APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

AJIBAL NARASINHA HEGDE AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHIREKOLI TIMÁPA' HEGDE (ORIGINAL PLAINTIFF), RESPONDENT.*

1892. *August* 25.

Civil Procedure Code (XIV of 1882), Sec. 282—Order in attachment proceeding, effect of—Judgment-debtor not necessarily a party to the investigation under an attachment proceeding.

The plaintiff obtained a decree. The defendants appealed. At the hearing of the appeal in the District Court a question was raised as to whether the defendants were not barred by limitation from denying the genuineness and validity of the lease and mortgage, they having failed to do so in certain execution proceedings which had taken place in 1890. It appeared that in execution of a decree against the father and the uncle of the defendants these lands had been attached. The plaintiff on that occasion had intervened, and set up his mortgage and lease which he produced. They were then held to be proved, and the lands were ordered to be sold subject to the plaintiff's mortgage. Upon these facts the District Judge held that by the attachment of their lands in these execution proceedings the defendants had been subrogated either to the cause of the decree-holder or to that of the plaintiff who intervened, and, therefore, they were parties "against whom the order was made." That order became conclusive against them within one year from its date, as they did not bring a suit to establish their right (art. 11, Schedule II, Limitation Act, 1877). He, therefore, confirmed the decree of the Court of first instance.

On second appeal to the High Court,

Held, reversing the lower Court's decree, that the defendants were not necessarily to be regarded as parties against whom the order in the execution proceedings was made. Whether they were or not, depended on the facts of the case. The Court accordingly remanded the case that the District Judge might investigate the facts and pass a decree accordingly.

SECOND appeal from the decision of A. H. Unwin, District Judge of Kánara.†

This suit was instituted by the plaintiff to recover arrears of rent and interest thereon. He produced the counterpart of a lease upon which he based his claim.

The defendants pleaded *(inter alia)* that the counterpart of the lease sued upon was not genuine, and that it was given in connexion with a fraudulent mortgage transaction effected by the plaintiff.

* Second Appeal, No. 461 of 1891.

† This case was once before the High Court on a different point: see I. L. R. 15 Bom., 297.

1892.

AJIBAL NARASINHA HEGDE v. SHIREKOLI TIMÁPÁ HEGDE.

The Subordinate Judge held that the counterpart was proved, and gave the plaintiff a decree.

On appeal by the defendants, the District Judge raised a question as to whether the defendants were barred from denying the genuineness and validity of the mortgage (Exhibit 49) and the counterpart of lease (Exhibit 68) relied on by the plaintiff. It appeared that the land in question had been attached in execution of a decree obtained against the father and uncle of the defendants in a suit in the Sirsi Court (No. 509 of 1878). The plaintiff had then intervened, alleging his mortgage and lease and producing the exhibits Nos. 49 and 68. In the investigation then held, the Subordinate Judge found that the mortgage (Exhibit No. 49) was proved, and ordered that the attached lands should be sold subject to the plaintiff's mortgage. Upon these facts the District Judge observed, in giving his judgment in the present case: "It seems now to be urged, that the judgment-debtor defendants got no notice of, and were no parties to, this proceeding, and that the decision does not, therefore, bind them. This contention I believe to be utterly untenable. By the attachment of their lands, they must have had sufficient notice, and have been subrogated either to the cause of the decree-holder or to that of the intervening mortgagee in the subsequent proceeding 'as a party to the investigation of the claim': see *Netictom* v. *Tayanbarry*[1], and, therefore, defendants were 'as much a party against whom the order was made under the section (246 of Act VIII of 1859=283 of Act X of 1877, under which the Sirsi Court's order was passed) as their judgment-creditor.' That order became consequently conclusive against defendants after the lapse of one year from its date, 5th February, 1890, without suit brought by them to establish their right clear of the intervenor's alleged mortgage and lease—article 11, Schedule II of the Limitation Act XV of 1877. They appear to have benefited, moreover, under the order by being left in physical possession of the lands."

The defendants preferred a second appeal.

Shámráv Vithal for the appellants:—The order in the execution proceeding cannot be held to be binding upon us, because we

(1) 4 Mad. H. C. Rep., 472.

1892.

AJIBAL NARASINHA HEGDE v. SHIREKOLI TIMAPA HEGDE.

were not parties to it—*Shivápá* v. *Dod Nágaya* [1]; *Kedár Náth Chatterji* v. *Rakhal Dás Chatterji* [2]. The order then made cannot be held to have the effect of *res judicata*.

Náráyan Ganesh Chandávarkar for the respondent.

PER CURIAM:—The District Judge, on the authority of *Netietom Perengaryprom* v. *Tayanbarry Parameshwaren* [3], has held that the order of the Court in the attachment proceedings is conclusive. But the authority of that case has been doubted: see *Shivápá* v. *Dod Nágaya* [1]; *Kedár Náth Chatterji* v. *Rakhal Dás Chatterji* [2]. As was pointed out in the former of these two cases, a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but it must depend upon the facts of each case.

We must, therefore, reverse the decree of the District Judge and remand the case, that he may investigate the facts and pass a decree accordingly. Costs to abide the result.

Decree reversed and case remanded.

(1) I. L. R., 11 Bom., 114. (2) I. L. R., 15 Calc., 674.
(3) 4 Mad. H. C. Rep., 472.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

LALU GAGAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I MOTAN BIBI (ORIGINAL DEFENDANT), RESPONDENT.*

1892. *September* 6.

Landlord and tenant—Suit by tenant to recover possession claiming as full owner—Subsequent claim as yearly tenant unjustly dispossessed—Notice to quit—Denial of landlord's title.

A plaintiff sued to recover possession of certain fields, &c., alleging that he was a permanent tenant of the defendant, having purchased the right of occupancy from previous occupants of the land. The lower Court held that the plaintiff's vendors were mere yearly tenants and not permanent tenants, but that the sale of their right to the plaintiff was valid, and that the plaintiff had been wrongfully dispossessed by the defendant, no notice to quit having been given. But

Held, that the plaintiff could not recover, in as much as his plaint and the conduct of his case amounted to a denial of his landlord's (defendant's) title. In his suit the plaintiff claimed to be full owner, and he could not afterwards claim

* Special Appeal, No. 522 of 1891.