beegahs for which he paid rent to his co-sharers; that they let out these 72 beegahs in tieca to the factory of which the defendant is the manager or proprietor; that on the termination of the lease the factory refused to give up possession; and that by their refusal and wrongful holding over of the land, the plaintiffs have been deprived of the profits which they would otherwise have made by their own cultivation of the lands. Both Courts appear not to have considered the frame of the plaint or the position of the plaintiffs. They appear to have blindly adhered to the ruling laid down in Volume IX, Weekly Reporter, (page 445) by the Full Bench, without considering whether that decision was applicable to the circumstances of the present case or not. Now, it is very clear that that case as well as the other cases that have been quoted proceed on the principle that the party claiming the wassilat is a party who is receiving rent, and not a party who is cultivating and enjoying the full profits of the land.

The decision quoted in Volume XIII, Weekly Reporter (page 37) by Justices L. S. Jackson and Markby appears to lay down the correct principle, and we may observe that Mr. Justice L. S. Jackson was one of the Judges who sat in the Full Bench case reported in Volume IX. In the case referred to in Volume XIII, the Judges lay down the rule that the Full Bench decision in Volume IX never intended to lay down the proposition of law that a man who was himself the cultivator was not to recover the profits which he would have made out of the land by his cultivation if he should be wrongfully dispossessed. The decision in Volume X, Weekly Reporter, page 463, quoted by Baboo Sreenath, appears *primâ facie* to be in his favour; but the circumstances of that case are not before us, and it appears also that in that case the plaintiff had certain lands which were in the cultivation and occupancy of ryots and that a portion of them only were the khas kamar lands of the plaintiff. In this case, the plaintiff states in his plaint that the whole area of 72 beegahs was in his own cultivation, and that he enjoyed the profits of the crops raised therein up to the date on which he leased the lands to the factory.

The case must therefore go back. The Lower Court will find in the first place whether the plaintiff did, as he alleges, cultivate these lands himself before he leased them to the factory; and if so, apply the principle laid down in the decision reported in Volume XIII, and decide what amount of mesne profits the plaintiff is entitled to recover.

Costs to follow the result.

The 7th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 246 Act VIII. 1859—Defective order—Limitation.

Case No. 7 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 31st October 1870, reversing a decision of the Moonsiff of Naraingunge, dated the 31st March 1870.

Jugobundhoo Bose (Plaintiff) *Appellant,*

versus

Sachya Bibee and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Sreenath Banerjee* for Appellant.

Baboo Doorga Mohun Dass for Respondents.

Where a claim is preferred under Section 246, Act VIII of 1859, and the Court simply releases the attached property without making any inquiry at all on the points specified in that Section, its order cannot be regarded as an order under the Section in question, and the rule of limitation there laid down does not apply to a regular suit subsequently brought by the decree-holder.

Mookerjee, J.—THE facts of this case are extremely simple. Plaintiff obtained a money-decree against one Mahomed Jahid and his wife Jetun Bibee. In execution the disputed property was attached for sale.

One Sachya Bibee, the sister of the judgment-debtor Mahomed Jahid, preferred a claim to the property under Section 246 of Act VIII of 1859, on the ground that she had purchased the same from the debtor and was in possession thereof at the time when the property was attached. The officer before whom the claim was preferred, however, made no inquiry under the provisions of the aforesaid Section, but released the property from attachment on the 1st of November 1865. The decree-holder has instituted this suit on the 2nd October 1869 in order to obtain a declaration that the property belongs to the judgment-debtors, and that the kobalah and decree pleaded by the sister Sachya Bibee are fraudulent documents obtained for the purpose of concealing the property from the creditors of the judgment-debtors.

The defence raised the plea of limitation under Section 246. On the merits, the defendant contended that the kobalah was a *bonâ fide* document executed for valuable consideration. As regards the merits of the case there is no doubt whatever. Both the Courts have held that the kobalah is a colorable and benamee deed executed in fraud of creditors and that the judgment-debtors are really in possession, and not the defendant.

But in respect to the question of limitation, the first Court was of opinion that the provisions of Section 246 do not apply, and that the suit being one for the establishment of the right of the judgment-debtors could be brought within 12 years. The Moonsiff quotes a decision of a Division Bench of this Court reported in VIII Weekly Reporter, page 73, Rajah Bishen Prokash Narain, appellant, *versus* Baboo Misser (Kemp and Glover, J. J.)

The Subordinate Judge was, however, of a different opinion. He held that the suit is barred, not having been instituted within one year of the date of the order of the 1st of November 1865.

On special appeal, it is contended by Baboo Romesh Chunder Mitter that the suit is not barred, inasmuch as there has been no adjudication under the provisions of Section 246 of the Procedure Code; that the suit is not brought to set aside any order passed in the execution department; and that a suit like the present can be instituted at any time the decree-holder is informed and believes that there is property belonging to his debtor held and enjoyed by him in the name of another person, provided that the decree itself is not barred by want of prosecution for 3 years under Section 20 of Act XIV of 1859. For the respondent it was argued that the order of the 1st November 1865 was an order under Section 246, inasmuch as it appears that when the claim was preferred by his client an order was passed for the production of evidence, and that in all probability evidence was produced by his client to prove his possession. It is however admitted by Baboo Doorgah Mohun that if there had been no order made under the provisions of Section 246, the plaintiff would not be barred.

