present defence, as the order became conclusive after the statutory period laid down by article 11 of the second schedule of the Limitation Act had expired.

The facts of the case are clearly set forth in the judgment of the Court of first instance. The appellant obtained a money decree in 1891 against the heirs of deceased Asha Girdhar, and attached the lands in dispute as belonging to his judgment-debtor. The respondents thereupon made an application for the removal of the attachment, alleging that the judgment-debtor had no right, title, or interest in the land, but that he held it as respondents' tenant, and that the land belonged to the respondents. The appellant answered that the land had been in the possession of his deceased judgment-debtor as a permanent tenant from time immemorial, and that the respondents had only a right to receive Rs. 2 as rent. He further stated that in a rent suit respondents' right had been established in respect of this rent only, and that the land had been mortgaged to him (the appellant), and had been since in his possession as mortgagee. The respondents, on the other hand, alleged in these miscellaneous proceedings that Asha was their tenant-at-will, and not a permanent tenant. On these pleadings, the Subordinate Judge disposed of the application on 20th February, 1892, saying that he "was of opinion, upon these admitted facts, that the land under attachment should be released from it. The judgment-debtor's possession, and that of his representative in interest, are admitted to be as tenant of the petitioners (respondents in the present appeal). Whether that possession was as a permanent tenant, and whether the deceased had a saleable interest in the land attached, are mixed questions of fact and law, very intricate and complicated, and cannot be inquired into and decided in a miscellaneous proceeding." The attachment was accordingly removed. No suit was filed by the appellant under section 283 to establish the right which he claimed to the property in dispute. The present suit was brought by the respondents to recover possession of the land in dispute against the appellant and the heirs of Asha, and the appellant pleaded that Asha's interest in the

land was that of a permanent tenant, and that he was a mortgagee of that interest.

Upon this statement of facts, both the lower Courts have held that the appellant was estopped from raising these defences by reason of the order removing the attachment having become conclusive under the operation of section 283. Reliance was chiefly placed upon the rulings in *Badri Prasad* v. *Muhammad Yusuf* (1) and *Sardhari Lal* v. *Ambika Pershad* (2) in support of the view that the order had a conclusive effect. We have now to see how far the present case falls within the purview of these rulings.

In the case before their Lordships of the Privy Council, the application was made by the wife and sons of the judgment-debtor to the effect that as they were not parties to the decree, their interests in the family property were not liable to be sold, and that only the right, title and interest of the judgment-debtor should be sold. The Court thereupon ordered that the property should be released from attachment as it was ancestral property, and that only the right, title and interest of the judgment-debtor should be sold. More than twelve months after this order was made, the attaching creditor brought a regular suit in which he sought for a declaration that the debt was binding upon the judgment-debtor's sons. It was held by both the original and appellate Courts in India that the suit was barred under article 11, and their Lordships of the Privy Council upheld this decree. The contention before their Lordships was that the order releasing the attachment was passed on a defective investigation, and that the miscellaneous proceeding should have determined the precise extent of the shares of the judgment-debtor and of his sons. Lord Hobhouse, in delivering the judgment of the Privy Council, observed, with reference to this contention, that the Code did not prescribe the extent to which the investigation should go, and that this would depend upon the circumstances of each case. It seems to me that the ruling furnishes no guidance in deciding a case like the present, where the Subordinate Judge expressly states in his order that he did not inquire into the question of the nature of Asha's interest in

(1) I. L. R., 1 All., 381. (2) I. L. R., 15 Cal., 571.

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the land, and the question of possession and mortgage raised by the appellant. As regards the Allahabad case, the judgment shows clearly that the order was passed upon investigation, and on a consideration of the oral and written evidence adduced on both sides. It, therefore, furnishes no help in deciding a case in which there was admittedly no investigation.

Where there has been no investigation in the attachment proceedings, it has been held by all the High Courts that the order passed in such proceedings had not a conclusive effect, and that article 11 of the Limitation Act (XV of 1877) did not apply to such cases. In the Allahabad Full Bench case noted above, the judgment of Pearson, J., shows the grounds on which that case was distinguished from a previous decision which suggested the reference. In this last case, it was observed that there had been no adjudication on the point of possession, and that, therefore, the order did not operate as *res judicata*. There are numerous decisions more directly in point, and which clearly show that when the order is passed without investigation, it has no conclusive effect. The wording of section 278 clearly requires the Court to proceed to investigate the claim or objection. It is only when the application is unnecessarily delayed that there is to be no investigation. Under section 279, evidence has to be adduced by both sides, and under sections 280, 282 the Court has to be satisfied, one way or the other, on the point of right or possession. Investigation is thus obligatory, however summary may be the nature of the proceedings. In a case decided by the North-West Provinces High Court, it was laid down that the Judge was bound to inquire and determine the question of possession as between claimant and judgment-debtor—*Bhola Dut* v. *Shah Ahmed*[1]. Where again attachment was released without investigation, it was held that it had no effect in the way of estoppel on failure to bring a suit within a year to set it aside—*Mussumat Kamran* v. *Neit Ram*[2]. In this case the order was very similar to the one in the present case. The Judge had stated that "as the registered sale-deeds were of long standing, the matter cannot be settled without a civil suit. It is not proper

