the order is altogether invalid and must be set aside. Each party will bear his own costs of the appeal and of the application for the order in the Court below if any.

1869. *April* 2. *C. M. R. A. No.* 178 *of* 1868.

Appellate Jurisdiction (*a*)

Regular Appeal No. 93 *of* 1868.

MALRAJA *alias* KRISHNAMA RAJAH.....*Appellant.*

NARAYANASAMY RAJAH and another... ...*Respondents.*

In a suit for a partition of family property in the possession of the plaintiff and defendants, part of the property was attached at the instance of one of the defendants in 1852 and the remainder of the property in 1864. Nothing was done with respect to the first attachment, but in 1865 a petition was presented by the plaintiff praying for the removal of the attachments. The petition was rejected, and the plaintiff brought this suit within one year from the date of the rejection of his petition. The plaintiff and defendants remained in possession notwithstanding the attachments.

Held, that the plaintiff's suit was not barred by the Act for the Limitation of Suits.

1869. *April* 15. *R. A. No.* 93 *of* 1868.

THIS was a Regular Appeal from the order of W. S. Whiteside, the Acting Civil Judge of Chingleput, in Original Suit No. 36 of 1865.

The suit was brought for the recovery of real and personal property valued at rupees 1,589-5-8, to which the plaintiff and the sons of his elder brother Ramaswamiraja (who are under the plaintiff's protection,) were entitled as their one share out of 2¼ shares of real and personal property under the stipulations of a deed of division made between the 1st defendant and plaintiff's father on the 23rd August 1834.

The plaint stated that a dispute arose between the 1st defendant and the plaintiff's father Goparaja, whereupon an agreement was passed in the presence of the cirkar on the 23rd August 1834. It is stipulated therein that both the parties should appoint a gumasta in common for the management of all the ancestral property inclusive of the shrotriem village, and having divided it into 2¼ shares, and after deducting expenses of management, one and quarter share should be taken by the 1st defendant and one share by the plaintiff's father.

(*a*) Present: Scotland, C. J. and Collett, J.

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The plaintiff's father continued in the enjoyment according to the stipulations of the said document until his death in May 1853.

He left at that time two minor sons, namely, the present plaintiff and his elder brother Ramaswamiraja, and they were in the enjoyment of the above shares until 1862 when the plaintiff's elder brother Ramaswamiraja died.

The said Ramaswamiraja left two minor sons named respectively Goparaja and Kodandaswamiraja, and while plaintiff was protecting the said sons and was in the enjoyment of the property according to the stipulations of the said document, the 2nd defendant caused the property to be in 1852 and 1864 attached in execution of a decree obtained against him.

Knowing the above circumstances the present plaintiff presented a Petition No. 36 of 1865 requesting the Court to release the property in the possession of the present plaintiff as well as that belonging to the minors. The said application was rejected on the 1st September, 1865, on the ground that the attachment was made a long time ago, and that it was not just to take exception to it at that time.

The defendants relied upon the Act of Limitation among other objections which they made to the plaintiff's suit.

The order of the Civil Judge was as follows:—

The plaintiff asserts in his plaint that his father, the late Gopu Razu, was in enjoyment of a certain share of the family property, (and for the recovery of which this suit is now brought) in virtue of a formal agreement entered into between himself and his brother the first defendant in the year 1834; that he continued to enjoy that property down to the date of his death in 1853 when plaintiff's elder brother the late Ramasamy Razu and plaintiff (who was then a minor) entered on their father's property and in like manner enjoyed it down to the year 1862 when plaintiff's elder brother died leaving two minor sons who have since then been under the protection of

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plaintiff and are so now. In the year 1852 the 1st defendant caused a large quantity of the plaintiff's family property to be attached in execution of a decree due by the defendant alone, and in 1864 all the remainder was attached in like manner, and plaintiff therefore now sues to set aside both attachments and be declared the owner of the said lands.

