

PRIVY COUNCIL.

CHANDRAMANI SHAHA

v.

ANARJAN BIBI.

P. C.*
1934April 19, 20;
May 10.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Limitation—Sale in execution—Purchaser's application for delivery of possession—“Time when the sale becomes absolute”—Code of Civil Procedure (Act V of 1908), s. 107, sub-s. (2); Order XXI, rr. 92, 95—Indian Limitation Act (IX of 1908), Sch. I, Art. 180.

Where a Subordinate Judge has disallowed an application under Order XXI, rule 90, to set aside a sale in execution, and has made an order under rule 92 (1) confirming the sale, and an appeal from the disallowance has been dismissed by the High Court, the three years' period provided by the Indian Limitation Act, 1908, Schedule I, Article 180, for an application under Order XXI, rule 95, by the purchaser for delivery of possession runs from the date of the order on appeal; the High Court, having under the Code of Civil Procedure, 1908, section 107, sub-section (2), the same powers as the Subordinate Judge, the “time when the sale becomes absolute” for the purposes of Article 180 is when the High Court disposes of the appeal.

Neckbar v. Prakash Chandra Nag Chaudhuri (1) disapproved.

Chhogan Lal Bagri v. Behari Lal Saha Ray (2) approved.

Judgment of the High Court reversed.

Consolidated appeal (No. 87 of 1932) from two decrees of the High Court (August 19, 1930) reversing two orders of the first Subordinate Judge of Tippera at Comilla (February 28, 1929).

The appellants purchased, with the leave of the court, immoveable properties at two auction sales in execution of two mortgage decrees in their favour. Two sets of objections to the sale in each case were filed under Order XXI, rule 90, one set by respondents Nos. 1 to 6 and one set by respondents Nos. 7 to 19. The objections were heard together by the Subordinate Judge and were dismissed by orders made

*Present : Lord Blanesburgh, Lord Wright and Sir Lancelot Sanderson.

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on April 15 and 22, 1924, respectively; he confirmed both sales under Order XXI, rule 92. Appeals to the High Court by the objectors were dismissed on March 17, 1927. On May 19 and June 6, 1928, the Subordinate Judge granted the appellants as purchasers sale certificates under Order XXI, rule 94.

On September 10, 1928, the appellants applied to the Subordinate Judge for an order for delivery of possession in respect of each purchase.

The Subordinate Judge made an order in each case, holding that the applications were not barred by limitation, as the period of three years allowed by the Indian Limitation Act, 1908, Schedule I, Article 180, ran from March 17, 1927, when the High Court had dismissed the objectors' appeals.

Upon appeals by respondents Nos. 1 to 3 to the High Court, the decisions were reversed and the applications dismissed. The learned Judges, Mukerji and Mitter JJ., following the decision of the Court in *Neckbar v. Prakash Chandra Nag Chaudhuri* (1), held (2) that the applications were barred, as they had not been made within three years of the confirmation of the sales by the Subordinate Judge.

De Gruyther K. C. (with him *Parikh*) for the appellants. The sale did not become absolute within the meaning of Article 180 of the Limitation Act until the High Court finally disposed of the judgment-debtors' application to set it aside; consequently, the appellants' applications were not barred. The view that the time ran from the date of the order of the Subordinate Judge would result in difficulty if the High Court allowed a judgment-debtor's appeal, but the decision was reversed by the Privy Council. The facts of the present case are the same as those in

(1) (1928) I. L. R. 56 Calc. 608.

(2) (1930) 56 C. L. J. 574.

