APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920. *October* 8.

SWAMIRAO SHRINIWAS PARVATI (ORIGINAL PLAINTIFF), APPELLANT *v.* BHIMABAI *kom* PADAPPA DESAI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Attachment—Decree—Execution—Claim to property—Burden of proof on the claimant—Adverse possession—Indian Limitation Act (IX of 1908), section 28.

A claimant in attachment proceedings must prove that he himself has an interest in the attached property. If he fails to do that, then he has no further interest in the proceedings.

An owner of property does not lose his right to property merely because he happens not to be in possession of it for twelve years. Under section 28 of the Indian Limitation Act, 1908, his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property ; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself.

SECOND appeal against the decision of A. C. Wild, District Judge of Bijapur, confirming the decree passed by V. V. Phadke, Second Class Subordinate Judge at Muddebihal.

Suit for a declaration.

Plaintiff obtained a decree against defendant No. 2. In execution of that decree, the plaintiff attached the house in suit. Defendant No. 1 claimed the house as hers and on her application the attachment was removed. The plaintiff, thereupon, sued for a declaration that the house in suit was of the ownership of the second defendant, and was liable to attachment and sale in execution of the decree obtained against him.

Defendant No. 1 contended that the house did not belong to defendant No. 2 but was hers and was in her Vahiwat through her tenants.

* Second Appeal No. 495 of 1919.

Defendant No. 2 contended that the house belonged to him and his brothers' sons and so only half the house was liable to attachment.

The Subordinate Judge held that half the house belonged to Adiveppa (defendant No. 2) ; that Mahaningappa, brother of Adiveppa, lived in the house upto 1900 when the family of Mahaningappa left the village; that thereafter till 1905 one Mallappa lived in the house ; that Mahaningappa and Adiveppa discontinued possession from 1900 and therefore their right to the house became barred in 1912. He, therefore, dismissed the plaintiff's suit.

On appeal the District Judge confirmed the decree.

Plaintiff appealed to the High Court.

A. G. Desai, for the appellant:-Both the lower Courts have found in my favour that the house in dispute belonged to my judgment-debtor, defendant No. 2, but dismissed my suit on the only ground that I have failed to prove that my judgment-debtor was in possession within twelve years before suit.

I submit that the second issue about possession within twelve years was wrongly framed. This is not an ejectment suit but is a suit for a declaration of title. As soon as I proved the title of my judgment-debtor, I was entitled to succeed.

Further, as the trial Court had held that my judgment-debtor was in possession till the end of 1899, it should have presumed that he was also in possession till 1905 and the conclusion arrived at by the trial Court from the mere fact that Mallappa was occupying the same in 1905, that he also lived in it from 1900, is not warranted by law. The lower Court should have applied the maxim "possession goes with the title" to the case.

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D. R. Manerikar, for respondent No. 1:—I submit that as I had succeeded in the claim petition in getting the attachment levied by the plaintiff removed on the ground that I was the owner and plaintiff's judgment-debtor had no title and as plaintiff has brought this suit for setting aside this order and for a declaration of the title of his judgment-debtor (defendant No. 2), plaintiff can only succeed on a title which subsists at the date of the attachment and not merely on the original title. He cannot rely on the weakness of defendant's title. The onus lies very heavily on the plaintiff. Such a suit is akin to an ejectment suit. Though I quite admit that the frame of the second issue was not quite proper, yet both the Courts in effect find that plaintiff had failed to prove a subsisting title at the date of the attachment and this is a question of fact which cannot be interfered with in second appeal.

MACLEOD, C. J.:—The plaintiff had to file this suit to obtain a declaration that the suit house was of the ownership of the second defendant, and liable to attachment and sale in execution of the decree which the plaintiff had obtained against him. The first defendant contended that the house did not belong to the second defendant but was hers and was in her Vahivat through tenants. The first issue raised in the trial Court was—Does plaintiff show that the whole house belongs to his judgment-debtor, defendant No. 2? On that issue the Court found that half the house belonged to the judgment-debtor. The next issue was—Was defendant No. 2 in possession of it within twelve years next before suit? The Court found that issue in the negative. Accordingly it dismissed the suit with costs with regard to house B. It appears to me that owing to the raising of the second issue, an issue which ought never to have been raised, the whole proceedings in both the Courts have been tainted with this mistake. Once the plaintiff had proved that

