

(1878) 06 CAL CK 0021

Calcutta High Court

Case No: None

Koylash Chunder Paul
Chowdhry

APPELLANT

Vs

Preonath Roy
Chowdhry and Others

RESPONDENT

Date of Decision: June 27, 1878

Citation: (1879) ILR (Cal) 610

Hon'ble Judges: Prinsep, J; Markby, J

Bench: Division Bench

Judgement

Markby, J.

This was a suit instituted on the 30th May 1876. The limitation, therefore, which is applicable, is that which is contained in Act IX of 1871. The suit is brought not to set aside any order, but to establish the plaintiffs title to the property which the Court has ordered to be sold, and which has been sold, in execution of a decree to which the present plaintiff was no party. The plaintiff had appeared and asked the Court to release the property from attachment, but the Court refused his application, and ordered the property to be sold. Until the time when Act IX of 1871 came into force, the suit ought to have been brought within one year from the date of the order rejecting the plaintiff's application to get his property released from attachment, by reason of the last twelve words of Section 246 of Act VIII of 1859. These twelve words having been repealed, we must now look to Act IX of 1871 to see what provision is applicable. The provision upon which the Subordinate Judge relies is that which is contained in Clause 15, Schedule II of that Act. He considers that to be a re-enactment of the repealed portion of Section 246 of the Procedure Code of 1859. It appears to me to be nothing of the kind. That clause relates to a suit brought to set aside a summary order. But, as I have pointed out, this is not a suit to set aside a summary order at all. This is a suit brought to establish the plaintiff's right. It is clear that no advantage can possibly accrue to the plaintiff by setting aside a summary order which directed this property to be sold in execution, because the

property has already been sold; therefore, the setting aside of the summary order, refusing to release the property from attachment, would be no advantage to the plaintiff whatsoever, What he wanted and what he asked for was a declaration that the property belonged to himself, and I see no possible means by which Clause 15 of Schedule It can be applied to such a, case as this. If in any case it is necessary to set aside the summary order, then no doubt the suit must be framed so as to have that effect, and then that clause will apply; but if the plaintiff can get all the relief he wants without setting aside the summary order, then he may get that relief without regard to Clause 15. I find it wholly impossible to distinguish this case from that of Durgaram, Bhattacharjee v. Nundo Coomar Roy (Sp. Ap. No. 2112 of 1875, unreported), where we fully considered that matter and came to the conclusion that as long as a plaintiff does not seek to set aside the summary order, he cannot be brought within Clause 15 of the 2nd schedule. We think, therefore, that the lower Appellate Court was wrong, and that the suit ought to have been tried.

2. The decision of the lower Appellate Court will be set aside, and the case remanded to the Munsif to be tried on the merits. Costs will abide the result.