It is to be observed that the first attachment of the lands is admitted by plaintiff to have taken place so far back as 1852 when his father was alive, and (he declares) in possession of that property, but plaintiff's father prior to his death in 1853 made no claim whatever to those lands, and in like manner plaintiff's elder brother Ramasami Raju was also silent as to his rights and took no steps to set aside the attachments of his lands on account of 1st defendant's debts up to his death, 1862. Plaintiff admits that he was then not a minor but nevertheless he also maintained complete silence on the subject of his claim to the lands until the second attachment was made in 1864 and then only did he come forward. The Court is of opinion that so far as the lands attached in 1852 are concerned the plaintiff's claim is undoubtedly barred by the Statute of Limitation. Moreover, it appears that the plaintiff's late father did in No. 508 of 1843 sue in the Pundit Sadr Amin's Court of the North Arcot district for the salt pans at Pungolam and the tamarind fruit which now form part of the property sued for by plaintiff, and in Appeal Suit 89 of 1844 on the file of the Chittoor Civil Court his claim was positively rejected. Yet the plaintiff has now included these very salt pans in this suit as if the property in question had never been adjudicated on or formed the subject matter of litigation. The plaintiff's case is clearly untenable as it stands, and the Court accordingly resolves under Section 32 to reject the plaint with costs. The plaintiff is of course at liberty to sue in the Lower Court for such portion of the property as has not yet been disposed by any competent Civil Court.

The plaintiff appealed to the High Court for the following reasons:—

I. The plaint was wrongly rejected with costs under Section 32 of the Civil Procedure Code.

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II. The Civil Judge was also wrong in holding that, as far as the lands attached in 1852 were concerned, plaintiff's claims were barred by the Statute of Limitation.

III. Because though there was an attachment in 1852, plaintiff (or the members of his family) was not deprived of possession thereof, but has always continued in possession of the said property up to this time.

IV. Because the mere attachment will not affect the legal rights of the parties.

V. Because plaintiff was not bound to come forward to oppose and to take steps to set aside the attachment until proceedings were taken to deprive him of the possession.

VI. Even if the plaintiff's claims to this property were barred by the Statute of Limitation, he was still entitled to a share in the other lands claimed by him.

VII. The decrees No. 508 of 1843 and Appeal Suit No. 89 of 1844 do not at all affect the claims of plaintiff to the salt pans at Pungalum and the tamarind trees, but they rather establish the agreement stated in the plaint.

Srinivasa Chariyar, for the appellant (the plaintiff.)

Rama Row, for the 1st respondent, (the first defendant.)

The Court delivered the following

JUDGMENT:—This is an appeal from an order of the Civil Court of Chingleput rejecting the plaint on the ground that the suit was barred by the Act of Limitation. No evidence has been taken, but the material facts appearing from the plaint are that the property of which the plaintiff seeks to recover a share was attached at the instance of the 2nd defendant in 1852 and again in 1864. The first and only proceeding taken in connection with the attachment was the petition of the plaintiff to set it aside, which was rejected on the 1st September 1865, and the property notwithstanding the attachment remained, it appears, in the enjoyment of the family of the plaintiff

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and the 1st defendant. Within a period of less than one year from the order of the 1st September 1865, rejecting the plaintiff's petition, the suit was brought.

On these facts it is clear that the suit was not barred by lapse of time. The Civil Judge proceeded, we suppose, on the ground that the cause of action arose at the time of the attachment and therefore more than twelve years before the institution of the suit. But the effect of the attachment was not to change in any way the possession of the property so as to bring the case at all within the twelve years' limitation. Even supposing the property had been taken out of the control and enjoyment of the family under an order of the Court, there would not have been adverse possession in any one so as to be a bar under the Act.

The decree therefore must be reversed, and the suit remanded for hearing and determination upon the merits. We say nothing as to the point of *res judicata* mentioned in the judgment, as that is a point not appearing on the plaint and must be determined at the hearing. The plaintiff's costs of this appeal must be paid by the 1st defendant who is the only respondent who appeared in this Court.

Appellate Jurisdiction *(a)*

Regular Appeal No. 31 *of* 1868.

SITARAMAIYAR.....*Appellant.*

ALAGIRY IYER and 371 others.....*Respondents.*

The plaintiffs, mirasidars of a village held on pangavaly tenure sued their co-mirasidars the owners of the remaining shares and others, occupants of land in the village, for a partition of the common lands of the village and an allotment to the plaintiffs of specific parts thereof proportionate to the shares which they represent.

In a former suit to which all the present mirasidars were parties, either actually or as privies to those through whom they claim, it was decided that no right existed in any individual shareholder of the village to have allowed to him a distinct portion of the common lands in proportion to his share or shares.

Held, that the former decree declaring the inpartibility of the common lands of the village was conclusive in the present suit between the present shareholders upon the same question of right.

Semble,—The right to enforce a partition or allotment of the common lands of mirasi villages held on pangavaly tenure probably does exist.

(*a*) Present : Innes, and Collett, J. J.