On referring to the record I find that the officer executing the decree had held no investigation whatsoever according to the directions enjoined by the provisions of Section 246 of Act VIII of 1859. That Section lays down that "in the event of any "claim being preferred to or objection offered against the sale of lands or any other "immoveable and moveable property which "may have been attached in execution of a "decree, &c., as not liable to be sold in execution of a decree against the defendant, the "Court shall proceed to investigate the same "with the like powers as if the claimant "had been originally made a defendant to "the suit," and "if it shall appear to the "satisfaction of the Court that the land or "other immoveable or moveable property was "not in the possession of the party against "whom execution is sought or some other "person in trust for him or in the occupancy "of ryots, &c., paying rent to him, at the "time that the property was attached, &c., "the Court shall pass an order for releasing "the said property from attachment." It also provides that if, on the other hand, it shall appear on this inquiry that the property was in possession of the party against whom the execution is sought as his own property, or was in the possession of some other person in trust for him, the Court shall disallow the objection. Then the Section says that "an order passed under *this* Section "shall not be subject to appeal, but the party "against whom the order may be given shall "be at liberty to bring a suit to establish "*his* right at any time within one year from the date of the order."

I find that the Court, when passing the order of the 1st of November 1865, had made no investigation and pronounced no decision as to whether the claimant was in possession

on his own account or in trust for the judgment-debtors. There is literally no sort of inquiry as to who was in possession of the property at the time of the attachment. The kobalah under which the claimant based his title and possession was also not adduced, and as far as the record shows no witnesses were examined. The order, therefore, of the 1st November 1865 is not an order under Section 246, and I am consequently of opinion that the plaintiff was not bound to come into Court within one year from the date thereof.

The words "*the order which may be* "*passed by the Court under this Section*" appear to me to contemplate an order passed after an enquiry duly made under the provisions of this Section. That is, if the Court, after an investigation as to the fact of possession, should declare that the claimant was in possession on his own account, the decree-holder, if dissatisfied with this order, may contest the propriety and correctness of it by a suit within one year of the passing of it. But I apprehend that if a Court does not make any inquiry at all on the points enumerated in Section 246, but simply releases the property attached because a claim has been preferred, and "it is not "shown what particular portion of the "attached property is claimed by the claim-"ant,"—which appears to me to be the only reason given (if it can be said to be any reason at all) by the Moonsiff for passing the order of the 1st of November 1865,—the order is not an order under Section 246, but is a simple denial of the inquiry required to be made under this Section. It is quite clear to me that the Court in the execution case wholly failed in its duty and has not done what was required of it by the law. Such an order is not a legal order, for there is no adjudication of any matter in favor of the claimant which the decree-holder would be bound to set aside within the time prescribed by the last portion of the Section afore-quoted.

In this view of the law I am supported by a decision of Pundit and Campbell, J. J., in page 35 of IV Weekly Reporter; of the present Officiating Chief Justice Norman and Justice Seton-Karr in page 252 of VII Weekly Reporter; of another Division Bench reported in XI Weekly Reporter, page 134. There is also a decision on this point in III Madras High Court Reports, page 139. In another decision reported in page 73, VIII Weekly Reporter, the Judges distinctly held that even if the order was clearly one properly passed under Section 246 where every thing turns upon the fact of a *bonâ fide* possession, that still the decree-holder is not barred by the provisions of that Section from bringing a suit to establish the right of the judgment-debtor after the lapse of one year from the date of the order under Section 246. In a later decision, passed by a Division Bench of this Court and reported in XIV Weekly Reporter, page 367, the Judges refused to hold that the suit of the claimant was barred, inasmuch as they held that the order disallowing the objection under Section 246 was not an order under that Section, because "there "was no decision as to possession in the "order passed on the plaintiff's claim under "Section 246," Now without expressing any opinion whatever as to the construction of Section 246, *i. e.*, whether the limitation prescribed by it affects suits brought to establish the right of the judgment-debtor, which is a matter on which the Court in the execution case had passed no decision whatsoever, or whether the Section simply contemplates suits brought expressly to set aside an order under Section 246, contesting the decision on the point of *bonâ fide* possession only, I am of opinion that the rule of one year's limitation does not apply to the present case, and that therefore the suit is not barred.

Under this view of the law, it is not necessary to remand the case as both the Courts have held that the alleged purchase by Sachya Bibee, the sister of the judgment-debtor Mahomed Jahid, is a benamee and fraudulent one and that the property in dispute is the property of the judgment-debtor, and as such liable to sale in execution of the decree obtained by the plaintiff against Mahomed Jahid. I would, therefore, decree the appeal of the plaintiff with costs. The effect of the order will be that the judgment and decree of the first Court will stand and the appeal of the defendants to the Subordinate Judge will be dismissed.

Jackson, J.—I agree with my learned colleague that no decision was arrived at within the terms of Section 246 Act VIII of 1859 in the execution proceedings out of which this case arose, and that the limitation of Section 246 is therefore inapplicable to the plaintiff's suit. The plaintiff's claim will, therefore, be decreed with all costs, the decision of the first Court to that effect being restored.