Chhogan Lal Bagri v. Behari Lal Saha Ray (1), in which it was held by the High Court that the sale became absolute only upon the appeal to the High Court being dismissed. In that case the High Court purported to distinguish *Neckbar v. Prakash Chandra Nag Chaudhuri* (2), but it is submitted that the cases conflict and that the last named case was wrongly decided. The judgments of the majority of the Madras High Court in *Muthu Korakkai Chetty v. Madar Ammal* (3) support the appellants. In *Baijnath Sahai v. Ramgut Singh* (4), Article 12 of the Limitation Act, 1877, and section 311 of the Code of 1882, were related, and there was an intermediate period when there was no confirmed sale, but the judgment of the Board supports the view that in the present case there was no final confirmation of the sale until dismissal of the judgment-debtors' appeal to the High Court. By section 107, sub-section (2) of the Code the High Court had all the powers of the Subordinate Judge and the dismissal of the appeal operated to confirm the sale without formal order to that effect. Section 16 of the Indian Limitation Act does not affect the present question. It is further submitted that no appeal to the High Court lay from the order of the Subordinate Judge for recovery of possession. That contention could not be raised in the High Court having regard to the decision of the Full Court in *Kailash Chandra Tarapdar v. Gopal Chandra Poddar* (5). That decision was based upon the view that the application was one to which section 47 of the Code applied, but the High Courts other than those at Calcutta and Madras have taken the contrary view. [Reference was made to *Tribeni Prasad Singh v. Ramasray Prasad Chaudhuri* (6) and *Gaya Bakhsh Singh v. Rajendra Bahadur Singh* (7).]

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(1) (1932) 56 C. L. J. 520.

(2) (1928) I. L. R. 56 Calc. 608.

(3) (1919) I. L. R. 43 Mad. 185

(4) (1896) I. L. R. 23 Calc. 775 ;

L. R. 23 I. A. 45.

(5) (1926) I. L. R. 53 Calc. 781.

(6) (1931) I. L. R. 10 Pat. 670.

(7) (1927) I. L. R. 3 Luck. 182.

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[The Board intimated that as the last contention had not been raised in India it was not desirable that it should be raised in the absence of the respondents.]

The respondents did not appear.

The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. These are two consolidated appeals from two decrees dated the 19th August, 1930, of the High Court of Judicature at Fort William in Bengal, which reversed two orders dated the 28th February, 1929, of the court of the first Subordinate Judge of Tippera at Comilla.

The question for determination is, whether the appellants, who purchased with the leave of the court at two auction sales certain mortgaged property in execution of two mortgage decrees in their favour, are entitled to delivery of possession of the said property.

It was alleged on behalf of the respondents that the two applications which were made by the appellants for delivery of possession of the said property were out of time and barred by the Indian Limitation Act, 1908.

The Subordinate Judge held that the applications were not barred and made an order for delivery of possession of the property referred to in each application.

The respondents Nos. 1 to 3 appealed in each case to the High Court, and, on the 19th August, 1930, the learned Judges of the High Court delivered a judgment which disposed of the two appeals. In pursuance thereof decrees were made setting aside the orders of the Subordinate Judge and dismissing the applications for possession on the ground that they were barred by the Limitation Act.

From these decrees the appellants have appealed to His Majesty in Council. The respondents were not represented.

The material facts are as follows :—

In 1901, respondents Nos. 1 to 8 or their predecessors executed a mortgage in respect of 19 immoveable properties in favour of appellant No. 1, who took the mortgage for himself and his co-sharers, the other appellants or their representatives. In 1914, the appellants sued on the mortgage, making the mortgagors respondents Nos. 1 to 8 or their predecessors principal defendants and the remaining respondents or their predecessors *pro forma* defendants. On the 10th July, 1919, the final mortgage decree for sale was passed. The same respondents executed in 1903 in favour of the appellants another mortgage in respect of the same 19 and 19 other immoveable properties and in 1914 the appellants sued the respondents in the same manner as mentioned before. On the 10th July, 1919, the final mortgage decree for sale was passed.

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In March, 1922, the appellants took out execution of both decrees, the first for Rs. 19,315-3 and the second for Rs. 32,180-15-9. At auction sales in execution in both cases the appellants purchased with the leave of the court on the 10th February, 1923, the mortgaged properties, in the first case for Rs. 18,225 and in the second case for Rs. 30,026.

Applications to the Subordinate Judge were made on behalf of the judgment-debtors under Order XXI, rule 90, of the Code of Civil Procedure, 1908, to set aside the sales. On the 15th April, 1924, the Subordinate Judge made orders disallowing the said applications, and, on the 22nd of April, 1924, he confirmed the sales in pursuance of Order XXI, rule 92, of the said Code. On the 21st July, 1924, appeals by certain of the judgment-debtors were filed in the High Court against the orders of the Subordinate Judge, dated the 15th April, 1924. On the 17th March, 1927, the High Court dismissed the said appeals.

