

1900  
DEC. 13.MARI-  
MONIAL  
JURIS-  
DICTION.

28 C. 84.

THE husband petitioned for dissolution of marriage by reason [86] of his wife's adultery with the co-respondent. Costs but no damages, were asked for against the co-respondent.

The respondent entered an appearance, but did not file an answer or defend the suit. The co-respondent, however, neither entered an appearance nor defended the suit.

The Court gave a decree *nisi* with costs against the co-respondent.

*Mr. Knight*, for the petitioner, asked for costs as between attorney and client. On principle the petitioner is entitled to an indemnity from the co-respondent. In this case no damages are claimed, but under the English practice the party and party costs are given. Where damages are recovered the usual order is that the amount of the difference between the party and party and client and party costs be given to the petitioner out of the damages before they are settled or dealt with according to the order of the Court. *Browne's Divorce Practice*, 5th Edition, p. 202, deals with the disposition of damages. [HARINGTON, J.—Have I jurisdiction to make the order you ask for?] Clearly s. 45 of the Indian Divorce Act provides that the Code of Civil Procedure shall regulate the procedure. Ch. XVIII of the Code of Civil Procedure deals with the question of costs. S. 220 could hardly in terms be wider. It gives the Court power to award costs in any manner it thinks fit. Moreover, though the principle of taxation in the Ecclesiastical Courts, which regulates the taxation in matrimonial suits here, was as between party and party, yet that term had a far different construction put upon it from that which obtained in the Common Law Courts.

HARINGTON, J.—I will make the order.

Attorneys for the petitioners : Messrs. *Leslie & Hinds*.

28 C. 86.

## [86] APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Harington.*

DEO NARAIN CHOWDHURY AND OTHERS (*Plaintiffs*) v. C. R. H.

WEBB AND ANOTHER (*Defendants*). \* [19th June 1900.]

*Limitation—Bengal Tenancy Act (VIII of 1885), art. 8, sch. III and s. 184—Limitation Act XV of 1877, sch. II, Art. 47—Attachment under s. 146 of the Criminal Procedure Code—Appellate Court, power of, to take cognizance of limitation for the first time—Suit to recover possession of land by occupancy-raiyat.*

On the 9th of February, 1895, the plaintiff was dispossessed from his *raiya* lands, and on the 31st of May, 1895, those lands were attached under s. 146 of the Code of Criminal Procedure; and on the 31st of May 1897, the plaintiff instituted a suit to recover possession of the same:

*Held*, that the suit was barred by limitation under art. 8, sch. III of the Bengal Tenancy Act: and the limitation having already commenced to run from the 9th February, 1895, *i.e.*, from the date of the actual dispossession, the plaintiff could not have a fresh start of limitation from the date of the subsequent attachment by the Criminal Court.

*Held*, further, that the lower Appellate Court was empowered to take cognizance of the question of limitation under s. 4 of the Limitation Act, and s. 184 of the Bengal Tenancy Act, though it had not been raised as a defence

\* Appeal from Appellate Decree No. 1881 of 1898, against the decree of Babu Bhagwan Chandra Chatterjee, Subordinate Judge of Tirhoot, dated the 11th of August, 1898, reversing the decree of Babu Jaya Prasad Pande, Munsif of Samastipur, dated the 17th of December, 1897.

in the Court of first instance, if upon the proceedings in the case it was clear that the suit was barred by limitation.

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THE plaintiffs alleged that they were, on the 9th of February 1895, forcibly dispossessed by the defendants from certain plots of land which they claimed, as occupancy-raiyats. Subsequently, proceedings were instituted under s. 145 of the Code of Criminal Procedure, and the lands in dispute were, on the 31st of May, 1895, attached by the Magistrate under s. 146 of that Code.

On the 31st of May, 1897, the plaintiffs instituted this suit for the recovery of possession of those lands, and the Court of [87] first instance gave judgment in favour of the plaintiffs without raising an issue as to limitation.

The Subordinate Judge held, on appeal, that the plaintiffs' allegations as to the disposition, and their previous possession within two years before the institution of the suit, were not true, and that the suit was barred by limitation under art. 3, sch. III, of the Bengal Tenancy Act; and he accordingly dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

1900, JUNE 19. *Moulvi Mustafa Khan* and *Babu Buldeo Narain* for the appellants:—As there was an order by the Magistrate under s. 146 of the Criminal Procedure Code attaching the lands in dispute, this suit is governed by art. 47, sch. II, of the Limitation Act, and not by art. 3, sch. III, of the Bengal Tenancy Act; and as the suit was instituted within three years from the date of the attachment it was barred by limitation, and besides the question of limitation was raised for the first time in the lower Appellate Court, and the suit ought not to have been dismissed by it without allowing the plaintiffs an opportunity of adducing evidence on the point of limitation.

