CIVIL REVISION.

Before Edgley J.

1938

Dec. 21, 22; 1939

Jan. 4.

AMAL CHANDRA BANERJI

v.

RAM SWARUP AGARWALA.*

Limitation—Application for setting aside execution-sale—Inherent power—Code of Civil Procedure (Act V of 1908), s. 151; O. XXI, rr. 91 to 93—Indian Limitation Act (IX of 1908), s. 5.

The law as to the extension of the period of limitation, enacted in s. 5 of the Indian Limitation Act, 1908, has no operation in the case of an application for setting aside an execution-sale under O. XXI, r. 91 of the Code of Civil Procedure, 1908.

The maxim *caveat emptor* ordinarily applies in the case of execution-sales. It would therefore be an improper use of s. 151 of the Civil Procedure Code to allow an applicant to take advantage of this section when such applicant, after the prescribed period of limitation, seeks to set aside a sale on the ground that the judgment-debtor had no saleable interest.

Obiter. The auction-purchaser of the property cannot maintain a suit for the refund of the purchase money by merely basing his claim on the allegation and proof that the judgment-debtor had no saleable interest in the property. The claim for such refund can only be made by an application under the provisions of O. XXI, rr. 91 to 93 of the Code of Civil Procedure, 1908.

Juranu Mahamad v. *Jathi Mahamad* (1); *Makar Ali* v. *Sarfuddin* (2) and *Ram Sarup* v. *Dalpat Rai* (3) followed.

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This Rule was issued at the instance of the auction-purchaser of immoveable property in execution of a decree, who applied for setting aside the sale on the ground that the judgment-debtor had no saleable interest.

The material facts of the case appear from the judgment.

*Civil Revision, No. 1135 of 1938, against the order of A. N. Sen, Additional District Judge of 24-*Parganâs*, dated April 29, 1938, reversing the order of Indu Sekhar Basu, First Munsif of Alipore, dated Jan. 31, 1938.

(1) (1917) 22 C. W. N. 760. (2) (1922) I. L. R. 50 Cal. 115.
(3) (1920) I. L. R. 43 All. 60.

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Apurba Charan Mukherji for the petitioner. The application cannot be under O. XXI, r. 91 of the Code of Civil Procedure (Act V of 1920); such application can be made only before the sale is confirmed. On the admitted facts of the case, the petitioner came to know long after the confirmation of the sale that the judgment-debtor had no saleable interest in the property sold. The petitioner's application was also under s. 151 of the Code. From this point of view the appeal to the lower appellate Court was incompetent and the appellate judgment was without jurisdiction, because the order of the trial Court was not under O. XXI, r. 72 or r. 92 of the Code, against which only appeal was under O. XLIII, r. 1, cl. (*j*) of the Code. There is no clear provision in law providing for the circumstances of the present case, where, for no fault of his own, the auction-purchaser came to know more than three months after the sale that the judgment-debtor had no saleable interest in the property sold. An application under O. XXI, r. 91 of the Code can be filed only within thirty days from the date of the sale. This period of limitation is provided under Art. 166 of the Indian Limitation Act, 1908. Thus there is no clear provision in law for the facts of the present case. Therefore, the inherent power of the Court under s. 151 of the Civil Procedure Code, 1908, should be exercised in the present case. I submit that the period of limitation applicable to the present case is provided in Art. 181 of the Indian Limitation Act, 1908. I rely on the cases of *Gopal Saran Narain Singh* v. *Sheikh Md. Ahsan* (1); *Makar Ali* v. *Sarfuddin* (2) and *Girdhari* v. *Sital Prasad* (3). If Art. 181 of the Limitation Act, 1908, applies then the petitioner's application is certainly not barred by limitation.

Baidya Nath Banerjee for the opposite party. In the present case the sale can be set aside only under O. XXI, r. 91 of the Code and, unless a sale is set aside, there cannot be an order for refund under

(1) (1910) 14 C. W. N. 1096. (2) (1922) I. L. R. 50 Cal. 115.
(3) (1889) I. L. R. 11 All. 373.

