APPELLATE JURISDICTION (*a*)

Special Appeal No. 63 *of* 1862.

NILÁTÁTCHI.....*Appellant.*

VENKATÁCHALA MUDALI.....*Respondent.*

When an appellate Court appears not to have taken into consideration a presumption of fact arising out of the circumstances in evidence and materially affecting the decision of the case, that is such "defect" (Sec. 372, Act VIII of 1859), as the High Court will remedy on special appeal by directing an issue.

Special Appeal No. 701 *of* 1860 observed upon.

1862. *December* 22. S. A. *No.* 63 of 1861.

THIS was an appeal from the decree of E.W. Bird, Acting Civil Judge of Negapatam, in Appeal Suit No. 132 of 1861, reversing the decree of J. H. Shunker, the District Munsif of Tranquebar, in Original Suit No. 18 of 1859, in which the plaintiff sued for the recovery of velis 2, mans 8 and gulis 55½ being his one-sixth share in certain family property, with the appurtenances, for the registration in his name of the mirási thereof, and for rupees 715 being the mesne profits from 1850.

The plaintiff alleged that he and the other members of his family divided all the family-property except the land in dispute, which was enjoyed in common down to 1849, and that this land had from 1850 been held by the first defendant's husband, (a stranger to the family) and after his death by the first defendant. He claimed one-sixth of the land, and one-sixth of the produce from 1850.

The first defendant's case was that the plaintiff, his brother, and the defendants 2 to 6 were entitled to the property: that the third defendant and the sixth defendant's late husband were the managing members of the family, that the property was purchased by the first defendant's husband in 1850 from them; and that the plaintiff's share of the purchase-money was paid by the third defendant to the plaintiff's brother.

The District Munsif dismissed the plaintiff's claim, observing that the first defendant's bill of sale was shewn to have been lost, that the deed itself was proved by the copy

(*a*) Present Scotland, C. J. and Frere, J.

1862. December 22. S. A No. 63 of 1861.

No. III, and by the *sammadipattiram* (*a*) No. 1 ; and that the third, the late husband of the sixth, and the seventh defendants were the managers.

On appeal, the Civil Judge reversed this decision, and recorded a judgment of which the following are the concluding paragraphs :—

" The points for decision in this case are whether the sale of the lands in issue by the third, sixth and seventh defendants, had or had not the consent of the plaintiff ; and whether the original decree has decided the suit according to the evidence.

" The appellate court sees no reason to doubt that the land in issue was sold by the 3rd, 6th and 7th defendants to the 1st defendant's husband, but observes that the bill of sale, No. 3, has been improperly admitted as evidence of the fact. This document, No. 3, as being copy of a copy, was inadmissible. There is no proof on which the court can rely that the plaintiff was a consenting party to this sale. He is admitted to be a co-parcener of the vendors ; is proved to have been of mature age at the date of sale ; and had a right to one-sixth of the land. The plaintiff did not sign the bill of sale. Beyond the mere assertion of the 3rd defendant (1st defendant's 1st witness) there is nothing to show he was present at the sale, or that he received his share of the purchase-money, as alleged. There is no proof that he consented to receive the amount after his brother Ayyá Mudali arrived, as declared by the said 3rd defendant. The evidence of the defendant's 4th witness is of the vaguest kind, and undeserving of attention.

" Document No. 4, alluded to in the original decree, throws no light on the case at all. It is not proved. It is no authority whatever to the vendors to sell the plaintiff's family property, but only empowers the 6th defendant's husband to incur certain debts for the recovery of the lands, and gives him an interest in the net proceeds thereof, to enable him to clear off his claim. The plaintiff appears, moreover, to deny this document. His pleader during the appeal repudiated it.

(*a*) ' A deed of acquiescence, permission or agreement' Wilson ; from Sanskr, *sammata* ' assented' and *patra* ' leaf.'

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"The sale of the family-property having been made without the consent of the plaintiff, a co-sharer, is invalid to the extent of his share; which therefore must be made good to him as sued for. The produce claimed is proved to be due, and the defendants have in no way rebutted the plaintiff's claim on this point.

"The original decree is therefore reversed, and plaintiff declared entitled as sued for, with all costs. The produce to be made good by the party in possession of the land."

The first defendant appealed specially.

Branson for the appellant, the first defendant, contended that the plaintiff was barred by acquiescence from 1850, the date of sale, the suit not having been instituted till 1859; and cited *Special Appeals No.* 113 *of* 1860(*a*), *No.* 92 *of* 1860(*b*) and *No.* 701 *of* 1860(*c*).

Sadagopacharlu for the repsondent, the plaintiff.

