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the order was that 'the money which was paid into Court belonged to the party who might be eventually found entitled to the sum.'

The result therefore is that the appeal must be dismissed with costs which will include the costs of this application—(all such costs to be provable in the insolvency)—with a direction to the Registrar to pay the sum of Rs. 21,850 with the interest which has accrued in respect thereof to the attorneys for the plaintiff respondents.

WALMSLEY J. I agree.

Attorneys for the applicants: *Khaitan & Co.*

N. G.

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## APPELLATE CIVIL.

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*Before Pearson and Graham JJ.*

HARIPADA HALDAR

v.

BARADA PRASAD ROY CHOWDHURY AND  
 OTHERS.\*

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 May 8.

*Execution Sale. Application to set aside—Limitation, period of—Limitation Act (IX of 1908), Sch. I, Arts. 160, 181—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90.—Bengal Tenancy Act (VIII of 1885), s. 173 (3).*

All applications whether under section 47, or Order XXI, rule 90, Code of Civil Procedure, are governed by the 30 days' period of limitation provided by article 166 of the 1st Schedule of the Limitation Act of 1908.

\* Appeal from Order No. 343 of 1922, against the order of G. B. Mumford, 2nd Additional District Judge, 24-Parganas, dated June 8, 1922, affirming the order of Tarak Nath Bose, Munsif of Diamond Harbour, dated May 26, 1921.

Article 166 of the 1st Schedule of the present Limitation Act is very much wider than the corresponding provision of the former Act and is quite general in its terms governing all applications to have an execution sale set aside.

*Chand Moni Dasya v. Santu Moni Dasya* (1) and *Chandrama Rai v. Maharaja of Dumraon* (2) distinguished.

An application for having a sale set aside under s. 173 (3) of the Bengal Tenancy Act is cognizable under s. 47, Code of Civil Procedure, and in consequence the operation of article 166 will be attracted.

SECOND APPEAL from Order by Haripada Haldar and others, the applicants.

The facts of the case out of which this appeal arises are as follows:—In August 1920 one Haripada Haldar and others applied to the Munsif, 4th Court, at Diamond Harbour to set aside a sale in execution of a rent decree. The applicants with a very large number of co-sharers held under the decree-holder, Barada Prasad Roy Chowdhury (one of the Opposite Parties) a *chak* comprising an area of 147 bighas and bearing a yearly rental of Rs. 183-12. Barada Prasad had sued the tenants (the applicants and their co-sharers) for arrears of rent and obtained a decree on 28th August 1917. The decree was put into execution on 18th January 1918 and in the course thereof this *chak* was put up to sale as the tenure in default and was purchased by one Jadu Nath Sarma on 2nd July 1918. The applicants wanted this sale to be set aside, the allegations in their petition being of a sweeping character. Both the decree and the sale were attacked, the applicants alleging that the decree was obtained fraudulently by suppression of summons, and that the sale was brought about fraudulently by suppression of process for publication of the sale. This double fraud was said to have been committed by two of the applicants,

(1) (1897) 1 C. W. N. 534.

(2) (1916) 33 Ind. Cas. 209.

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co-sharers, the judgment-debtors Nos. 2 and 3 (Manahar and Kusai), acting in collusion with the decree-holder, this collusion to defraud the applicants being attributed to the ill-feeling both the decree-holders and the judgment-debtors entertained against the applicants. It was further alleged that the purchase, which was for a grossly inadequate price, was made by the judgment-debtors Nos. 2 and 3 *benami* in the name of Jadu Nath Sarma. The delay in making the application was explained by the applicants' stating that they came to learn of the sale on the 27th Asar, 1317 B.S., when the judgment-debtors Nos. 2 and 3 forcibly ousted the applicants from a 6 bigha plot included in their share of the *chak* in question, declaring that they had purchased the *chak*. This application was opposed by the objectors, Nirapada and Bipin (the sons of Manahar and Kusai). They contended that it was they, and not their respective fathers, who had purchased the property in the name of Jadu Nath Sarma. They pleaded limitation and denied that the decree or the sale was in any way fraudulent. They maintained that the purchase in the name of Jadu Nath Sarma, who was the spiritual guide of all the judgment-debtors, was made to their knowledge and with their consent being really at their suggestion.