at any rate half the house B belonged to his judgment-debtor, then the only person entitled to dispute his right to attach that house would be a person who claimed that the house belonged to him. Any other person, as an outsider, could have no title to interfere in attachment proceedings by urging that as a matter of fact the property attached did not belong to the judgment-debtor. I should go so far as to say this, that a claimant in attachment proceedings must prove that he himself has an interest in the attached property. If he fails to do that, then he has no further interest in the proceedings. The findings of the trial Judge are by no means clear, but he certainly came to the conclusion that the first defendant was not the owner of the property either by title or by adverse possession. But he found that one Mallappa Kumbhar had lived in the house admittedly since 1905, and probably from 1900. The result was, according to the learned Judge, that as Mahaningappa, the brother of Adiveppa, discontinued possession from 1900, his right to the house had become barred in 1912. That appears to me to be an entirely wrong conception of section 28 of the Indian Limitation Act. An owner of property does not lose his right to property merely because he happens not to be in possession of it for twelve years. Under section 28 his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of the property. It must be, therefore, that the period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself. It has not been shown then in this case when the period for instituting a suit began to run. Apparently it was thought sufficient to show that Mallappa had been in possession for twelve years, and that therefore at the end of twelve

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years Mahaningappa ceased to be the owner. The learned trial Judge said: "Plaintiff's pleader argues that Mallappa may come and claim the house by adverse possession or by discontinuance of possession of Mahaningappa's family since 1900, but that the present defendant No. 1 cannot make any such claim. To my mind this is not a correct way of looking at the case. The plaintiff in this case wants to claim the house as his judgment-debtor's and he must prove that his judgment-debtor had a subsisting interest on the date of the attachment. For this purpose it does not matter whether Mallappa claims the house himself or somebody else claims it." I cannot agree with that view at all. Apparently it was not suggested, so far as I can see, from the record, that defendant No. 1 claimed to be in possession of the house through Mallappa as her tenant, and that, therefore, her possession was adverse to the knowledge of the second defendant, and, therefore, the period for instituting a suit against her by the second defendant had commenced to run. That was not proved by the evidence. Nor does it appear that Mallappa came forward to say that he held the house adversely to the second defendant. This passage in the judgment especially shows how the mind of the trial Judge was affected by the raising of issue 2, which was a wrong issue to be raised in the case. It is quite true that the plaintiff must show that the property which is attached is the judgment-debtor's, and that the judgment-debtor has a subsisting interest in the property. He did show that the title was in the judgment-debtor, defendant No. 2. The title will remain so until it can be shown that somebody else has got a better title.

In the appellate Court the Judge said: "In the second suit the lower Court has held that Mahaningappa and defendant No. 2, Adiveppa, were owners of the house but have been out of possession for more than twelve years

and that their ownership is lost by adverse possession on the part of Mallappa. It is argued that Mallappa may be the tenant of Mahaningappa and Adiveppa. There is nothing, however, in support of this contention and Mallappa himself says that he is the tenant of the Desai. So the presumption is that Adiveppa has lost his title to the house by adverse possession of Mallappa." It is not a question at all of presumption. Either defendant No. 1 could establish her right to remain in possession of the house by adverse possession for twelve years against the second defendant, or else it might have been proved that Mallappa had acquired a title. But there is certainly no presumption that Mallppa could have acquired a title, and Mallappa himself has not come forward to claim that he acquired a title.

So the result, so far as the hearing of this suit is concerned, has been, that it has been proved that defendant No. 2 had a title to the property. It has not been proved that anybody else has acquired a title to the property against defendant No. 2, yet the plaintiff is not allowed to attach the second defendant's property in execution of his decree. If that decision were to stand, although no one is entitled to the property except the second defendant, he will be entitled to retain it free from attachment. I should like to refer to the recent decision of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao*[1] where it was first held by the High Court of Madras that where claimants were in possession of property which originally belonged to the Crown it rested upon the Crown to prove that it had a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, i.e., sixty years before the notification. That was the view taken by the High Court of Madras, and their Lordships of the Privy Council said

[1] (1916) 39 Mad. 617.

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(p. 631): "Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here: be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

It must follow from that decision that a person who happens to be in possession of property without title cannot be allowed to say to the owner: "You cannot turn me out until you have demonstrated that my possession is not long enough to fulfil all the legal conditions." I think, therefore, that the decision of both the lower Courts was wrong and that the plaintiff was entitled to the declaration he asked for in the suit with regard to half the house, and there will be a decree in his favour with costs throughout to the extent of his success.

FAWCETT, J.:—I concur.

Decree reversed.

J. G. R