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In pursuance of Order XXI, rule 94, the Subordinate Judge granted sale certificates to the appellants in the first case on the 19th May, 1928, and in the second case on the 6th June, 1928.

On the 10th September, 1928, the appellants made an application in each case to the Subordinate Judge for possession of the properties purchased by them at the said auction sales. The applications were made under Order XXI, rule 95, of the first schedule of the Code of Civil Procedure.

The respondents Nos. 1 to 3 objected to the said applications on the ground that they were barred by limitation. They alleged that the sales had become absolute on the 22nd April, 1924, when the Subordinate Judge confirmed the sales, and that inasmuch as the applications for delivery of possession were not made until the 10th September, 1928, the said applications were out of time by reason of Article 180 of the Limitation Act, which provides that such an application must be made within three years from the time when the sale becomes absolute.

As already stated, the Subordinate Judge held that the applications were not out of time; he considered that, inasmuch as the judgment-debtors appealed against his orders of the 15th April, 1924, time did not begin to run until the date of the disposal of the appeals, *viz.*, the 17th March, 1927, and, therefore, the applications for possession made on the 10th September, 1928, were made within the three years specified by Article 180 of the Limitation Act.

The learned Judges of the High Court were of opinion that the sales became absolute on the 22nd of April, 1924, when the Subordinate Judge confirmed the sales, and, therefore, that the applications for possession, which were made on the 10th September, 1928, were barred by reason of the said Article.

There is no doubt that Article 180 of the Limitation Act, 1908, is applicable to the matter now under consideration. It provides that a purchaser

of immoveable property at a sale in execution of a decree for delivery of possession must make the application within three years from the time when the sale becomes absolute.

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In order to ascertain when such a sale as is referred to in the said Article becomes absolute, reference must be made to the Code of Civil Procedure, and the orders and rules contained in the first schedule thereto, for that is the Code which contains the provisions relating to the sale of immoveable property in execution of decrees.

Order XXI, rules 82 to 96, in the said schedule are applicable to sales of immoveable property. Rules 89, 90 and 91 deal with applications to set aside a sale and rule 92 (1) provides as follows:

Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute.

There is no doubt that the above-mentioned rule is applicable to the present case: for, as already stated, the judgment-debtors did apply to set aside the sales, and the Subordinate Judge disallowed the applications on the 15th April, 1924, and on the 22nd April, 1924, he confirmed the sales.

The sales therefore became absolute on the 22nd April, 1924, at any rate so far as the court of the Subordinate Judge was concerned. But the judgment-debtors had a right of appeal under Order XLIII, rule (1) (j) against the orders of the Subordinate Judge, by which he disallowed their applications to set aside the sales. This right of appeal the judgment-debtors exercised. Upon the hearing of the appeals, the High Court, by reason of the provisions of section 107 (2) of the Code, had the same powers as the court of the Subordinate Judge.

In the present case, the High Court dismissed the appeals and on such dismissal the orders of the Subordinate Judge confirming the sales became effective and the sales became absolute.

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In considering the meaning of the words in Article 180 of the Limitation Act, it is useful to consider the converse case. Take a case in which the Subordinate Judge allowed the application to set aside the sale; in that case, of course, there could be no confirmation of the sale as far as the Subordinate Judge was concerned, as there would be no sale to be confirmed. But if, on appeal, the High Court allowed the appeal, and disallowed the application to set aside the sale, the High Court would then be in a position to confirm the sale, and, on such an order of confirmation by the High Court, the sale would become absolute. Again, take a case in which the Subordinate Judge disallowed the application to set aside the sale; there would then be confirmation of the sale by the Subordinate Judge and the sale would become absolute as far as his court was concerned. If the High Court allowed an appeal, and set aside the sale, there would then be no sale, and, of course, no confirmation and no absolute sale.

Upon consideration of the sections and orders of the Code, their Lordships are of opinion that, in construing the meaning of the words "when the sale becomes absolute" in Article 180 of the Limitation Act, regard must be had not only to the provisions of Order XXI, rule 92 (1) of the schedule to the Civil Procedure Code, but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under Order XXI, rule 92 (1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above-mentioned application.