The learned Munsif found that Jadu Nath Sarma was really a *benamidar* for two of the judgment-debtors as alleged, but he also found that there was no fraud proved and that the application was time-barred. In the applicants' appeal it was strenuously argued before the Additional District Judge of the 24-Parganas that in any case, so far as the application could be said to fall under section 173(3) of the Bengal Tenancy Act, it was governed by article 181 of the Limitation Act and was therefore within time. This

appeal having been dismissed, the applicants preferred the present second appeal from order to the High Court.

[*Babu Surendra Chandrà Sen*, for the respondents, took the preliminary objection, on the appeal being opened, that the appeal was incompetent as (i) no appeal was provided for by law against an order passed under section 173 (3) of the Bengal Tenancy Act, and as (ii) the heirs and legal representatives of one of the deceased respondents had not been brought on the record.]

*Babu Hira Lal Chakravarti*, for the appellants. I have filed an application under section 115 of the Code of Civil Procedure in the alternative, but I submit that an appeal does lie. The application was made, as the heading shows, under section 47 C. P. C. and section 173 of the Bengal Tenancy Act. It is the nature of the objections and not the findings which can decide the question whether the order is appealable or not. As to limitation, I admit that the present article 166 of the first schedule of the Limitation Act is much wider than the same provision of the Act of 1877, and therefore it may be argued that all applications under section 47 must be made within 30 days. But the application in the present case is made not merely under section 47, but under section 173 (3) of the Bengal Tenancy Act, for which no period is expressly provided in the Limitation Act, and therefore it must come under the residuary article, viz., article 181 of the first schedule of the Limitation Act which provides a period of 3 years. It is noticeable that article 166 is confined to applications under the Code of Civil Procedure. If it had been the intention of the Legislature to make that article applicable when the sale is sought to be set aside

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under the Bengal Tenancy Act or any other special or local law, the Legislature would have provided for that limitation in article 166. In fact, section 173 (3) is a self-contained provision for annulment of sales when the judgment-debtor is the purchaser and is absolutely independent of section 47 of the Code of Civil Procedure. [Cites and explains the cases of *Chand Moni Dasya v. Santo Moni Dasya* (1) and *Chandrama Rxi v. Maharaja of Dumraon* (2)].

*Babu Surendra Chandra Sen* (with him *Babu Hemendra Chandra Sen*), for the respondents. It is practically admitted by the other side that the present article 166 governs all applications under section 47 of the Code of Civil Procedure. The question therefore is whether an application under clause (3) of section 173 of the Bengal Tenancy Act is also one under section 47 of the Code of Civil Procedure, so as to attract the operation of article 166. [Cites *Chand Moni's case* (1) to show that it is also an application under section 47.] It would be singular if an application, to have a sale set aside on the ground that the judgment-debtor had purchased it, might be made within 3 years, whereas a similar application on any other ground must be made within 30 days. The present application, it is noticeable, relates to a question about the execution of a decree as between the parties to the suit, and therefore section 47 of the Code of Civil Procedure is applicable.

*Babu Manmatha Nath Roy*, for the respondents Nos. 5 and 6, cited the case of *Satish Chandra Kanungoe v. Nishi Chandra Dutta* (3) and supported the respondent's vakil's contentions.

(1) (1897) 1 C. W. N. 534.

(2) (1916) 38 Ind. Cas. 209.

(3) (1919) I. L. R. 46 Calc. 975.

*Babu Hira Lal Chakravarti*, for the appellants, in reply.

