

operated simply as a temporary stay of process for the sale of the property, and there was therefore a pending proceeding to enforce the decree throughout the period of the stay. The appeal will be dismissed with costs.

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March 10.
C. M. S. A.
No 18 of
1869.

Appellate Jurisdiction (a)

Special Appeal No. 342 of 1868.

RAMANADA BUTT.....*Special Appellant.*

BITHEE and another.....*Special Respondents.*

The plaintiff sued to obtain a decree declaring that the ancestral land possessed by the family of the plaintiff was not liable to seizure and sale in satisfaction of an *ex parte* decree obtained by the defendant in a suit against the yejaman of the plaintiff's family on the ground that the decree had been obtained collusively and fraudulently for a debt alleged to have been contracted for the benefit of the family.

The decree against the yejaman was passed on the 22nd June 1857, and upon attachment of the family property the plaintiffs made a claim under Section 246 of the Civil Procedure Code, alleging their independent right to the property and resisting a sale. The claim was disallowed on the 18th October 1861, and an appeal from that decision was dismissed on the 15th November 1861. The present suit was instituted on the 2nd February 1864.

Held, that this was not a suit to which the limitation provided by Section 246 of the Civil Code or by Clause 5 Section 1 of Act XLV of 1859 was applicable, and that the suit was not barred.

THIS was Special Appeal against the decision of Srinivassa Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 325 of 1866, confirming the decree of Court of the District Munsif of Mulki in Original Suit No. 15 of 1864.

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Srinivasa Chariyar, for the special appellant (the defendant.)

Kurunagara Menon, for *Parthasarathy Iyengar*, for the special respondents (the plaintiffs.)

The facts are sufficiently set forth in the following

JUDGMENT:—The plaintiffs in this case are members of a family subject to the Aliyasantana law, and the suit has been brought to obtain a decree declaring the ancestral land possessed by the family not to be liable to seizure and sale in satisfaction of an *ex parte* decree obtained

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by the defendant in a suit by him against Boda Pujari as the yejaman of the family, on the ground that such decree had been obtained collusively and fraudulently for a debt falsely alleged to have been contracted for the benefit of the family. Both the Lower Courts have decided that the decree was so obtained and have granted the relief prayed, and their decisions on that point cannot be questioned.

The ground of appeal now relied upon by the defendant is that the suit, not having been commenced within one year from the date of the order passed on the claim of the plaintiffs under Section 246 of the Code of Civil Procedure, was barred by that Section and by Clause 5 Section 1 of the Act of Limitation. The record shews that the *ex-parte* decree against Boda Pujari was passed on the 22nd of June 1857 on his promise in writing to pay the amount due by him to the plaintiff in the suit (the now defendant,) and that after the death of Boda Pujari the property in question was attached in execution, and the plaintiffs thereupon put in a claim under Section 246 of the Code alleging their independent right to it and resisting a sale; that on the 18th October 1861 the Original Court made an order disallowing the claim; that an appeal therefrom to the Civil Court was dismissed on the 15th November 1861, and the present suit instituted on the 2nd of February 1864.

The question to be determined is whether this is a suit to which either Section 246 of the Code or Clause 5 Section 1 of the Act of Limitation is applicable, and we are of opinion that it is not. The enactment in Section 246 empowers the Court executing the decree to determine summarily whether at the time of the attachment the property claimed was or was not in the possession of the judgment-debtor as his own property, or of some one in trust for him, or in the occupancy of persons paying rent to him and thereupon to pass an order, and the limitation of one year is allowed to "the party against whom the order may be given to bring a suit to establish his right." The suit meant is clearly, we think, a suit to try any claim of proprietary or possessory right cognizable under the Section, which, if successful, would entitle the claimant to an order releasing the property from attach-

ment, and the specific terms of the Section relating to the questions of right for determination obviously exclude the cognizance of an objection to the validity of the decree.

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Now the present suit was brought not to establish such a right but to invalidate the decree. The plaint implies the liability of the property for the debt, if the decree be valid, and, charging that the decree had been obtained by collusion and fraud, asks that it may be cancelled on that ground, and as a consequence the property declared not liable to be sold under the order dismissing the plaintiff's claim, and this is the relief decreed by the Lower Courts. The claim in the suit then not being cognizable under Section 246, we think the period of limitation therein prescribed is not applicable.

With respect to Clause 5 Section 1 of the Act of Limitation, we are of opinion that the enactment relates to suits to set aside or alter summary orders on some ground affecting the jurisdiction of the Court or the soundness of the decision on which the order is founded, and, for the reasons already expressed, we think the present is not such a suit but one brought to get rid of the decree on a ground not open on the summary determination of the former claim, and consequently that the limitation in the clause is equally inapplicable.

It becomes unnecessary to decide the point taken on behalf of the respondent that the case was excluded from the operation of Section 246 of the Code by the provision in Section 387, but our opinion is against it. The provision in Section 387 saves to every party to a suit pending, at the time when the Code came into operation, the rights of procedure whether of appeal or otherwise which but for the passing of the Code would have belonged to him. Here the plaintiffs were not parties to a pending suit when the Code came into operation. The suit was against Boda Pujari alone on his personal contract and had been determined by a decree before the Code became law, and the plaintiffs came in as claimants under Section 246.

The appellant's objection failing, the decree of the Lower Appellate Court must be affirmed and the appeal dismissed with costs.