

ing the general question; and we accordingly affirm the decree below dismissing the suit, but looking to the special circumstances of this case, we think that we may rightly dismiss this appeal without costs.

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## Appellate Jurisdiction (a)

*Regular Appeal No. 58 of 1868.*

APPUNDY IBRAM SAHIB..... *Appellant.*

MRS. MARIA VARDEN SETH SAM..... *Respondent.*

The plaintiff was by an order of the Civil Court in execution of a decree, to which the plaintiff was no party, ejected from the possession of a muttah. He brought a suit more than three years afterwards to eject the legal representative of the person who was so put in possession.

*Held* (reversing the decree of the Civil Court) that the order of the Civil Court was not a summary decision within the meaning of clause 5, Section I Act XIV of 1859, and that the suit was not barred.

That clause is only applicable to orders which the Civil Courts are empowered to pass deciding matters of disputed property raised for hearing and determination by a summary proceeding between the parties disputing.

**T**HIS was a Regular Appeal against the decree of W. S. Whiteside, the Acting Civil Judge of Chingleput, in Original Suit No. 27 of 1866.

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The plaintiff sued to eject defendant and recover possession of the muttah of Tripasore, in Truvalur taluq of Madras district, and for profits of the estate from 16th June 1863.

The plaint set forth that the plaintiff purchased the aforesaid muttah of Tripasore for rupees 4,950 from B. Ragavulu Chetty, as per agreement of 9th October and deed of sale of 11th November 1860, and was put in possession by the proclamation and registration of the Collector of the District, dated 22nd March 1861, subject to an annual peishkist of rupees 2,549-8-9.

The muttah originally belonged to one Gulam Husain Khan Bahadur *alias* Navoh Husain Khan Bahadur Delar Zung who sold it to one Lukpati Royji Lalah who again sold it to one Mr. James Outchterlony. The estate was subsequently conveyed to one Chengelroya Chetty and by him to the aforesaid B. Ragavulu Chetty.

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The defendant's late husband sued Delar Zung Bahadur his father Honorable Sir Shurful Oomra Bahadur, Kt., C. S. I. Lukpati Royji Lalah and Mr. Ouchterlony in Original Suit No. 16 of 1855 on file of the late Principal Sadr Amin of Chingleput for recovery of rupees 4,614 3-5 founded on a lien arising out of the pledge of the title-deeds of Tripasore muttah, and obtained judgment holding the Tripasore estate responsible for that sum. This judgment was confirmed by Her Majesty's Privy Council on 19th July 1862.

The defendant's late husband knowing plaintiff purchased and held possession did not apply to plaintiff for the amount of his charge, but sued the former defendants in Original Suit No. 11 of 1862 on file of the Court for recovery and possession of the said muttah, fraudulently alleging "that the stipulated value of the said muttah was " rupees 4,000 bargained and sold to plaintiff (Mr. Sam) in " October 1851 by the 1st and 2nd defendants as proved " by the judgment of the late Principal Sadr Amin of " Chingleput in Original Suit No. 16 of 1855, which judgment plaintiff pleads in bar against the above defendants " and all other parties privies to them by way of estoppel."

The plaintiff having been excluded as a party to Original Suit No. 11 of 1862, and his repeated applications to be admitted a supplemental defendant, rejected, had no opportunity to contest the claim therein set up and to establish the legality of his own purchase. Judgment was eventually given in favor of Mr. Sam and on its execution plaintiff was put out of possession on the 16th June 1863.

Subsequently plaintiff put in his claim under Section 230 Civil Procedure Code, in M. P. No. 318 of 1863, whereon two orders were passed on 9th and 17th November 1863. In the first order Mr. Sam was directed to prove notice to plaintiff, and in the second the petition was set aside under the belief that the High Court admitted a regular appeal on the decree by the plaintiff. On a subsequent application, dated 28th July 1864, reviving M. P. No. 318 of 1863, the plaintiff's claim was heard in Original Suit No. 5 of 1864, and judgment given in his favor; but upon

appeal the High Court on the 28th April 1856 reversed the judgment as being upon an application put forward after lapse of time allowed by Section 230, referring the plaintiff to a regular suit.

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The defendant submitted that plaintiff's claim was barred under Clause V, Section 1, Act XIV of 1859.

The written statement contained other allegations relating to the merits of the suit to which it is not necessary to advert.

