

APPELLATE CIVIL.

Before B. B. Ghose and N. K. Bose JJ.

NECKBAR

v.

1928.
July 27.

PRAKASH CHANDRA NAG CHAUDHURI.*

Limitation—Limitation Act (IX of 1908), Art. 180—Application by auction-purchaser for delivery of possession—When sale becomes absolute within meaning of Art. 180—Confirmation of sale before application for setting aside sale—Proceedings to set aside sale, effect of.

The period of three years provided for in Article 180 of the Limitation Act, 1908, for an auction-purchaser's application for delivery of possession should be reckoned from the date of the confirmation of the sale under Order XXI, rule 92 and not from that of the final disposal of the judgment-debtor's application under Order XXI, rule 90.

The judgments of the majority in *Muthu Korakkai Chetty v. Madar Ammal* (1) dissented from and the judgment of Oldfield J. followed. *Bajinath Sahai v. Ramgut Singh* (2) distinguished.

SECOND APPEAL by the judgment-debtor.

In this case the trial court and the lower appellate court overruled the judgment-debtor's objection that the decree-holder-purchaser's two applications for delivery of possession in Execution Cases Nos. 420 and 421 of 1921 were barred by limitation. The facts and the material dates are set out in detail in the judgment of Mr. Justice B. B. Ghose.

Mr. Akhilchandra Datta (with him *Mr. Shyama Prasanna Deb*), for the appellant. Under Article 180, the auction purchaser has to make his application for delivery of possession within three years from the date when the sale becomes absolute. Under O. XXI, r. 92, the sale becomes absolute when it is

*Appeal from Appellate Order, No. 504 of 1927, against the order of Ashutosh Ghose, Subordinate Judge of Tippera, dated Aug. 29, 1927, affirming the order of Hiralal Mukerjee, Munsif of Comilla, dated May 4, 1927.

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confirmed. In this case the sales were confirmed on the 23rd June, 1922, and on the 27th November, 1922. The applications for delivery of possession were not made within 3 years from these dates. Therefore, the applications are out of time. The Madras Full Bench case of *Muthu Korakkai Chetty v. Madar Ammal* (1) has been cited as an authority for the proposition that time should not run from the first confirmation of the sale but from the final disposal of the application for the setting aside of the sale. My submission is this is not good law. Their Lordships went beyond the terms of the Reference. The only question that was referred was whether the cause of action for such an application was suspended during the pendency of the proceedings for the setting aside of the sale. In this case the application will be barred even if the cause of action is held to be suspended.

Mr. Jogesh Chandra Roy (with him *Mr. Kiran Mohan Sarkar*), for the respondent. The sale cannot become absolute till the disposal of the proceedings for setting aside the sale. Therefore, the cause of action for such an application remains suspended till those proceedings are disposed of. The principles laid down in *Surno Moyee v. Shooshee Mokhee Burmonia* (2) are applicable. For the purpose of limitation, there was no final or definitive confirmation of sale until the application to set aside the sale was dismissed finally. Cites *Baijnath Sahai v. Ramgut Singh* (3).

Mr. Akhil Chandra Datta, in reply. The two cases cited are distinguishable. In the case of *Baijnath Sahai* (3), the order of confirmation of sale was set aside by the Board of Revenue. In this case, the orders passed on the 23rd June, 1922 and 27th November 1922 were never set aside.

GHOSE J. This is an appeal by the judgment-debtor against the order of the Subordinate Judge affirming that of the Munsif by which he rejected the objection of the judgment-debtor that the application

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made by the decree-holder for delivery of possession under Order XXI, rule 95 of a certain property which was in the occupancy of the judgment-debtor and which the decree-holder had purchased in execution of his decree was barred by limitation. The sale was held on the 19th May, 1922. It was confirmed on the 23rd June, 1922. On the 18th June, 1925 an application was made by the judgment-debtor to set aside the sale. That application was dismissed on the 29th April, 1926 by the trial court. The judgment-debtor appealed against that decision and that appeal was also dismissed on the 15th September, 1926. The decree-holder made the application for delivery of possession on the 28th February, 1927. The objection of the judgment-debtor is that this application is barred by limitation. Both courts have answered the question in the negative and have allowed the application of the decree-holder.