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O. XXI, r. 93 of the Code. I rely on the cases of *Juranu Mahamad* v. *Jathi Mahamad* (1) and *Ram Sarup* v. *Dalpat Rai* (2). It is only on the setting aside of the sale that the decree-holder can again execute the decree. Therefore, in the present case, O. XXI, r. 91 of the Code is the only provision which can give relief to the petitioner. But in this respect the application of the petitioner is barred by limitation under Art. 166 of the Indian Limitation Act, 1908. The inherent power of the Court under s. 151 of the Code cannot be exercised to get rid of the bar of limitation which affects the petitioner's case. The petitioner wanted to avoid the bar of limitation by trying to make out a case of fraud under s. 18 of the Indian Limitation Act, 1908. The Court below has found against the petitioner on the question of fraud. The petitioner's application is under O. XXI, r. 91 of the Code. Hence the appeal to the lower appellate Court was competent. Section 5 of the Indian Limitation Act has not been made applicable to the proceedings under O. XXI, r. 91 of the Code. I would refer to the plain words of s. 5 of the Indian Limitation Act and O. XXI, r. 91 of the Code. In Court-sales there is no warranty of title and the doctrine *caveat emptor* applies.

Mukherji, in reply. The petitioner's application was also under s. 151 of the Code. This part of the case was not at all dealt with by the appellate Court. Upon the admitted facts, it is a fit case for exercise of the powers under s. 151 of the Code. Admittedly the petitioner is an innocent purchaser who relied upon the representation of the opposite party decree-holder in making the purchase. He had paid Rs. 1,000. The sale proclamation issued stated that the property was subject to mortgage charges of about Rs. 25,000. Admittedly a fair price was fetched. If the trial Court's order is restored the decree-holder can put his decree in execution again, but if the same be not restored the petitioner will loose his

(1) (1917) 22 C. W. N. 760. (2) (1920) I. L. R. 43 All. 60.

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Rs. 1,000. This sum of Rs. 1,000 cannot be retained by the decree-holder, as the applicant is not his judgment-debtor. It is no doubt true that there is no warranty of title in execution sales. But what is meant by this? I submit it means that the title represented may not be as good as it is stated but this does not and cannot mean that there is a total want of title. I rely on the observations of Page J. in the case of *Rishikesh Laha* v. *Manik Molla* (1). The sale can also be looked at from the view point of a contract. I rely on the case of *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (2). The facts disclose that both the parties were under a mistake of fact. It was not known at the date of sale that the judgment-debtor had no interest. This is a fit case in which the Court should exercise its inherent power under s. 151 of the Code.

Cur. adv. vult.

EDGLEY J. This Rule is directed against an order of the learned Additional Judge of Alipur, dated April 29, 1938, under which he dismissed an application which had been filed by the petitioner, Amal Chandra Banerji, in which the latter asked that an execution-sale, which had been held on February 25, 1937, might be set aside and that he might be allowed a refund of the purchase-money which he had paid in his capacity as auction-purchaser at the sale.

The facts of the case are briefly as follows :—

Opposite party No. 1, Ram Swarup Agarwala, obtained a decree in suit No. 1189 of 1935 on the Original Side of this Court. This decree was transferred for execution against the judgment-debtors to the District Court of the 24-*Parganâs*. On September 11, 1936, the decree-holder duly attached some property belonging to the judgment-debtors, which comprised premises No. 5, Southern Avenue. He caused a sale proclamation to be issued on January 10, 1937, and on February 25, 1937, the

(1) (1926) I. L. R. 53 Cal. 758. (2) (1910) I. L. R. 35 Bom. 29

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property was put up for sale and purchased by the petitioner subject to certain charges, in favour of the Calcutta Improvement Trust and the Equitable Insurance Company, Ltd. This sale was confirmed on March 31, 1937, and the petitioner obtained symbolical possession on May 19, 1937.

On May 25, 1937, the petitioner was served with a copy of the plaint in a suit which had been instituted by the Calcutta Improvement Trust for the enforcement of their mortgage upon the property and in that plaint there was a statement to the effect that the premises situated at No. 5, Southern Avenue had already been purchased, on February 8, 1937, by a firm named Ram Kissen Das Bagri in execution case No. 215 of 1936. The petitioner, thereupon, caused enquiries to be made and he ascertained that the facts stated in the plaint of the Calcutta Improvement Trust were correct and that Ram Kissen Das Bagri was actually in possession of the premises. The petitioner then proceeded, on June 15, 1937, to file the petition in the Court of the first Munsif at Alipur, to which reference has already been made.