(1) 3 Agra, 397. (2) 6 N. W. P., 185.

at present that the sale should be carried out." In a Calcutta case it was held that where the Court refused to entertain an application or to order the stay of a sale, because the application was made too late, article 11 of the Limitation Act, or rather the equivalent provision of the last clause of section 246 of Act VIII of 1859, had no application—*Syed Mahomed* v. *Kanhya Lal*[1]. This Calcutta ruling was followed by this Court in *Venkapa* v. *Chenbasapa*[2] and by the Madras High Court in *Venkatanaru* v. *Akkamma*[3]. In *Rash Behari* v. *Budden Chunder*[4], the order was to the effect that "To enter into evidence would lead to an adjudication * * of complicated questions of fact, which it would not be at all easy and convenient to try summarily." It was held that such an order did not become conclusive by reason of failure to bring a suit within one year to set it aside. It is true this ruling referred to an order under section 335, and not section 283, but it has been held in *Minguel Antone* v. *Waman Lakshman*[5], that the rulings under section 283 must equally apply to those under section 335. In *Bhikha* v. *Sakarlal*[6], the order stated that as applicant did not want to proceed further, no investigation was made, and it was held that article 11 did not apply. In such cases there was, in fact, no order under sections 280 or 282, and as there was no investigation, there was no estoppel. Similarly in *Chandra Bhusan* v. *Ram Kanth*[7], it was ruled under section 281 that it is only when an order is made after investigation that it operates as estoppel. When an application was rejected because the boundaries did not agree, and it was not likely that applicant would suffer by reason of the sale, it was held that the limitation of one year did not apply. Of course it is otherwise when the claimant gives no evidence, or insufficient evidence, or is absent. In these cases the order operates as though it were passed after investigation—*Tripoora Soondaree* v. *Ijjutoonnissa Khatoon*[8]; *Gooroo Doss Roy* v. *Sona Monee*[9]; *Seemunto Hajrah* v. *Syud Tajooddeen*[10].

(1) 2 Cal. W. R., 263.
(2) I. L. R., 4 Bom., 21.
(3) 3 Mad. H. C. Rep., 139.
(4) 12 Cal. L. R., 550.
(5) P. J. for 1889, p. 17.
(6) I. L. R., 5 Bom., 440.
(7) I. L. R., 12 Cal., 108.
(8) 24 Cal. W. R., 411.
(9) 20 Cal. W. R., 345.
(10) 21 Cal. W. R., 409.

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From a review of all these authorities, it is clear that the order in this case expressly avoided deciding the question of Asha's rights and appellant's mortgage, and as such it must be held to have been passed without investigation, and appellant's failure to bring a suit within twelve months did not preclude him from raising his defence in the present suit.

There is an additional reason for coming to the same finding in the present suit. The respondent-plaintiffs have joined the heirs of the deceased Asharam as parties to this suit. They were not parties to the miscellaneous application, and they cannot be shut out from raising the defence that they have permanent rights in the land. The point, that the judgment-debtor cannot be regarded as being necessarily a party in attachment proceedings under sections 278, 283, has been settled by a long course of rulings of the several High Courts—*Shivapa* v. *Dod Nagaya* [1]; *Ajibal Narasinha* v. *Shirekoli Timapa* [2]; *Kedar Nath* v. *Rakhal Das* [3]; *Mannu Lal* v. *Harsukh Das* [4].

For all these reasons, I am of opinion that both the lower Courts were in error in holding that the appellant was precluded in this case from urging his defence in the present suit. He has clearly a right to require the Courts to adjudicate upon the nature and extent of Asha's interest and his own mortgage. We reverse the decrees of both the Courts below.

Decree reversed.

(1) I. L. R., 11 Bom., 114.
(2) I. L. R., 17 Bom., 629.
(3) I. L. R., 15 Cal., 674.
(4) I. L. R., 3 All., 233.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

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CHUDASAMA NAUDHABHAI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NARAN TRIBHOVAN AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Tálukdár—Gujarát Talukdars' Act (Bom. Act VI of 1888), *Sec.* 31, *Cl.* 2—*Sale in execution of a decree—Sale of tálukdári estate—Sanction of Government.*

A tálukdár mortgaged his tálukdari estate in 1883, *i. e.*, prior to the passing of the Gujarát Tálukdárs Act (Bombay Act VI of 1888). In 1893 the mort-

* Appeal No. 42 of 1897.