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**(1877) 04 AHC CK 0005**  
**In the Allahabad High Court**

Badri Prasad

APPELLANT

Vs

Muhammad Yusuf and Another

RESPONDENT

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**Date of Decision :** 12-04-1877

**Acts Referred:**

**Citation :** (1875) ILR (All) 381

**Hon'ble Judges :** Robert Stuart, C.J.;Turner, J;Spankie, J;Pearson, J;Oldfield, J

**Bench :** Full Bench

**Final Decision :** Disposed Of

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## Judgement

Robert Stuart, C.J., Turner, Spankie and Oldfield, JJ.—The 246th section of the CPC declares that when a claim is made to Immovable property attached in execution of a decree as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate it, and if it shall appear that the property was in the possession of the party against whom execution is sought, as his own property, at the time when the property was attached, the Court shall disallow the application. This follows the clause out of which the question before the Court arises. The order which shall be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given, shall be at liberty to bring a suit to establish his right, and the Limitation Act prescribes that such a suit must be brought within one year from the date of the order.

2. Two questions were principally raised at the hearing, one as to the effect of the order, the other as to the pertinency of the enquiry, whether the order was passed on a correct decision of the issue as to possession.

3. Now it appears to us that when an enquiry has been duly held u/s 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code, it is as final and conclusive on all persons who are parties to it as any other final order or decree of a Court of Justice. Until it

has been over-ruled in a regular suit, brought in virtue of the permission expressly given by the Code, no Court is at liberty afterwards to go behind the order, and inquire whether the Court, which disallowed the objection, had correctly appreciated the evidence as to possession, or had come to the conclusion erroneously, that possession was with the judgment-debtor. Consequently, at the hearing, we expressed our opinion that it was immaterial to the determination of the question submitted to us, whether or not the Court which had investigated the claim had formed an erroneous judgment on the question of possession.

4. The effect of the order cannot be affected by the propriety, or otherwise, of the decision at which the Court, which investigated the claim, arrived as to the fact of possession.

5. We proceed, then to consider what is the effect of the order. Inasmuch as the Code declares that, in the suit brought to contest it, the claimant must prove his right, we understand the Legislature to have intended that the order until reversed is conclusive as to right.

6. It is not a novelty in Indian law that possession, which is prima facie evidence of title, should be accepted as justifying a record of title unless and until the record is amended in pursuance of a decree obtained in a regular suit-brought within a limited time.

7. Thus Settlement Officers, when engaged in preparing the record of rights under Regulation VII of 1822, were directed to enquire into present or very recent possession, and to frame their record in accordance with the result of that enquiry, and if the parties affected appear before them, and an award is made, that award is final and conclusive, unless, within three years from the date of the award, the party who is aggrieved by it, institutes a regular suit to question it. We are unable to distinguish the principle on which the case cited at the argument was decided from the principle which should guide the Court in determining the point now before it. It appears not unreasonable that, to give some little security to titles which, in this country, are exposed to much peril, as titles derived from auction sales in execution of a decree, the Legislature should have required any person who makes a claim to attach property, to come in within a limited time, and vindicate his rights if he have any, or thereafter to be barred from asserting them.

8. The argument that limitation does not apply to a defendant is not in our opinion pertinent. The question is, whether or not the defendant is not bound by an order which he did not contest within the time allowed by law. In our judgment, having failed to prove his right within that time, he is precluded from asserting it, by an order which has become final.

Pearson, J.

9. The finding of the Court, u/s 246 of Act VIII of 1859, whether the attached

property is in the possession of the party against whom execution of decree is sought, as his own property and not on account of any other person, or is in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, or whether it is not in his possession or in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators paying rent to him, or that being in his possession, it is not so on his own account, or as his own property, but on account of, or in trust for, some other person, appears to me to be an adjudication of proprietary right on the basis of possession. The order which may be passed on such finding is declared not to be subject to appeal, and would not, I conceive, be contestable at all, but for the express permission which is given by the concluding words of the section to the party against whom an order may be given to bring a suit to establish his right. Those words show that the matter in dispute between the decree-holder and the claimant is not, by reason of the finding and order u/s 246, so absolutely a res judicata as not to be open to re-adjudication in a suit brought by the party against whom the order was passed to establish his right. But in the event of no such suit being brought, the matter in dispute must be held to have been finally disposed of by the finding and order u/s 246, and to be absolutely a res judicata.

10. The learned Judge then distinguished the circumstances of the present case from those in special appeal No. 751 of 1874, in which as the judgment continued "there had been no adjudication on the basis of possession, in respect of the proprietary right in the property, which therefore could not be regarded as a res judicata; while the order disallowing the claim on the ground of a lien was beyond the scope of the Munsif's jurisdiction under the section."

11. The Division Bench (Stuart, C.J., and Turner, J.,) made the following order: In accordance with the ruling of the majority of the Full Bench of this Court, we must allow the appeal, and reversing the decree of the lower Appellate Court restore that of the Court, of First Instance, with costs.