There is no question that Article 180 of the first Schedule of the Limitation Act applies to such an application as this. The question is when the period of limitation begins to run. The words in the third column of the Limitation Act are "when the sale becomes absolute." The contention on behalf of the appellant is that time runs from the 23rd June, 1922 when the sale became absolute under the provisions of Order XXI, rule 92. If that is so, then the application, which had been made nearly five years after that date is clearly barred by limitation. It is also contended as a subsidiary proposition that even if it be held that the right to apply for delivery of possession was suspended from the date when the judgment-debtor made his application for setting aside the sale on the 18th June, 1925 till the date of the final disposal of his application by the appellate court, even then the period of three years had expired before the 28th February, 1927, and in any view of the case the application is barred by limitation. The learned Subordinate Judge has held that the period commenced from the final disposal of the application for setting aside

the sale made by the judgment-debtor, that is, on the 15th September, 1926, and therefore the application is within time. The learned Subordinate Judge relies upon the Full Bench case of the Madras High Court *Muthu Korakkai Chetty v. Madar Ammal* (1) and in particular the observations made in the judgment of the Officiating Chief Justice, Sir Abdur Rahim. In that case the facts were similar to the present case. The question which was referred to the Full Bench for answer was, "whether the existence of the cause of action for an application for delivery of possession to which Article 180, Schedule I, Limitation Act, applies is suspended during the pendency of proceedings for setting aside of the sale." In answering that question the Officiating Chief Justice made the observation which was assented to by the majority of the Judges that the period of limitation should be computed from the date of the order disallowing the petition for setting aside the sale on the ground of fraud and not from the date of the first confirmation. Oldfield J. was of the contrary opinion and he held that the answer should be that when once a cause of action has arisen it is not suspended by later events. Sadasiva Ayyar J. held that the cause of action was suspended during the interval of the pendency of the application for setting aside the sale.

On behalf of the respondent it is urged very forcibly that the whole cause of action should be held to be suspended up to the 15th September, 1926. Reference has been made to the case of *Surno Moyee v. Shooshee Mokhee Burmonia* (2). The question in that case, however, was quite different from the present one. There the *zemindar* sold a *patni* under Regulation VIII of 1819 for arrears of rent. The *patnidar* brought a suit for setting aside the sale. That was allowed after a good deal of litigation when the *patnidars* who had been dispossessed by the purchasers were restored to possession with mesne profits to be paid by the purchasers. After the restoration, the *zemindar* brought a suit for rent for the period during

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which these *patnidars* were out of possession. It was held by the Judicial Committee that the cause of action accrued at the date when the auction sale was set aside and limitation should run from that date. It was held that when the purchasers were in possession and the old *patnidars* were out of possession by virtue of the sale under Regulation VIII of 1819, the landlord had no cause of action, as she was in the position of a person whose claim had been satisfied. It is, however, unnecessary to discuss the question as regards the suspension of the period of limitation which has been decided in some cases by the Privy Council. The cases fall under two classes, where there is suspension of the running of the time under certain circumstances and where the cause of action has arisen afresh at a certain time. The case on which the respondent very strongly relies is that of *Baijnath Sahai v. Ramgut Singh* (1).

