APPELLATE CIVIL.

Before Nasim Ali and Mukherjea JJ.

1937

July 16, 19.

NIRODE KALI RAY CHAUDHURI

v.

HARENDRA NATH RAY CHAUDHURI.*

Execution of Decree—Sale in execution—Suit to set aside void sales—Code of Civil Procedure (Act V of 1908), s. 47; O. XXI, r. 63—Indian Limitation Act (IX of 1908), Arts. 166, 181.

Where, in execution of a money-decree in a contribution-suit, the exclusive property of a *pro forma* defendant in that suit is sold, in spite of objections, the latter's remedy to set aside that execution sale is by an application under s. 47 of the Code of Civil Procedure and not by separate suit under O. XXI, r. 63 of the Code.

A separate suit filed under O. XXI, r. 63 of the Code of Civil Procedure to set aside the execution-sale may be treated as an application within the meaning of s. 47(2) of the Code.

Article 166 of the Indian Limitation Act applies to applications to set aside voidable sales in execution of decrees, and not to applications to set aside execution sales which are void, the latter being governed by Art. 181 of the Act.

Nazibal Islam Molla v. *Golam Afsar Molla* (1) criticised.

APPEAL FROM APPELLATE DECREE by the plaintiffs-appellants.

The material facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Anilendra Nath Ray Chaudhuri and *Jnanendra Nath Bakshi* for the appellant.

Atul Chandra Gupta and *Surendra Nath Basu* (*Jr.*) for the respondents.

NASIM ALI J. The subject matter of the dispute in this appeal is a tank called Chaubari, which has been recorded in C.S. *dâg* No. 1971 of *khatiyân* No. 287 of the finally published record-of-rights

*Appeal from Appellate Decree, No. 683 of 1936, against the decree of A. N. Sen, Additional District Judge of 24-*Parganâs*, dated Feb. 11, 1936, reversing the decree of Bagala Prasanna Basu, Third Subordinate Judge of 24-*Parganâs*, dated April 25, 1935.

(1) (1933) I. L. R. 60 Cal. 1401.

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relating to *mouzá* Taki in the District of 24-*Parganâs*. Defendant No. 1 attached this tank in execution of a decree against defendant No. 2. The plaintiffs, thereupon, filed an objection to the attachment on the ground that the tank did not belong to defendant No. 2 at all, but was the exclusive property of the plaintiffs at the date of the attachment. This objection was disallowed, as it was unnecessarily delayed. The tank was, thereafter, sold in a execution and was purchased by defendant No. 1. The plaintiffs thereafter raised the present suit under O. XXI, r. 63 of the Code of Civil Procedure for a declaration that the property belonged to the plaintiffs and was not liable to be attached and sold in execution of the decree against the defendant No. 2. The defence of the defendant No. 1 to this suit is that the defendant No. 2 had 2/3rds share in his property at the date of the attachment and that s. 47 of the Code of Civil Procedure is a bar to the maintainability of the present suit. The Subordinate Judge, who heard the suit, overruled the defence and decreed the suit. On appeal by the defendant No. 1 to the lower appellate Court, the Additional Judge has affirmed the finding of the trial Judge, that at the date of the attachment the tank did not belong to defendant No. 2 at all, but was the exclusive property of the plaintiffs. He has, however, held that s. 47 is a bar to the maintainability of the present suit as the plaintiffs were parties to the suit in which defendant No. 1 obtained the decree against defendant No. 2 in execution of which the property was attached and sold. The learned Additional District Judge has also held that the present suit cannot be treated as an application under s. 47, as it was not filed within one month from the date of the sale. In this view of the matter, the learned Additional District Judge has allowed the appeal and dismissed the suit. Hence this Second Appeal by the plaintiffs.

