APPELLATE CIVIL.

Before Mookerjee and Chotzner JJ.

MAKAR ALI

v

SARFUDDIN*

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June 13.

Execution Sale—Suit for recovery of possession of property or for refund of purchase money, maintainability of—Rights of the purchaser under the Code of Civil Procedure (Act XIV of 1882), ss. 313, 315 and the Code of Civil Procedure (Act V of 1908), O. XXI, rr. 91, 93, compared and discussed—General Clauses Act (X of 1897), s. 6, cls. (c), (e)—Limitation Act (XV of 1877) Arts. 172, 178, 120 and Limitation Act (IX of 1908), Arts. 166, 181, compared and discussed.

Where a purchaser of certain immoveable property in execution of a mortgage decree, claimed that he was entitled to the benefits of the provisions of the Code of Civil Procedure of 1882, by reason of the fact that the sale took place and the confirmation of his title accrued before the 1st of January, 1909, when the new Code of Civil Procedure of 190 came into operation :—

Held, (i) that the right of the purchaser to maintain the present suit must be determined with reference to the provisions of the Civil Procedure Code of 1882, when the sale took place, and his title as execution purchaser accrued on confirmation.

Munna Singh v. *Gajadhar Singh* (1), *Kishan Lal* v. *Muhammad Safdar Ali* (2), *Sidheswari* v. *Goshain* (3) and other cases followed.

The principle laid down in s. 6, cls. (c) and (e) of the General Clauses Act (X of 1897) applied to such a case.

Colonial Sugar Refining Co. v. *Irving* (4) referred to and discussed.

(ii) that an application to set aside a sale should be made within sixty days from the date of the sale and article 172 of the Indian Limitation Act of 1877 applied.

* Appeal from Appellate Decree, No. 1630 of 1920, against the decree of O. M. Martin, Additional District Judge of Chittagong, dated March 10, 1920, affirming the decree of Sachindra Kumar Sen, Munsif of North Raozan, dated Aug. 31, 1918.

(1) (1883) I. L. R. 5 All. 577.
(2) (1891) I. L. R. 13 All. 383.
(3) (1913) I. L. R. 35 All. 419.
(4) [1905] App. Cas. 369.

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concurrently found that the fifth defendant had no title to the land at any time, and that, consequently, the mortgage as also the execution sale based thereon had passed no title to the plaintiff. In this view, the claim for possession put forward by the plaintiff has been negatived. The alternative claim for recovery of the purchase money from the sixth and seventh defendants has been dismissed on the ground that the only remedy of the plaintiff is by an application under O. XXI, r. 93 read with r. 91 of the Civil Procedure Code, 1908, and that a regular suit is not maintainable for the purpose. The plaintiff has now appealed to this Court and has argued that the decision of the District Judge is erroneous on two grounds, namely, first, that under the Code of 1908, as under the Code of 1882, a regular suit may be maintained by an execution purchaser to recover the purchase money, on the ground that the judgment-debtor had no saleable interest in the property sold, and secondly, that, if under the Code of 1908 the law be deemed to be different from what it was under the Code of 1882, the provisions of the latter Code should be applied to the present case, as they were in force on the date when his purchase became absolute under sections 312 and 314 of that Code.

For the determination of the first question, a comparison between the relevant provisions of the Codes of 1882 and 1908 is essential. Sections 313 and 315 of the Code of 1882 were as follows:

"313. The purchaser at any such sale may apply "to the Court to set aside the sale, on the ground that "the person whose property purported to be sold had "no saleable interest therein, and the Court may make "such order as it thinks fit.

"Provided that no order to set aside a sale shall be "made unless the judgment-debtor and the decree-holder

"have had opportunity of being heard against such "order."

"315. When a sale of immoveable property is set "aside under sections 310A, 312 or 313,

"or when it is found that the judgment-debtor had "no saleable interest in the property which purported "to be sold and the purchaser is for that reason deprived "of it,

"the purchaser shall be entitled to receive back his "purchase money (with or without interest as the Court "may direct) from any person to whom the purchase "money has been paid.

"The repayment of the said purchase money and of "the interest (if any) allowed by the Court, may be "enforced against such person under the rules provided "by this Code for the execution of a decree for money."

Rules 91 and 93 of O. XXI of the Code of 1908 are as follows:—

"91. The purchaser at any such sale in execution "of a decree may apply to the Court to set aside the "sale, on the ground that the judgment-debtor had no "saleable interest in the property sold."