In that case the question was whether a suit brought by a person for setting aside a revenue sale was barred under Article 12, Schedule I of the Limitation Act. The facts shortly stated were these:—The revenue sale was held on the 24th September, 1882. It purported to have been confirmed by the Commissioner on the 25th January, 1884 who refused the petition of the owner for setting aside the sale. The plaintiff then being dissatisfied with the order of the Commissioner made an application to the Board of Revenue. The Board of Revenue set aside the order of the Commissioner confirming the sale on the 12th August, 1884 and sent back the proceedings before the Collector. The result was that the order of the Collector confirming the sale on the 25th January, 1884 was discharged and the sale remained unconfirmed. The Collector on receiving the proceedings back refused to confirm the sale. There was an appeal again to the Commissioner who held that he had no jurisdiction to entertain the appeal. Then the defendant in the suit appealed again to the Board

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of Revenue, and on that occasion the Board of Revenue reversed their previous judgment holding that everything that had been done by them was without jurisdiction. They discharged their previous order and they also discharged the subsequent order of the Collector, the result of which was that they confirmed the order of the Commissioner confirming the sale which was passed on the 25th January, 1884. This order was made on the 21st August, 1886 and from that date the order of the Commissioner of the 25th January, 1884 became an operative order. Upon these facts, their Lordships held that "there was no final conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January, 1884, became definitive and operative by the final judgment of the Board of Revenue on the 21st August, 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date." Strong reliance has been placed upon these words, and it is contended that there was no final or definitive confirmation of the sale in this case until the application of the judgment-debtor to set aside the sale was dismissed finally in September, 1926. Now the difference between the case of *Baijnath Sahai v. Ramgut Singh* and this case is that in *Baijnath Sahai's case* the order which the plaintiff wanted to set aside by his suit was actually set aside by the Board of Revenue, and it was, after vicissitudes of fortune, that the order was finally restored on the 21st August, 1886. Under those circumstances it seems to me that their Lordships held that the plaintiff could not bring a suit for setting aside the order confirming the sale of January, 1884 before August, 1886. That order was really not in existence in the interval, it having been set aside by the Board of Revenue in August, 1884. To my mind that is the distinction between that case and the present case, that in the present case the order confirming the sale was never set aside but

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remained an effective order throughout. The sale became absolute, as I have already stated, on the 23rd June, 1922. Up to the 18th June, 1925 nothing happened and in the ordinary course the application for delivery of possession would have been barred after the lapse of about five days if the judgment-debtor had not made any application for setting aside the sale. The mere fact that the judgment-debtor had made such an application did not prevent the decree-holder from making his application for delivery of possession. In *Baijnath Sahai's case* when there was no order confirming the sale in existence the plaintiff could not bring a suit for setting aside the sale. Here the decree-holder could always make his application for delivery of possession, and I do not see any reason why the provisions of Article 180 should not be given effect to.

It is, however, contended on behalf of the respondent that under rule 92 of Order XXI, the court can make an order confirming the sale only when no application is made or where such application is made and disallowed and thereupon the sale becomes absolute. It is urged that in the present case although the court made an order confirming the sale which had the effect of making the sale absolute, still an application was made under rule 90 and therefore the order which was made under rule 92 was not an effective order. The answer to that contention seems to me that the meaning of that rule is that, when no such application is made under the ordinary rules of limitation, the order confirming the sale should be made. Article 166 gives the period of 30 days for making such an application, and when no application is made within that period, the court has to make the order under rule 92. I do not think that, if for some reason or other, that is by the operation of section 18 of the Limitation Act or for some other reason, the judgment-debtor prays for the time for making the application for setting aside the sale being extended, the order which has already been made confirming the sale should be considered as ineffective. That order

should be considered to be effective so long as it is not set aside. With very great respect I am unable to agree with the opinion of the majority of the Judges in the case of *Muthu Korakkai Chetty* (1) which was not really an answer to the question referred to the Full Bench. It is not necessary for me to decide in this case whether the period of limitation was suspended during the pendency of the hearing of the application of the judgment-debtor for setting aside the sale, for assuming that to be so the present application would be barred. In my opinion, the period of limitation in this case commenced to run from 23rd June, 1922.

On all these grounds in my opinion the application made by the decree-holder is barred by limitation. The appeal is allowed and the application of the decree-holder is dismissed with costs in all courts. The hearing fee is assessed at three gold mohurs.

BOSE J. I agree.

R.K.C.

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