The only point for determination in this appeal is whether s. 47 is a bar to the maintainability of the

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present suit. In view of the fact that the plaintiffs were parties to the suit in which the decree, in execution of which the property was attached and sold, was passed, there cannot be any doubt that the question involved in the suit is a question between the parties to the suit within the meaning of s. 47 of the Code of Civil Procedure although no decree was passed against them in that suit. The question, as to whether the tank is liable to be attached and sold for satisfaction of the decree against defendant No. 2, is a question which relates to the satisfaction of the decree. The dispute between the parties in the present suit, therefore, clearly comes within the terms of s. 47 of the Code.

The next question is whether this suit can be treated as a proceeding under s. 47 of the Code. The learned Additional District Judge answered this question in the negative, as he was of opinion that Art. 166 of the Limitation Act was a bar. That Article contemplates applications for setting aside sales which are not void but voidable. The appellants in this case do not want the sale to be set aside on the ground that it is voidable. Their case is that the property was not liable to be attached and sold and that the sale did not affect their interest in the property. The contention of the learned advocate for the defendant No. 1 is that, if the plaint in the suit be treated as an application under s. 47, it must necessarily involve a prayer for setting aside the sale, as the executing Court cannot give any declaration after the sale but can only set aside the sale. Now if the plaintiffs had not been parties to the suit, in which the decree under execution was passed, they could get the declaration that the sale did not affect their interest in this suit. But as they were parties in the suit, they cannot get the declaration in a separate suit, as the declaration depends upon the determination of the question whether the property was liable to be attached and sold for satisfaction of the decree under execution and

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such a question can be determined only under s. 47. I am not aware of any provision of law which precludes the executing Court from giving such a declaration when it determines that the property was not liable to be attached and sold in the execution proceedings. The mere fact that the sale took place before the present suit cannot alter the position, as the appellants' case is that the attachment and the sale founded on that attachment are of no effect so far as their interest in the property is concerned. They ask the executing Court to ignore the sale and to treat decree under execution as not satisfied by the sale. Article 166 of the Limitation Act does not therefore apply to this case. The proper Article is Art. 181.

The appellants' case is that defendant No. 2 had no interest in the property at the date of attachment and consequently it was not liable to be attached and sold. The Courts below have concurrently found that the defendant No. 2 had no interest in the property at the date of attachment and that the property at the date of attachment was the property of the plaintiffs. The property, therefore, was not liable to be attached and sold for satisfaction of the decree under execution. The appellants instituted the present suit within the period of limitation prescribed by Art. 181.

I, therefore, treat the suit as a proceeding under s. 47 of the Civil Procedure Code and allow this appeal. I declare that the disputed tank was not liable to be attached and sold in execution of the decree obtained by defendant No. 1 against defendant No. 2 and the sale in question did not in any way affect the interest of the appellants in the disputed tank. The order of the trial Court is restored. The appellants will get their costs throughout on the footing that the case from the beginning was a proceeding under s. 47 of the Code. Hearing-fee in this Court is assessed at three gold mohurs.

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MUKHERJEA J. I agree with my learned brother in the order that has been passed. The facts of this case lie within a very short compass and there is no dispute about them after the concurrent findings arrived at by the Courts below. The controversy centres round the short point as to whether the plaintiffs' suit is barred under s. 47 of the Code of Civil Procedure. It is not disputed that the plaintiffs' father and the defendant No. 2 were joint owners of the disputed property, which is a tank, and their shares were 1/3rd and 2/3rds respectively. In the year 1923, there was a partition between them, under which the tank in its entirety was allotted to the plaintiffs' father, and defendant No. 2 got in exchange of his share a garden elsewhere. Defendant No. 1 got a decree against defendant No. 2 in Money Suit No. 195 of 1930 and in execution of that he attached the 2/3rds share of the defendant No. 2 in the tank in suit. The plaintiffs thereupon preferred a claim under O. XXI, r. 58 of the Code of Civil Procedure which was dismissed without investigation on the ground that it was unduly delayed. The property was then sold in December 1933. The plaintiffs brought this suit in August, 1934, under O. XXI, r. 63 of the Code of Civil Procedure, and prayed for establishment of their title to the entire tank and for a declaration that it could not be attached or sold in execution of the decree obtained by defendant No. 1 against defendant No. 2. The defence raised by defendant No. 1 was of a threefold character. It was contended in the first place that the partition was a colourable transaction; in the second place a plea of estoppel was taken and the last contention was that the plaintiffs' suit was barred under s. 47 of the Code of Civil Procedure. The trial Court negatived these contentions and gave the plaintiffs a decree. On appeal by defendant No. 1 the lower appellate Court concurred with the findings of the trial Court on the first two points but dismissed the suit on the ground of its being barred under s. 47 of the Code of Civil