*Cur. adv. vult.*

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PEARSON AND GRAHAM JJ. This appeal is directed against an order of the 2nd Additional District Judge of the 24-Parganas confirming the order of the Munsif, 4th Court, Diamond Harbour, dismissing an application for setting aside a sale in execution of a rent decree. The judgment-debtor applicants, now appellants,\* with a large number of co-sharers held under the decree-holder, Barada Prasad Roy Chowdhury, a *chak* comprising an area of 147 bighas bearing a yearly rental of Rs. 183-12. The said Barada Prasad sued the tenants, the applicants, and their co-sharers for arrears of rent and obtained a decree on the 28th August 1917. The decree was in due course put into execution on the 18th January 1918 and the *chak* in default being put up to sale was purchased by one Jadu Nath Sarma on the 2nd July 1918. The judgment-debtor Haripada and others then applied to have the sale set aside and assailed both the decree and the sale on various grounds. One of the points for determination was whether the application was barred by limitation, and the finding of the Munsif was that the case was governed by Article 166 of the Limitation Act, and that the application was time-barred, and he accordingly dismissed it with costs. On appeal, the learned Additional District Judge confirmed the decision of the Munsif holding that Article 166 and not Article 181 was applicable to the case, and dismissed the appeal with costs. The judgment-debtors, Haripada Haldar and others, then filed this Second Appeal.

A preliminary objection has been taken on behalf of the respondents to the hearing of the appeal *first*,

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on the ground that insofar as the application was one under section 173 of the Bengal Tenancy Act, no appeal lies either in this Court, or in the Court of first appeal; and secondly, that the appeal is not competent by reason of non-joinder of parties, the heirs and legal representatives of one of the respondents (No. 10) Ananda Charan Haldar, not having been brought on the record. We do not think it is necessary to go into these matters because we are satisfied that the appeal fails upon the merits. On the merits the sole point for determination is whether the Courts below have rightly held that the application was barred by limitation. The execution sale took place on the 2nd July 1918 and the application for setting aside the sale was made in August 1920, i.e., some 2 years later. Under Article 166 the period of limitation is 30 days, whereas under Article 181 it is three years. If the former is applicable, the application was clearly time-barred, while if Article 181 applies it was within time. In our judgment the Courts below have rightly held that the case is governed by Article 166. The rulings which have been referred to in support of the contrary view—*Chand Moni Dasya v. Santa Moni Dasya* (1) and *Chandrama Rai v. Maharaja of Dumraon* (2)—were decided under the Act as it formerly stood before the passing of the present Limitation Act when Article 166 was restricted to a particular class of applications. That article as now worded is very much wider and is quite general in its terms, governing all applications to have an execution sale set aside. Indeed, it is arguable having regard to the extremely wide wording of the Article that it covers the case of applications made under Section 173 of the Bengal Tenancy Act. But be that as it may, it is clear that an application under Section 173, Bengal Tenancy Act, is

(1) (1897) 1 C. W. N. 534.

(2) (1916) 38 Ind. Cas. 209.

cognizable under Section 47, Code of Civil Procedure, (see *Chand Moni Dasya v. Santa Moni Dasya* (1), relating to Section 244 of the old Civil Procedure Code), and that being so the operation of Article 166 will be attracted. This view accords moreover with the fitness of things as it is manifestly anomalous that the period of limitation for setting aside a sale under the Bengal Tenancy Act should be so long as three years, whereas under the Code of Civil Procedure it is only 30 days. As pointed out in *Satish Chandra Kanungoe v. Nishi Chandra Dutta* (2), the policy of the Legislature appears to be that questions arising in execution should be brought before the Courts and decided with the least possible delay. In the present instance nearly two years elapsed before the application was made.

For the reasons stated, the appeal in our judgment fails and must be dismissed with costs. We assess the hearing fee at two gold mohurs.

An application is also made under Section 115, Civil Procedure Code, in the alternative. Inasmuch as we have disposed of the appeal on the merits, it is not necessary to pass any order under Section 115, Civil Procedure Code.

G. S.

*Appeal dismissed.*

(1) (1887) 1 C. W. N. 534.

(2) (1918) I. L. R. 46 Cal. 975.

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