The judgment of the Civil Court was in the following terms:—

This suit coming up for first hearing and for settlement of issue:—After hearing the arguments of the counsel on both sides, this Court is of opinion that the plaintiff's claim cannot be maintained, inasmuch as it is barred by Clause 5, Section 1, Act XIV of 1859. By the order of this Court dated 8th June 1863 executing the decree in Original Suit 11 of 1862 the plaintiff was on the 16th idem ejected from the possession and enjoyment of the Tripasore muttah, which he alleges had been sold to him for valuable consideration and placed formally in his possession by the Collector on the 22nd March 1861. Supposing the plaintiff's claim to be true, it was manifestly his interest to have this order of the Court set aside as speedily as possible, and recover possession of the muttah. The order of this Court above quoted was clearly a summary decision within the meaning of Clause 5, Section 1, Act XIV of 1859, and the plaintiff's suit to set it aside should undoubtedly have been brought within one year from its date that is to say within the 16th June 1864, but the plaint in this suit is dated 26th August 1866, and the claim is therefore barred by limitation (*Sheikh Khyrut Alli v. Khuranli Dharee Singh, Marshall's Reports I. 520*) and it is unnecessary to proceed with the further hearing of this case.

The plaintiff appealed to the High Court.

*The Advocate General* and *Rama Row*, for the appellant, the plaintiff.

*Mayne*, for the respondent, the defendant.

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The Court delivered the following

**JUDGMENT:**—This is a suit to recover possession of a muttah from which the plaintiff had been ejected on the 16th of June 1863 under an order passed on the 8th of the same month in execution of a decree obtained by the late husband of the defendant in Original Suit No. 11 of 1862 to which the plaintiff was not a party, and the Civil Court has decreed the dismissal of the suit on the ground that the order which it was the purpose of the suit to set aside, was a summary order or decision within the meaning of Clause 5, Section 1 of the Act of Limitations, and as the suit had not been instituted within a year of the date of the order it was barred. From the decree of the Civil Court the plaintiff has appealed, and the question to be determined is whether the clause just referred to is applicable to the suit.

The plaintiff claims to be entitled to the property in dispute under a deed of sale executed on the 11th of November 1860 by the then alleged owner Ragavulu Chetty, and his first proceeding after the decree in the Suit No. 11 of 1862 appears to have been a petition presented under Section 229 of the Code of Civil Procedure for stay of execution. That petition was held not to be maintainable, and soon after the order of the 8th June 1863 was issued directing execution to be enforced and thereupon the plaintiff was dispossessed of the property on the 16th of June 1863. The plaintiff appealed from the order on his petition to this Court, and whilst the appeal was pending he presented another petition claiming to be entitled to the muttah under the deed of sale of the 11th of November 1860, and that petition the Civil Court on the 17th November 1863 refused erroneously to entertain because the appeal to this Court was pending. The order on the first petition was affirmed by this Court and soon after, namely on the 28th July 1864, the plaintiff renewed his claim by petition and it was numbered and registered as a suit under Section 230 of the Code, and on the 19th of December 1865 the Civil Court made an order in favor of the plaintiff's claim, and directing possession of the property to be restored to him. But on appeal to this

Court, that order was reversed, on the ground that it had been passed on an application instituted more than one month from the date of the plaintiff's dispossession and was therefore not cognizable under Section 230. The order of reversal by this Court was made on the 28th of April 1866, and on the 16th of August following this suit was filed.

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These facts do not, we are of opinion, bring the suit within the enactment in Clause 5, Section 1 of the Act of Limitations. That Clause is applicable, we think, only to orders which the Civil Courts are empowered to pass deciding matters of dispute properly raised for hearing and determination by a summary proceeding between the parties disputing. The concluding words of the clause "The period of one year from the date of the final decision, an award or order in the case" seem to us to indicate clearly that orders of adjudication in pending proceedings were meant.—See the recent decision of this Court in *Ramanada Bhutt v. Bittu*, and another Special Appeal No. 342 of 1868 not yet reported (a.)

In the present case there is no such order to be set aside. The plaintiff no doubt seeks by the suit indirectly to invalidate one of the two existing orders of the Civil Court, namely, the order under which the plaintiff was dispossessed, but that is merely a part of the necessary process in the regular course of execution to enforce the decree, and there is no specific provision prescribing a period of limitation for a suit to set aside such an order like that in Clause 3, Section 1 of the Act of Limitations relating to suits to set aside sales of property under process of execution. The suit therefore was not in our opinion barred by Clause 5 Section 1 of the Act. Consequently the decree of the Lower Court must be reversed and the suit remanded for hearing and determination upon the merits. The defendant will be ordered to pay the plaintiff's costs in this appeal.

(a) See ante page 263.