APPELLATE JURISDICTION. (*a*)

Special Appeal No. 433 *of* 1871.

CHERIYARAKEL *alias* ARAKEL KUNHI KUTTIYALI. } *Special Appellant.*

VAYAKA PARAMBATH IMBICHI AMMAH... *Special Respondent.*

Suit for redemption of an otti by an alleged purchaser of the same, and for recovery of land on which he had purchased a kánam. The defence was that the purchase was made by the father of the 1st defendant, and that the plaintiff was, constructively, a mere trustee. The Munsif decreed for the plaintiff, and the Principal Sadr Amin reversed his decree because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants, which attachment was made in execution of two decrees for money against the present plaintiff. It appeared that in the proceedings had releasing the property from attachment no notice was issued to the judgment-debtor (present plaintiff). *Held*, that the decision of the Principal Sadr Amin was wrong. In the present case, the claimants in possession were not so according to any of the modes of derivation which Section 24 enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimants, and there was nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, even assuming that he was a party to the order made, such order could not be said to be against him; because his claim was one which could not have been determined by any order made under Section 246. The order so made was perfectly consistent with his present contention.

Special Appeal No. 541 *of* 1868 (4, M. H. C. R., 472) distinguished.

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THIS was a Special Appeal against the decision of J. K. Ramen Nair, the Principal Sadr Amin of Calicut, in Regular Appeal No. 285 of 1870, reversing the decree of the Court of the District Munsif of Calicut in Original Suit No. 195 of 1868.

The suit was brought to recover, with arrears of rent, five parcels of land, of which Nos. 1 to 4 were plaintiff's jenm, and held by the defendants on otti, and No. 5 one on which plaintiff had a kánam claim, on payment of the otti and kánam amounts. The plaintiff alleged that Koyali (deceased,) the father of the 1st, and grandfather of the 2nd and 3rd defendants, held the lands Nos. 1 to 4 on otti, and No. 5 on simple lease. The 1st defendant answered that the jenm and kánam rights alleged by the plaintiff were acquired by her (1st defendant's) father Koyali in plaintiff's name: that plaintiff had no right to the property, and that the suit was

(*a*) Present: Morgan, C. J. and Holloway, J.

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barred by the Act of Limitation, as an attachment of this property for a debt due by plaintiff was released on her application on the 25th February 1867, and the present suit was not brought within one year from that date.

The Munsif decreed for the plaintiff.

The 1st defendant appealed.

The Principal Sadr Amin, reversing the decree of the Munsif, said—

"I am clearly of opinion that this suit is barred by Section 246 of Act VIII of 1859. The plaint property was once attached at the instance of a third party for plaintiff's debt, and the present 1st defendant appears to have laid claim to it, and had the property released from attachment,—vide Exhibit No. VIII. The present suit was not brought within one year from the date of that order, and it is, therefore, clearly unsustainable. I reverse the Munsif's decree, and dismiss the original suit with all costs."

The plaintiff appealed to the High Court against this decree of the Principal Sadr Amin, upon the grounds that the suit was not barred by the Law of Limitation, that the plaintiff was no party to the proceedings under the attachment, and was not summoned as a party or as a witness in the case, nor was any notice given to him.

O'Sullivan, for the special appellant, the plaintiff.

The Advocate General, for the special respondent, the 1st defendant.

The Court delivered the following

JUDGMENT.—The suit was for redemption of an otti by and alleged purchaser of the jenm and for recovery of land on which he had purchased a kánam.

The Munsif decreed for plaintiff, and the Principal Sadr Amin reversed his decree, because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants. The attachment was made in execution of two decrees for money against the present plaintiff.

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If Section 246 is applicable to the case, it seems plain that a new period of limitation will not be given by a second order upon a second attachment.

So to decide would be to render the rule quite illusory. Like all other periods of limitation, this will, of course, continue to run, and can only be interrupted by modes prescribed by the authority which enacted the rule.

The defence to the suit and presumably the ground of seeking the release from attachment is, that the purchase was made by the father of 1st defendant; that plaintiff was, in fact, constructively, a mere trustee.

It appears in the present case that notice was not issued to the judgment-debtor, and that he was not a party to these proceedings which ended in the release of the property, unless the word party must, under this section, receive an extended interpretation. The point decided in 4, M. H. C., 472, was that an order prejudicial to the right of the judgment-debtor would put him, as well as the claimant, to his action within the year; because, within the meaning of the section, he was a party against whom the order was given. In the present case, the claimants in possession were not so according to any of the modes of derivation which the section enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimant, and there was and is nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, and assuming, as for the present purpose we seem bound to do, that he was a party to the order made, we are clearly of opinion that the order so made cannot be said to be against him, because his claim is one which could not have been determined by any order under Section 246. The order, so made, was not only not against his present contention, but was perfectly consistent with it; and, if its existence had been found affirmatively, it could have had no influence upon the result; it would still have been the duty of the court to release, because the possession was neither in trust for, nor on account of, the judgment-debtor. We are, therefore, relieved from saying anything as to

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the case 4, M. H. C. R., 472. We think that an order admitting a claim which must have been admitted whether the plaintiff's (judgment-debtor's) contention is well or ill-founded, cannot be an order against him so as to put him to a period of limitation other than that to which his original action was subject. It might be otherwise if he had been present and promoting a contention of the decree-holder which, if well-founded, would have justified the continuance of the attachment. We should, but for the case referred to, have had great difficulty in saying that he was a party to the order at all, but we think that this case may be decided without touching the ground of decision in that. All the judges there assume that the order was antagonistic to the title of the judgment-debtor and subsequent plaintiff. Here the case is manifestly otherwise. So far, therefore, as the suit for redemption is concerned, the decision of the Principal Sadr Amin seems to us wrong.

The case of the kánam is apparently subject to the same observation, for it does not seem that there has been any pretence of the possessors being persons paying rent to the judgment-debtors.

The decree of the Principal Sadr Amin on this preliminary point must be reversed, and the suit remitted for decision of the appeal on its merits. The costs of this proceeding will be costs in the cause, and be provided for on the passing of a final decree.