"93. Where a sale of immoveable property is set "aside under rule 92, the purchaser shall be entitled to "an order for repayment of his purchase money, with "or without interest as the Court may direct, against "any person to whom it has been paid."

It will be observed that the second and fourth paragraphs of section 315 are not reproduced in rule 93, while the words "shall be entitled to receive back" which occurred in the third paragraph of section 315 are replaced by the words "shall be entitled to an order for repayment" in rule 93. The defendants-respondents have contended that these changes indicate a substantial alteration in the pre-existing law.

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Under the Code of 1882, it had been held that a purchaser could not only obtain repayment of his purchase money when the sale was set aside upon his application under sec. 313, but that he might also maintain a suit against the decree-holder for recovery of his purchase money, if it should so happen that the judgment debtor had no saleable interest whatever in the property sold. The existence of the alternative remedy by suit was inferred from the provision in the second paragraph of sec. 315 and from the use of the words "may be enforced" in the fourth paragraph of that section. The matter was elaborately examined by a Full Bench of the Allahabad High Court in *Munna Singh* v. *Gajadhar Singh* (1), where it was ruled that a purchaser at a sale in execution of a decree was competent to maintain a suit against the decree holder for recovery of his purchase money when the judgment debtor was found to have had no saleable interest in the property sold; the purchaser was not restricted to the special procedure in the execution department, mentioned in sec. 315. This view was followed in *Kishunlal* v. *Muhammad Safdar Ali* (2), *Sidheswari* v. *Goshain Mayanand* (3), *Muhammad Najibullah* v. *Jainarain* (4), *Girdhar Das* v. *Sidheshwari* (5). A similar view was adopted by the Bombay High Court in *Gurshidawa* v. *Gangaya* (6). The identical principle was approved in this Court in *Haridoyal* v. *Sheikh Samsuddin* (7), *Nityanund* v. *Juggat Chandra* (8) and *Ram Kumar* v. *Ramgour* (9). The same construction was placed upon the Code by the Madras High Court in

(1) (1883) I. L. R. 5 All. 577.
(2) (1891) I. L. R. 13 All. 383.
(3) (1913) I. L. R. 35 All. 419.
(4) (1914) I. L. R. 36 All. 529.
(5) (1918) I. L. R. 40 All. 411.
(6) (1897) I. L. R. 22 Bom. 783.
(7) (1900) 5 C. W. N. 240.
(8) (1902) 7 C. W. N. 105.
(9) (1909) I. L. R. 37 Calc. 67.

Pachayappan v. *Narayana* (1), *Nila Kanta* v. *Imam Sahib* (2), *Mohideen* v. *Mahomed Mura* (3) and *Tirumalaisami* v. *Subramanian* (4). This then was the accepted interpretation of the provisions of the Code of 1882, though there might have been now and then a note of hesitation and even of dissent: *Kishunlal* v. *Muhammad* (5), *Sidheswari* v. *Goshain* (6), *Muhammad* v. *Jainarain* (7), *Sundara* v. *Venkata* (8). It was further held that an application under section 313 to set aside the sale, was required to be made within sixty days from the date of the sale under Article 172 of the second schedule to the Indian Limitation Act, 1877: *Haji* v. *Atharaman* (9). That Article, however, as pointed out in *Sivarama* v. *Rama* (10), would not apply to an application under section 315 for refund of the purchase money; such an application was governed by Article 178, which enacted that an application, for which no period of limitation was provided elsewhere in the schedule, could be made within three years from the date when the right to apply accrued: *Giridhari* v. *Sital* (11). On the other hand, a regular suit, instituted by the auction purchaser under section 315, would be governed by article 120, which provided that a suit for which no period of limitation was provided elsewhere in the schedule, could be instituted within six years from the date when the right to sue accrued: *Nilakanta* v. *Imam Sahib* (2), *Sidheswari* v. *Goshain* (6).

(1) (1887) I. L. R. 11 Mad. 269.
(2) (1892) I. L. R. 16 Mad. 361.
(3) (1912) 23 Mad. L. J. 487.
(4) (1916) I. L. R. 40 Mad. 1009.
(5) (1891) I. L. R. 13 All. 383.
(6) (1913) I. L. R. 35 All. 419.
(7) (1914) I. L. R. 36 All. 529.
(8) (1893) I. L. R. 17 Mad. 228.
(9) (1883) I. L. R. 7 Mad. 512.
(10) (1884) I. L. R. 8 Mad. 99.
(11) (1889) I. L. R. 11 All. 372.

