VENKATA-PATHI v. SUBRAMANYA.

vested in them prior to the sale, unless they showed also that the sale was invalid. We must hold that the suit was properly held not to fall under the twelve years' rule. But we are of opinion that the suit is governed by art. 95. Art. 12 is intended to protect *bonâ fide* purchasers only, but when the purchaser is a party to the fraud, art. 95 will alone apply, otherwise the purchaser will be enabled to take advantage of his own fraud for the purposes of limitation. We shall therefore ask the Subordinate Judge to return a finding on the question whether the respondent No. 5 was a party to the fraud and whether he made the purchase really for the respondents Nos. 1 and 2. The issue will be tried on the evidence on the record and on such further evidence as the parties may adduce and the finding will be submitted within three months from this date when ten days will be allowed for filing objections.

We are satisfied, however, that respondents Nos. 3, 4 and 6 were unnecessarily made parties to this appeal and we dismiss the appeal as against them and direct the appellants to pay the costs of respondent No. 6 in this Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. July 21, 27.

NILAKANDAN (PLAINTIFF), APPELLANT,

and

THANDAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, sch. II, art. 12—Sale of land in execution of decree—Suit by third party to recover—Adverse possession—Burden of proof.

In a suit to redeem certain land demisedon kánam in 1850 by A, to the predecessor of B, C, who was in possession of the land, was made a defendant. A proved his title to the land and possession up to 1850. C pleaded title to the land and denied that B had ever been in possession. Both pleas were found to be false. It was found, however, that C had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against C (to which A was not a party) and purchased by D who resold to C in 1879.

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* Second Appeal 85 of 1886.

The Lower Court held that C's possession must be taken to have been derived from B, till the contrary was proved; but that the suit was barred by art. 12 of sch. II of the Indian Limitation Act, 1877, because it had not been brought within one year from the date of the sale in 1876:

Held, that the suit was not barred by limitation, and that the burden of proving that his possession was not derived from B lay upon C.

APPEAL from the decree of V. P. de'Rozario, Subordinate Judge at Palgat, reversing the decree of P. Govinda Menon, District Múnsif of Chowgat, in suit 523 of 1884.

The plaintiff, Nilakandan Nambudri, sued Thandamma, defendant No. 1 and eleven others, the vicar, wardens and tenants of the Kotappadi church, to recover two plots of land demised on kánam to Tarathu, the deceased brother of defendant No. 1 in 1850. Defendant No. 1 pleaded that neither she nor Tarathu ever were in possession, and that the land belonged to the church.

Defendant No. 5, the vicar, Paranju Kathanar, pleaded that the land was the ancient jenm of the church, and had been in its possession for a very long time. The Múnsif found that only one plot had been demised to Tarathu and decreed redemption on payment of Rs. 331 for improvements.

The vicar and church wardens appealed, and the Subordinate Judge dismissed the suit.

Plaintiff appealed.

Gopálan Náyar for appellant.

Sankara Menon for respondents.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J).

JUDGMENT.—This second appeal relates to tak or tract No. 1 of the schedule attached to the plaint or to the plot marked A in the plan. It is found as a fact by both the courts below that the land in question was originally the appellant's jenm. It is also found that it was demised on kánam first to a Malabar family called Vettipara tarwad, and next to one Tarathu, the brother of respondent No. 1. This individual executed exhibit A in 1850 in favour of the appellant's brother, Sriman Nambudri, acknowledging that he held the land on the kánam which the appellant brought this suit to redeem. It is found that Tarathu was in possession in 1850 under the appellant's tarwad, and that the land passed into the possession of respondents 2 to 5, the trustees of the Kotappadi church about 17 years ago. It was not, however,

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shown how it passed from the possession of Tarathu's family into that of the trustees. The District Múnsif held, that after Tarathu's death the respondent No. 1 got into possession, and that she was evidently colluding with the other respondents.

On appeal, the Subordinate Judge adverted to the fact that the trustees did not show either that the land was their jenm or that they asserted their jenm title prior to 1877, and considered that their possession must be taken to have been derived from Tarathu unless they showed (which they did not) that it was hostile for more than 12 years before suit. But it was also in evidence that the land in suit was sold in execution of the decree in original suit 75 of 1876 on the file of the Subordinate Court as the jenm of the trustees, and that it was purchased by one Lazar prior to June 1877 and re-sold by him to the trustees in June 1879. Referring to these transactions, the Múnsif remarked that the sale and the re-sale were a mere contrivance resorted to by the trustees of the church in conjunction with those interested in the church, that the purchaser, Lazar, was one of the managers of the church, and that the appellant was not a party either to the suit or to the proceedings in execution. The Subordinate Judge, however, considered that the appellant adduced no evidence to show that the sale and re-sale were collusive, and that the suit which was not brought within one year from the date of the sale was barred by art. 12 of the second schedule of the Limitation Act. He relied on the decision of this Court. It is urged in second appeal that the appellant was not bound to set aside a sale in execution of a decree obtained by one stranger against another, and that their wrong can be no valid ground for dealing with his claim under the one year's rule.

We were referred to *Venkata Narasiah* v. *Subbamma*(1) *Sadagópa* v. *Jamuna Bhái*(2) *Suryanna* v. *Durgi*.(3) On the other hand it is contended for the respondents that even if the one year's rule did not apply, the Subordinate Judge was wrong in holding upon the facts found that the respondents got into possession under Tarathu.

In the case of *Suryanna* v. *Durgi*, the decision proceeded on the ground that what was sold was not the right, title and interest of the judgment-debtor, but the property on which the arrear of

(1) I.L.R., 4 Mad., 178. (2) I.L.R., 5 Mad., 54. (3) I.L.R., 7 Mad., 258.

revenue which was sought to be recovered was a charge. It is not shown in this case that anything more than the right, title and interest of the judgment-debtor in Original Suit 75 of 1866 was liable to be sold. This case falls, therefore, to be decided on the principle laid down in *Venkata Narasiah* v. *Subbamma*, and *Sadayśpa* v. *Jamuna Bhái* which were not overruled by the decision in *Suryanna* v. *Durgi*.

We see no reason to think that the Subordinate Judge was in error in presuming that the respondents got into possession under the first respondent's father. The trustees, it must be observed, pleaded that Tarathu was never in possession, and that the land was the ancient jenm of the church and that both of those statements were found to be untrue.

We set aside the decree of the Subordinate Judge and restore that of the District Múnsif. The respondents will pay the appellant's costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

ADAMSON (DEFENDANT No. 1), APPELLANT,

and

ARUMUGAM AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1886. March 4. July 12.

Suit for obstruction of highway—Special damage—Civil Procedure Code, s. 30.

The rule of English law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage should be enforced in British India as a rule of "equity and good conscience."

Section 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having special interests to represent the rest of the class.

APPEAL from the decree of K. R. Krishna Menón, Subordinate Judge at Tinnevelly, reversing the decree of V. Srinivásácharlu, District Múnsif of Tuticorin, in Suit 188 of 1883.

The plaintiffs, Arumugam Pillai and 8 others, as representatives of the villagers of Podiamputhúr, sued the Revd. Thomas

* Second Appeal 792 of 1885.