*Babu Umakali Mukherji* for the respondents:—An order of attachment under s. 146 of the Criminal Procedure Code is not an order "respecting the possession" of property, and therefore art. 47 of the Limitation Act has no application to the present case the possession of the property during its attachment by the Criminal Court is nobody's possession; see *Akilandammal v. Periasami Pillai* (1).

Although limitation had not been actually pleaded before the Munsif, the Subordinate Judge was quite competent to try that question on appeal, under s. 184 of the Bengal Tenancy Act and also under s. 4 of the Limitation Act.

*Moulvi Mustafa Khan* replied.

The judgment of the Court (GHOSE and HARRINGTON, JJ.) was delivered by

[88] GHOSE, J.—Two points have been raised before us in this appeal on behalf of the plaintiff, appellant, one being that so far as the plots Nos. 1 and 2 covering an area of 5 cottahs of land are concerned, the plaintiff is not barred by the limitation of two years prescribed by art. 3, sch. III, of the Bengal Tenancy Act, because there was an order by the Magistrate, under the provisions of s. 146 of the Code of Criminal Procedure, attaching the lands in question, and the limitation prescribed by art. 47, sch. III of the Indian Limitation Act for setting aside such an order is three years from the date when the order is made; and the other point raised is, that the defendant not having raised the plea of limitation, and the Munsif not having raised an issue as to limitation, the

Subordinate Judge in appeal ought not to have dismissed the case upon the ground of limitation, without, at any rate, allowing the plaintiff an opportunity of adducing evidence upon the matter.

As to the first point raised before us, it seems to us that the ouster of the plaintiff, as found by the Subordinate Judge, and that finding is based mainly upon the evidence coming from the side of the plaintiff himself, having taken place on the 9th of February 1895, antecedent to the date on which the Magistrate made his order under s. 146 (which was on the 31st May, 1895), the limitation as prescribed by art. 3, sch. III of the Bengal Tenancy Act, began to run against the plaintiff from the date of the actual ouster; and it would not be reasonable to hold that because subsequent to this ouster some dispute arose between the parties, and the interference of the Magistrate was invoked, and because that officer attached the land, being unable to find which party was in possession, the limitation which had already begun to run against the plaintiff ceased to run on, and that the plaintiff would have a fresh start of limitation from the date when the Magistrate made his order under s. 146 of the Code of Criminal Procedure. Moreover, as pointed out by the learned vakil for the respondent, it is not altogether free from doubt whether art. 47, sch. III of the Indian Limitation Act, which relates to a "person bound by an order respecting the possession of property made under the Code of Criminal Procedure," is applicable to the case of an order made under s. 146, which does not maintain [89] the possession of any party. We accordingly overrule the point raised before us.

As regards the other question raised, all that we need do is to refer to s. 4 of the Indian Limitation Act, and s. 184 of the Bengal Tenancy Act, which empowered the Subordinate Judge to take cognizance of the question of limitation, though it might not have been raised by the defendant in the Court of first instance, if upon the proceedings in the case it appeared to him to be clear that the suit of the plaintiff was barred by limitation. He has come to a definite conclusion upon this matter. He has held that the allegation of the plaintiff as to dispossession, and to his previous possession within two years before the institution of the suit, is not true; but rather the evidence on the other side tends to show that the defendants were in possession for more than two years. All that the plaintiff in view of these facts could do was to ask the Subordinate Judge to allow him an opportunity of adducing other evidence upon the matter of possession if he thought such other evidence was available, and forthcoming. He apparently did not do so nor does it appear that in his petition of appeal to this Court he makes any complaint that by reason of the omission of the Munsif to raise any issue as to limitation, he did not adduce such evidence as he might have adduced if the Munsif had raised the issue.

Upon these grounds we think that the contention raised as to limitation fails.

There is one other matter involved in this suit, and that is with regard to plot No. 4. As to this plot the plaintiff has been found to have no cause of action against the present defendants, and it is therefore obvious that he is entitled to no relief as to that plot in this case.

For all these grounds the appeal is dismissed with costs.

*Appeal dismissed.*

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