As pointed out by the learned Additional Judge, it is almost impossible to follow the reasoning of the learned Munsif, but, as far as his judgment can be understood, he appears to have treated the petitioner's application as one under O. XXI, r. 91 of the Code of Civil Procedure and he found that the judgment-debtor had no saleable interest in the property sold. The application was filed about three and a half months after the date of the sale, but the learned Munsif held that it was not time-barred as the petitioner had been prevented by the fraud of the decree-holder from knowing about the earlier sale. He, therefore, allowed the application and set aside the sale which had been held on February 25, 1937.

On appeal the learned Additional Judge held that it had not been established that the decree-holder, Ram Swarup Agarwala, had committed any fraud.

He, therefore, found that the petitioner was unable to get the benefit of s. 18 of the Limitation Act and that the application was time-barred. He agreed, however, with the first Court in holding that the judgment-debtor had no interest in the property after the first sale, which could be described as a saleable interest.

In this Court it is admitted that the property sold on February 25, 1937, was identical with that which was sold at the previous sale. It further appears that both the sales were properly held in the course of regular execution proceedings.

It is first contended that no appeal lay against the order of the learned Munsif setting aside the sale, on the ground that this order was virtually one under s. 151 of the Code. The difficulty in accepting the contention is that, although the petition to set aside the sale purports to be one under O. XXI, rr. 91 and 93 read with s. 151 of the Code, the order which was actually passed by the learned Munsif was one under O. XXI, r. 92(*2*), whereby an application under r. 91 was allowed and the sale was set aside. The law allows an appeal from such an order under O. XLIII, r. 1(*j*). This contention must therefore fail.

The position in which the petitioner finds himself is certainly a very difficult one. When he purchased the property on February 25, 1937, he probably had no reason to suppose that there had been any previous sale and there seems to be no reason why his statement should not be accepted that the fact of the previous sale only came to his notice on May 25, 1937, when he was served with a copy of the plaint in mortgage suit No. 32 of 1937. Nevertheless, as there was no fraud on the part of the decree-holder, he was *prima facie* debarred on that date from applying to have the second sale set aside, as more than thirty days had elapsed since the date of that sale. At the same time he had deposited a considerable sum of money in Court as the purchase-price of the property sold to

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him on February 25, 1937, in which property, it has been found that the judgment-debtor had no saleable interest. This money has been withdrawn by the decree-holder who refuses to refund it to the petitioner.

The question which arises for consideration in this case is whether an auction-purchaser is entitled to obtain a refund of his purchase-money in circumstances such as those which have been disclosed in this case.

The learned advocate for the petitioner admits that the only remedy open to the petitioner is by making an application to the executing Court. Whatever may have been the position under the Code of 1882, the law is now clear that a purchaser at a regular execution-sale cannot obtain a refund of his purchase-money on the ground that the judgment-debtor has no saleable interest unless the sale is set aside. 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 Art. 166 of the schedule to the Indian Limitation Act, 1908, followed by an application under r. 93, which may be made within three years from the accrual of the right under Art. 181 : *Makar Ali* v. *Sarfuddin* (1); *Juranu Mahamad* v. *Jathi Mahamad* (2).

Had the application been filed in time, it is probable that the petitioner would have succeeded in obtaining an order setting aside the sale under r. 92(*2*). With regard to this point, it is urged, on his behalf, that, owing to the unusual circumstances of the case, the petitioner should have been allowed the benefit of s. 5 of the Limitation Act, which provides that certain matters and "any other application to which "this section may be made applicable by or under any "enactment for the time being in force, may be "admitted after the period of limitation prescribed "therefor, when the appellant or applicant satisfies "the Court that he had sufficient cause for not

(1) (1922) I. L. R. 50 Cal. 115. (2) (1917) 22 C. W. N. 760.