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Under the Code of 1908, it has been urged before us, a substantial alteration has been effected in the law. The purchase money cannot now be got back unless the sale is set aside, further, a suit does not lie for recovery of the purchase money, as it did under the Code of 1882. This view has been adopted in *Nannulal* v. *Bhagwandas* (1), *Parvathi* v. *Govindasami* (2), *Mohideen* v. *Mahomed* (3), *Tirumalaisami* v. *Subramanian* (4), *Subbu* v. *Ponnambala* (5), *Bhagwandas* v. *Allah Bakhsh* (6), *Ramsarup* v. *Dalpat* (7), *Juranu* v. *Jathi* (8), *Manmohan* v. *Gopi* (9), *Prasanna* v. *Ibrahim* (10). But it must be noted that the contrary view found favour with the Bombay High Court in *Rustomji* v. *Vinayak* (11) where without an examination of the changes introduced by the Code of 1908, it was ruled that the purchaser might now, as before, proceed by suit. It is not necessary, for our present purpose, to pronounce a final judgment upon the question of the exact extent of the alteration made in the pre-existing law by the Code of 1908. But this much is indisputable that if the law has been changed, the alteration has been of a substantial character, namely, first, the right to recover the purchase money by a suit instituted within six years after the accrual of the right to sue has been taken away; and, secondly the purchaser is restricted to his remedy by an application under r. 91, which must be made within thirty days from the date of the sale under Article 166 of the schedule to the Indian Limitation Act, 1908, followed by an application under r. 93, which may be

(1) (1916) I. L. R. 39 All. 114.
(2) (1915) I. L. R. 39 Mad. 803.
(3) (1912) 23 Mad. L. J. 487.
(4) (1916) I. L. R. 40 Mad. 1009.
(5) (1918) Mad. W. N. 655.
(6) (1919) P. R. No. 52 page 130.
(7) (1920) I. L. R. 43 All. 60.
(8) (1917) 22 C. W. N. 750.
(9) (1918) 16 A. L. J. 511.
(10) (1917) 41 I. C. 924.
(11) (1910) I. L. R. 35 Bom. 29.

made within three years from the accrual of the right under Article 181. This leads us on to a consideration of the second point.

For the determination of the second question, we must recall that when the execution sale took place in this case and was confirmed, the Code of 1882 was in force. The auction purchaser, whose title accrued on the 11th December, 1908, acquired on that date the right to obtain a refund of the purchase money either by application or by suit, within the prescribed period, in one contingency, namely, if it should be discovered that the judgment-debtor had no saleable interest at all in the property sold. This right can not be deemed to have been extinguished by the promulgation of the Code of 1908, which came into operation on the first day of January, 1909. The view is supported by the decisions in *Sidheswari* v. *Goshain* (1), *Mohideen* v. *Mahomed Mura* (2), *Parvathi* v. *Govindasami* (3), *Tirumalaisami* v. *Subramanian* (4) and *Alaji* v. *Vengu* (5), where the provisions of the Code of 1882 were applied, though the suit had been instituted after the commencement of the Code of 1908; it may be observed parenthetically that, apparently through an oversight, in *Muhammad* v. *Jainarain* (6) the provisions of the Code of 1882 were assumed to be applicable, though the sale had been held on the 26th November, 1910, in execution of a mortgage decree made in 1892. Our conclusion is clearly supported by section 6, clauses (*c*) and (*e*) of the General Clauses Act, 1897, which provide that a repeal shall not affect any right or privilege acquired or accrued under the enactment repealed. The right of the purchaser dates

(1) (1913) I. L. R. 35 All. 419.
(2) (1912) 23 Mad. L. J. 487.
(3) (1915) I. L. R. 39 Mad. 803.
(4) (1916) I. L. R. 40 Mad. 1009.
(5) (1920) Mad. W. N. 736; 12 Mad. L. W. 639.
(6) (1914) I. L. R. 36 All. 529.