Procedure, the reason being that the plaintiffs themselves were parties to suit No. 195 of 1930 in which the decree was obtained by defendant No. 1.

Mr. Ray Chaudhuri, who appears in support of this appeal, has assailed the propriety of this decision. His argument is that, although the plaintiffs were nominally made parties to the suit, there was no relief claimed and no decree, even of dismissal, was passed, against them. It is further stated that the question arose between the plaintiffs and defendant No. 1 was not one relating to execution, discharge and satisfaction of the decree. In the alternative, Mr. Ray Chaudhuri contends that the suit could have been treated as an application under s. 47 of the Code of Civil Procedure. Mr. Gupta, who appears for the respondents, has sought to repel these contentions, by saying, first of all, that the plaintiffs do come within the mischief of s. 47 of the Code of Civil Procedure, inasmuch as they were parties to the suit in which the decree was obtained and it is really immaterial whether any decree was passed against them or not. As against the prayer for treating the suit as an application under s. 47, Mr. Gupta raises the bar of limitation. His argument is that the suit being instituted more than thirty days after the sale took place, is hit by Art. 166 of the Indian Limitation Act and, according to him, it is not open to the plaintiffs merely to attack the attachment of the property on the ground of want of judgment-debtors' title in the same. If an application is to be made under s. 47, there must be a prayer for setting aside the sale, as the sale had already taken place.

Now so far as the first ground is concerned it appears that defendant No. 1 instituted the Money Suit, which was one for contribution, against a large number of co-sharers including the present plaintiffs. As it was alleged in the plaint of that suit that the present plaintiffs had paid their shares of the joint dues, there was no relief claimed against them, but the suit had to be decided in their presence as there

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was a question of shares raised in the same. The suit was not contested by any body and it culminated in an *ex parte* decree against those defendants only against whom contribution was claimed by defendant No. 1. There was no direction in the decree so far as the present plaintiffs were concerned. Section 47 of the Code of Civil Procedure speaks of parties to the suit and not of decreeholders or judgment-debtors and the explanation attached to the section makes it clear that, even if the suit is dismissed against a person, he does not cease to be a party within the meaning of that section. It cannot be said that the plaintiffs were merely formal parties, inasmuch as the suit, being one for contribution, all the co-sharers were proper, if not necessary, parties to the suit. If, as I have held, the plaintiffs were parties to the suit, the provision of s. 47 is imperative and obliges them to prefer an objection, if any, before the executing Court and that Court alone. The question certainly related to the execution of the decree obtained by defendant No. 1 and as to how far it could be satisfied from the property attached. It cannot be seriously argued that the section contemplates that the question must relate to the execution of the decree as between the attaching decreeholder on the one hand and the objecting defendants on the other. There are indeed certain observations in the case of *Nazibal Islam Molla* v. *Golam Afsar Molla* (1), upon which some reliance was placed by the appellants. In that case there was a suit for possession started by the plaintiff, who was a decreeholder, auction-purchaser, at a rent sale and defendant No. 1 was a co-sharer landlord, who was made a party to the rent-suit in that capacity, and who had purchased the tenant's right and got possession of the land sometime before the sale. The Courts below held the plaintiffs' suit to be barred against defendant No. 1 under s. 47 on the authority of the Full Bench decision of this Court in the case