Their Lordships, therefore, are of opinion that on the facts of this case the sales did not become

absolute within the meaning of Article 180 of the Limitation Act until the 17th March, 1927, and that the applications for possession of the properties purchased at the auction sales were not barred by the Limitation Act.

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Their Lordships' attention was drawn to certain cases decided by the High Court at Calcutta, from which it appears that there has been a difference of opinion on the point now under consideration.

The learned Judges, in their judgment in this case, referred to two unreported cases which in their opinion covered the point.

The first of these cases, decided on the 27th July, 1928, *viz.*, *Neckbar v. Prakash Chandra Nag Chaudhuri* (1) is now reported. This is undoubtedly a decision which supports the judgment of the learned Judges now under consideration, for it was held that—

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 decision of the High Court in the present case was given on the 19th August, 1930, and followed the decision in the above-mentioned cited case. It may be noted that it is now reported in 56 Cal. L. J. 574.

On an earlier page of the same volume of the Calcutta Law Journal, the case of *Chhogan Lal Bagri v. Behari Lal Saha Ray* (2) is reported. That case was decided by a Division Bench of the High Court at Calcutta on the 15th July, 1932, *i.e.*, nearly two years later than the decision in the case now under appeal. In *Chhogan Lal Bagri v. Behari Lal Saha Ray*, the head-note is as follows :

The decree-holder (appellant) in execution of his mortgage decree purchased the property on the 17th September, 1924. An application for setting aside the sale by one of the judgment-debtors was dismissed on the 30th May, 1925, and the sale was confirmed on that date. An appeal was afterwards filed against the order dismissing the application for setting aside the sale, and the appeal was dismissed on the 25th July, 1927. The present application for delivery of possession was made on the 18th January, 1929.

(1) (1928) I. L. R. 56 Calc. 678.

(2) (1932) 56 C. L. J. 520.

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It was held that the application, being governed by Article 180, Schedule I, of the Limitation Act, was in time; that the three years ran from the 25th July, 1927, when there was a final, conclusive and definite order confirming the sale, and not from the 30th May, 1925.

The learned Judges were able to distinguish the case of *Neckbar v. Prakash Chandra Nag Chaudhuri* (1) from the case which they were considering, and held that it was not an authority against the appellants. Their Lordships find considerable difficulty in appreciating that conclusion, for it seems to them that the decisions in the two above-mentioned cases are directly in point on the matter now under consideration, and that the decisions are in conflict.

Reference was also made to the case of *Muthu Korakkai Chetty v. Madar Ammal* (2), which was a decision of a Full Bench; the question which was referred to the Full Bench was :—

Whether the existence of the cause of action for an application for delivery (of possession) to which Article 180, Schedule I, of the Limitation Act applies is suspended during the pendency of proceedings for the setting aside of the sale.

In their Lordships' opinion the decision on that question, apart from observations which were made in the judgments, does not assist in the present appeal, for there is here no question of any suspension of any cause of action.

For the reasons already given, their Lordships agree with the decision of the High Court in *Chhogan Lal Bagri v. Behari Lal Saha Ray* (3), so far as it relates to the matter now under consideration.

Two further points were raised on behalf of the appellants: (1) That there was no right of appeal from the decision of the Subordinate Judge on the question of limitation, and (2) that if the application under Order XXI, rule 95 was out of time, a suit

(1) (1928) I. L. R. 56 Cal. 608. (2) (1919) I. L. R. 43 Mad. 185.

(3) (1932) 56 C. L. J. 520.

might have been brought by the appellants to recover possession and that the suit would have been in time. Neither of these points was taken in the High Court, and in view of their Lordships' above-mentioned conclusion, it is not necessary for them to express, and they do not express, any opinion in respect of either of them.

The result is that their Lordships are of opinion that the appeals should be allowed, the decrees of the High Court dated the 19th August, 1930, set aside, and the orders of the Subordinate Judge of the 28th February, 1929, restored, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the High Court and of these appeals.

Solicitors for appellants: *Stanely Johnson & Allen.*

A. M. T.

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