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from the confirmation of his purchase, and is primarily to the property, and secondarily, in the alternative and contingently, to repayment; the latter branch becomes enforceable only in consequence of the discovery that the debtor had no saleable interest and that the title which the purchaser had imagined that he had acquired had no real existence. Such an alternative and contingent right is preserved by section 6, clause (*c*) of the General Clauses Act, 1897. Reference may in this connection be made to the lucid exposition contained in the judgment of the Judicial Committee in *Colonial Sugar Refining Co.* v. *Irving* (1). In that case, the creation of the High Court of Australia took away the right of appeal from the Supreme Court of Queensland direct to His Majesty in Council. It was ruled that the Australian Commonwealth Judiciary Act, 1903, whereby the High Court was established, could not be interpreted as retrospectively in operation, and that a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards, was not taken away. Lord Macnaghten observed as follows:

"As regards the general principles applicable to the "case, there was no controversy. On the one hand "it was not disputed that if the matter in question be a "matter of procedure only, the petition is well found-"ed. On the other hand, if it be more than a matter "of procedure, if it touches a right in existence at the "passing of the Act, it was conceded that, in accordance "with a long line of authorities extending from the "time of Lord Coke to the present day, the appellants "would be entitled to succeed. The Judiciary Act is "not retrospective by express enactment or by necess-"ary intentment. And therefore the only question is,

(1) [1905] App. Cas. 369.

"was the appeal to His Majesty in Council a right "vested in the appellants at the date of the passing of "the Act, or was it a mere matter of procedure? It seems "to their Lordships that the question does not admit of "doubt. To deprive a suitor in a pending action of an "appeal to a superior tribunal which belonged to him "as of right is a different thing from regulating proce-"dure. In principle, their Lordships see no difference "between abolishing an appeal altogether and transfer-"ring the appeal to a new tribunal. In either case "there is an interference with existing rights, contrary "to the well-known general principle that statutes are "not to be held to act retrospectively, unless a clear "intention to that effect is manifested."

This opinion is not opposed to the decision of the Judicial Committee in *Abbott* v. *Minister for Lands* (1), where the right in controversy was neither definite nor enforceable from its origin. The principle of the decision in *Colonial Sugar Refining Co.* v. *Irving* (2) has been repeatedly followed: *Kalinga* v. *Narasinha* (3), *Salimamma* v. *Vulli* (4), *Madurai* v. *Muthu* (5), *Rajah of Pittapur* v. *Venkata* (6), *Alaji* v. *Vengu* (7). We must further bear in mind the important circumstance that if, in the class of case now before us, the new Code were held applicable, the remedy of the purchaser, even by way of application, might be found barred by limitation at the date of the commencement of the new Code, as actually happened in *Tirumalai Sami* v. *Subramanian* (8). In such an event, the repealing enactment cannot be given retrospective operation, so as to impose an impossible condition

(1) [1895] App. Cas. 425.
(2) [1905] App. Cas. 369.
(3) (1911) 21 Mad. L. J. R. 631.
(4) (1911) 21 Mad. L. J. R. 764.
(5) (1913) I. L. R. 38 Mad. 823.
(6) (1915) I. L. R. 39 Mad. 645.
(7) (1920) Mad. W. N. 736; 12 Mad. L. W. 639.
(8) (1916) I. L. R. 40 Mad. 1009.

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on pain of forfeiture of a vested right: see *Munjhoori* v. *Akel Mahmud* (1), *Budhu Koer* v. *Hafiz* (2), *Gopeshwar* v. *Jiban Chandra* (3), *Rajah of Pittapur* v. *Venkata* (4). We hold accordingly that the right of the plaintiff to maintain the present suit must be determined with reference to the provisions of the Civil Procedure Code of 1882, when the sale took place, and his title as execution purchaser accrued on confirmation.

The result is that this appeal is allowed and the decree of dismissal made by the District Judge set aside. A decree will be made in favour of the plaintiff against the sixth and seventh defendants for a sum of rupees one hundred and ninety with interest at six per cent. per annum from the 11th December, 1908, to the date of realisation. The plaintiff will have his costs in all the Courts from the sixth and seventh defendants. The other defendants will pay their own costs in all the Courts.

CHOTZNER J. concurred.

B. M. S. *Appeal allowed.*

(1) (1913) 17 C. L. J. 316.
(2) (1913) 18 C. L. J. 274.
(3) (1914) I. L. R. 41 Calc. 1125; 19 C. L. J. 549.
(4) (1915) I. L. R. 39 Mad. 645