SCOTLAND, C. J.:—Were I sitting here to decide this question as a matter of fact, my impression is that my mind would incline strongly to the conclusion that there had been consent and acquiescence on the plaintiff's part. The sale takes place in 1850, and from that time to 1859, when the suit is instituted, the plaintiff lies by. He takes no step whatever. He knows that the defendant is in the enjoyment of the property and exercising acts of ownership over it—and yet he puts forth no claim for that long period of time. It appears to me that, under such circumstances, there was strong ground for the presumption of his having acquiesced in, and been a consenting party to, the sale.

If the defendants had put forward that they at the time of purchase paid to the plaintiff himself his one-fifth share of the purchase-money; had they relied upon that as proof of his consent; and had the Judge, totally disbelieving such a case, considered that his share had never been paid for, no inference from the mere lapse of time would have arisen. But such is not the case of the defendant here. His case is that the money was paid by her late husband to the managing members, and that the plaintiff's share was paid

(*a*) M. S. D. 1860, p. 253. (*b*) M. S. J. 1861, p. 27.

(*c*) Ibid p. 145.

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by them to the plaintiff brother. So that the question remains whether or not the plaintiff knew of this and was a consenting party ?

This, however, is a question of fact, and we are not, in special appeals, judges of fact. We sit here trammelled by the provisions of the Civil Procedure Code, as applicable to such cases. And the question we have to consider is, whether there has been on this point a substantial error of defect in law in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits ? That a decision may be most materially affected by the exclusion from the mind of the Judge of a presumption arising out of the circumstances of the case, cannot, I think, be doubted; and here it appears to us, upon reading the appeal case and the judgment, that the learned Judge could hardly have dealt with the consideration of the transaction having occurred so far back as nine years before the institution of the suit, and the effect by way of inference on the plaintiff's claim resulting from this lapse of time. We cannot therefore, I think, say that there has not been a defect in the investigation of the case which may have affected the decision of the suit upon the merits. Under these circumstances the Court ought to submit the question to the Civil Judge—whether considering the inference arising from lapse of time, he comes to the conclusion that the defendant was or was not a consenting party to the sale ?

There is no ground for the argument that there is a presumption of law here. Lapse of time short of the period of legal limitation does not bind so as to exclude evidence in explanation. It is true that there are numbers of cases in equity, in which relief has been refused where the plaintiff has lain by a great many years. But in those instances the party has not been held to be absolutely estopped ; but he has been refused relief where all the circumstances have been such as to establish laches or acquiescence. The lapse of time in this case is a strong circumstance tending to prove consent and acquiescence, and the Judge should give effect to it considered with the other satisfactory evidence offered in explanation.

Three cases have been referred to, and the last certainly does seem to lay down the law in such a way as to warrant

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Mr. Branson's argument, that acquiescence is a binding presumption of law after the lapse of several years. But it would be difficult to apply such a doctrine. What is to be the time which is so to operate? There is no dividing time stated, and whilst in one case nothing may appear to account for the lapse of time, in another the same length of time may be shewn to be inconsistent with either consent or acquiescence. The decision referred to cannot, I think, be taken to amount to more substantially than this, that there was evidence in that case which showed acquiescence. If, however, it can be said to go beyond that, I cannot concur in it. In the two other cases cited, lapse of time appears properly to have been put as matter of evidence.

FRERE, J. concurred.

Issue directed.

APPELLATE JURISDICTION (*a*)

Civil Petition No. 130 *of* 1862.

Ex parte CHELLAPPERUMÁL PILLAI.

A Mufti Sadr Amin may set aside an attachment in a suit issued from his court and no longer properly in force in the suit, although no express statutory power to do so exists.

But on a petition to set aside such an attachment, he cannot also make a declaration as to the right to the property attached and claimed to have been acquired subsequently, and direct that possession should be transferred to the petitioner.

1863. *January* 5. *Civ. P. No.* 130 *of* 1862.

THIS was a petition under section 35 of Act XXIII of 1861 (*b*), against an order of J. W. Cherry, the Civil Judge of Salem, on Summary Appeal Petition, No. 135 of 1862.

It appeared that certain land in zil'a Salem had been taken on attachment pending a suit (No. 510 of 1830) respecting it in the court of the Mufti Sadr Amin. The suit

(*a*) Present Scotland, C. J. and Frere, J.

(*b*) This section enacts that the Sadr Court may call for the record of any case decided on appeal by any Subordinate Court in which no further appeal shall lie to the Sadr Court, if such Subordinate Court Shall appear in hearing the appeal to have exercised a jurisdiction not vested in it be law, and the Sadr Court may set aside the decision passed on appeal in such case by the Subordinate Court, or may pass such other order in the case as to such Sadr Court may seem right.