

(1924) 12 CAL CK 0039
In the Calcutta High Court

Sailesh Chandra Dutta and Others

APPELLANT

Vs

Joy Chandra Roy and Others

RESPONDENT

Date of Decision : 22-12-1924

Acts Referred:

Citation : AIR 1925 Cal 1147 : 87 Ind. Cas. 756

Hon'ble Judges : Ewart Greaves, J;Chakravarti, J

Bench : Division Bench

Judgement

1. The question raised in this appeal is whether the suit is barred by the rule of one year's limitation as provided for in Article XI of the Second Schedule of the Limitation Act. The plaintiff's suit for declaration of his title to certain immovable property was dismissed by both the Courts below and the present second appeal is by the plaintiff against the decree of the Subordinate Judge of the 5th Court of Dacca, affirming the decision of the Munsif, 2nd Additional Court of that district. The facts which are necessary for the purpose of this appeal shortly stated are these: Defendants Nos. 1 to 4 obtained a decree for possession of certain immovable property and also a decree for mesne profits to be determined in execution proceedings against the predecessors of Defendants Nos. 5 and 6. Defendants Nos. 1 to 4 applied for execution of their decree, and amongst other things prayed for ascertainment of mesne profits and obtained an order for attachment of the land in suit before judgment ascertaining mesne profits. The plaintiff put in a claim under Order 21, Rule 60 of the Code of Civil Procedure. The claim was disallowed on the 28th February 1914. It appears that the execution proceedings were dismissed disallowing the claim for mesne profits on the 22nd of January 1915. It also appears that the execution proceedings were revived on appeal in 1918, the appellate Court holding that the order disallowing the execution was erroneous. Defendants Nos. 1 to 4, after they had obtained a decree for mesne profits, attached the same property again in the year 1921. The plaintiff put in another claim against the attachments,. The claim was disallowed on the 2nd of August 1921, and the present suit was instituted by the plaintiff on the 3rd August 1921 for declaration of their title to the property which

their claim had been dismissed. The defendants amongst other pleas contended that the suit not having been brought within one year from the 28th February 1914, was barred by limitation. The plaintiff on the other hand contended that the present suit was brought well within one year from the date of disallowance of their present claim. Both the Courts below have held that the suit, as it was not brought within one year from the 28th of February 1914, was barred.

2. In this appeal it was contended by the learned vakil for the appellant that the Courts below were in error in holding that the present suit was barred by limitation. It was urged by the learned Vakil that the effect of dismissal of the execution proceedings on the 22nd January 1915 put; an end to the attachment before judgment under the provisions of Order 38, Rule 9.

3. It is unnecessary to discuss the point at any length, as it is covered by the direct authority which discussed the effect of dismissal of a claim in which an attachment before judgment was obtained. In the case of Protap Chandra Gope and Others Vs. Sarat Chandra Gangopadhyaya, after reviewing all the previous authorities and the provisions of the Code, Sir Ashutosh Mukerjee, as the acting Chief Justice at page 206 states as follows: "We are not unmindful that a different rule has been adopted with regard to attachments before judgment. There the view has prevailed that it is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit and the reversal of the judgment of dismissal on appeal does not operate to revive the attachment, which has been cancelled. As explained in the case of Sasiram v. Meherban Khan [1911] 13 C.L.J. 243 this result follows from the provisions of Order 38, Rule 9 which directs the withdrawal of attachment on dismissal of the suit and contains no provision which makes such withdrawal temporary and liable to be vacated, on reversal of the decree of dismissal." This view of the law is also supported by the cases: Jyoti Prakash Nandi v. Lala Mukti Prakash Nandi [1918] 22 C.W.N. 297 and Sasiram Kumari v. Meherban Khan [1911] 13 C.L.J. 243. In this view of the law it is clear that the attachment which was put upon the property on the 28th February 1914, disappeared as soon as the claim for mesne profits was dismissed on the 22nd January 1915. The reversal of the order of the 22nd January 1915 on appeal did not revive the attachment. When, in the execution proceedings of 1921, a fresh attachment was effected, therefore, the plaintiff had a right to prefer a fresh claim, which was dismissed on the 2nd August 1921, and the period of one year should be counted from that date. We, therefore, think that the Judgments and decrees of the Courts below are wrong and should be set aside, and the case is accordingly remanded to the 1st Court for a retrial on the merits. The appellants will be entitled to their costs here and the costs of the Courts below are to abide the result of the suit.

Greaves, J.

4. I agree.