(1) (1933) I. L. R. 60 Cal. 1401.

of *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (1). This Court reversed the decision and held that the suit was not barred as against defendant No. 1. The decision could perhaps be justified on the ground that the Full Bench decision was not strictly speaking applicable to the facts of the case. But the observations of the learned Judges to the effect that "as there was no liability in the defendants "to satisfy the decree, no question of execution, "discharge and satisfaction of the decree could "possibly arise as between the plaintiff on one hand "and the defendant No. 1 on the other", seems to be very wide and taken literally would go against the plain wording of the section and the explanation attached to it. The first ground raised by the learned advocate for the appellants must therefore fail.

The only other point that requires consideration is as to whether this suit can be treated as an application under cl. (*2*) of s. 47 of the Code of Civil Procedure. The only objection to that, as raised by Mr. Gupta, is the plea of limitation under Art. 166 of the Indian Limitation Act. It may be conceded that Art. 166 extends to all applications for setting aside a sale under s. 47 of the Code of the Civil Procedure and are not limited to applications under O. XXI, rr. 89, 90 or 91. But if the property was really not the property of the judgment-debtors, the attachment must be held to be void and the sale must go as a nullity out and out having no foundation to rest upon. Article 166, as my learned brother has pointed out, must be confined to cases where the sale is voidable only and not void and when the execution sale is a nullity, if a party files an application under s. 47 to have it pronounced a nullity or for setting it aside for safety's sake to avoid future difficulties, the proper Article would be Art. 181 and not Art. 166 of the Indian Limitation Act. This principle has been applied in cases where

(1) (1926) I. L. R. 53 Cal. 781.

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the execution sale has been impeached as void *ab initio* on the ground of want of notice under O. XXI, r. 22 of the Code of Civil Procedure [see *Rajagopala Ayyer* v. *Ramanujachariar* (1) and *Manmatha Nath Ghose* v. *Lachmi Debi* (2)] and it has been held uniformly that if the sale is a nullity, it is not really an application to set aside the sale as contemplated by Art. 166, but it comes under the residuary Article. In the case of *Manmatha Nath Ghose* v. *Lachmi Debi*, Page J. observed in his judgment that the sale being void would not have to be set aside at all and the order as passed was in substance merely a declaration that the sale was a nullity and of no effect. In the present case, the plaintiffs have got to establish and, in fact, they have established that the attached property belongs to them and not to the judgment-debtor. They are, in these circumstances, entitled to ask the Court to set aside the attachment and the sale automatically falls through; and a mere declaration that the sale could not subsist and that the decreeholder would be free to start execution-proceedings again would be quite enough. I am not impressed by the argument of Mr. Gupta that the sale in this case cannot be said to be a nullity, because there are express provision in s. 47 which obliges the party to a suit to make an objection within the proper time under s. 47 of the Code of Civil Procedure. The same argument could have been undoubtedly advanced in the cases just now mentioned where the sale was held to be a nullity for absence of notice under O. XXI, r. 22 of the Code of Civil Procedure. Apart from that it seems that if there was no s. 47 the plaintiffs could have simply ignored the sale and instituted a suit for recovery of possession of the property on establishment of their title to it. Because of s. 47 they are obliged to bring the matter to the notice of the executing Court; but I cannot agree with Mr. Gupta that the executing Court had no jurisdiction to make

(1) (1923) I. L. R. 47 Mad. 288. (2) (1927) I. L. R. 55 Cal. 96.

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an order of a declaratory character and the order must be one to set aside the sale. In these circumstances I agree with my learned brother that the suit must be treated as an application under s. 47, cl. (*2*) of the Code of Civil Procedure, and as the findings are in favour of the plaintiffs they are entitled to an order in their favour. Accordingly, the property must be held to be the property of the plaintiffs and not of the judgment-debtor and the attachment and sale must be held to be void, and of no effect so far as the plaintiffs are concerned.

Appeal allowed.

A. K. D.