"preferring the appeal or making the application "within such period". Even assuming, however, that the petitioner would have been able to satisfy the requirements of the latter part of the section, I am nevertheless of opinion that his application is not one to which the section applies. Section 5 of the Limitation Act has been expressly made applicable by law in the case of such applications as those under O. XXII, r. 9 of the Civil Procedure Code or those under s. 78 of the Provincial Insolvency Act, but such is not the case with applications to set aside execution sales under the appropriate sections of the Civil Procedure Code. The exclusion of these sections from the operation of s. 5 of the Limitation Act is probably deliberate, as it is conceivable that much confusion might arise if execution sales could be easily set aside long after the sale proceeds had been distributed to the various parties entitled thereto.

The main contention of the learned advocate for the petitioner is that his client's application should have been treated as one under s. 151 of the Civil Procedure Code, in which case no question of limitation would have arisen in this particular case for consideration. This section can only be invoked in a case in which it may be necessary for the ends of justice to make an order for which no provision is made elsewhere in the Code or to prevent the abuse of the process of the Court. In my opinion, these conditions are not present in this case. As pointed out by Richardson J. in *Juranu Mahamad's* case (*supra*) under what we may term the general law apart from statute, there is no warranty of title at a Court-sale. The legal position with reference to such matters is summarised as follows by the Judicial Committee of the Privy Council in the case of *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen* (1):—

> Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the

(1) (1878) I. L. R. 3 Cal. 806 (813); L. R. 5 I. A. 116 (126).

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Sheriff or the judgment-debtor. This, however, is because the Sheriff is authorised by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

Their Lordships proceed to point out that "what "the Sheriff proposes to sell is only the right title and "interest, whatever that may be, of the judgment-"debtor". The judgment also contained another passage in which the principle is laid down that—

> The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than his judgment-debtor.

The position adopted by the learned advocate for the petitioner in this case is that, as his client had no means of knowing that there had been a previous Court-sale when he purchased the property on February 25, 1937 and had no notice of such sale until May 25, 1937, it would be against reason and conscience to allow the decree-holder, Ram Swarup Agarwala, to retain the purchase-money. In support of his contention he places considerable reliance upon the judgment of Page J. in the case of *Rishikesh Laha* v. *Manik Molla* (1). In that case Page J. seems to have held the view that, in certain circumstances, an auction-purchaser might even maintain a suit to obtain a refund of his purchase-money in a case in which the judgment-debtor had no saleable interest. In this respect, however, I am of opinion that the law has been more correctly stated in the earlier decisions of this Court cited above. *Juranu Mahamad* v. *Jathi Mahamad* (*supra*); *Makar Ali* v. *Sarfuddin* (*supra*) and a similar view was adopted by the Allahabad High Court in the case of *Ram Sarup* v. *Dalpat Rai* (2) in which the learned Judges accepted the position that, outside the provisions of the Code of Civil Procedure, an auction-purchaser has no right to recover his purchase-money merely by showing that the judgment-debtor had no saleable interest.

(1) (1926) I. L. R. 53 Cal. 758. (2) (1920) I. L. R. 43 All. 60.

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The learned advocate for the petitioner, however, asks me to apply the principles laid down by Page J. in *Rishikesh Laha's* case for the purpose of enabling his client to sustain an application for the refund of his purchase-money under s. 151 of the Civil Procedure Code. If he had been able to show that the sale, which was held on February 25, 1937, was held without jurisdiction, as was the case with the Sheriff's sale with which the Judicial Committee were dealing in *Dorab Ally Khan's* case (*supra*) there would have been some force in his contention. Similarly, the position might have been different if it had been established that there had been any fraud or misrepresentation on the part of the decree-holder. Here, however, we are concerned with a sale properly held in regular execution proceedings in connection with which no fraud on the part of the decree-holder or judgment-debtor has been established. In such a case it is clear from the principles laid down by the Judicial Committee in *Dorab Ally Khan's* case (*supra*) that the maxim *caveat emptor* must apply, and, that being the general law, it would, in my view, be improper to allow the petitioner to take advantage of the provisions of s. 151 of the Code merely for the purpose of bringing himself within the scope of the statutory exception to the general law on this point, which is provided in O. XXI, rr. 91 to 93 of the Civil Procedure Code.

I must, therefore, hold that the petitioner is not entitled to obtain a refund of his purchase-money and that the decision of the learned Additional Judge is correct. The Rule is therefore discharged. I make no order regarding the costs of this Rule.

Rule discharged.

N. C. C.