

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MUTTIA (PLAINTIFF), APPELLANT,

v.

APPASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1890.
April 18, 24.

Civil Procedure Code—Act XIV of 1882, ss. 244, 318, 334—Petition by purchaser at Court-sale for possession—Obstruction—Appeal against order—Limitation Act—Act XV of 1877, sched. II, arts. 167, 179.

On an application made in 1888 under Civil Procedure Code, s. 318, by the purchaser at a Court-sale (who was the assignee of the decree which was being executed), praying for delivery of possession of the property purchased, it appeared that the sale took place in 1885, that it was confirmed in 1886, and that in January 1887 an order was made for delivery of possession to the purchaser. The judgment-debtor had resisted the purchaser's efforts to obtain possession in 1887 and set up in bar of the application in 1888 an oral agreement alleged to have been made between him and the purchaser. The application was rejected:

Held, (1) that an appeal lay against the order rejecting the application;

(2) that the application not being a complaint of obstruction, was not barred by limitation and should be heard and determined on the merits.

APPEAL against the order of C. Venkoba Chariar, Subordinate Judge of Madura (West), made on miscellaneous petition No. 181 of 1888 in original suit No. 36 of 1878.

Application under Civil Procedure Code, s. 318, for delivery of immoveable property in the occupancy of the judgment-debtor. The judgment-debtor set up an agreement between him and the applicant in bar of the application and raised also a plea that since a former attempt to obtain delivery was rendered futile by the assertion of his right, the present application was barred under Limitation Act, sched. II, art. 167. The Subordinate Judge held that the application was not barred by limitation, and, after referring to circumstances which in his view rendered the agreement set up probable, added that "as the obstruction was under colour of a legal right," the matter should be determined in a regular suit, which under the circumstances should be brought by the present applicant.

The plaintiff preferred this appeal.

* Appeal against order No. 16 of 1889.

Subramanya Ayyar for appellant.

Mr. *Wedderburn*, *Bhashyam Ayyangar* and *Sambamurti Ayyar* for respondents.

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BEST, J.—The appellant is the assignee of the decree obtained by the plaintiff in original suit No. 36 of 1878 on the file of the Subordinate Court of Madura (West). As such assignee he executed the decree, and on the attached property being put up for sale, himself purchased the house now in question. Respondent No. 1 was one of the defendants in the suit No. 36 of 1878 and owner of this property at the time of the sale above mentioned. The order appealed against was passed by the Subordinate Judge on a petition presented by the appellant as purchaser at the auction sale for possession of the property under section 318 of the Code of Civil Procedure, which application was opposed by the respondent No. 1, alleging that he was entitled to retain the property under an oral agreement come to between himself and appellant subsequent to the sale. He further contended that appellant's present application was barred under article 167 of schedule II of the Limitation Act, by reason of a period of more than 30 days having elapsed since appellant was obstructed by respondent No. 1 in former proceedings taken for obtaining possession of the same property.

The Subordinate Judge has held this latter objection to be invalid on the authority of *Ramasekara v. Dharmaraya*(1); but he has, at the same time, rejected the appellant's application to be put in possession of the property on the ground that the first respondent's obstruction is "under cover of a legal right, though inchoate and contingent, and this being so, the question practically is, who has to go to a regular suit to establish his right," and that, "in the circumstances, the purchaser should have recourse to it."

The preliminary objection is taken on behalf of respondent No. 1 that the order objected to is not appealable.

If the order in question had been passed on a complaint of resistance made either under section 334 or under section 328 of the Code of Civil Procedure, it is possible that both the objections (1) that the order is not appealable, (2) that the application as made to the Lower Court was time barred, would have had to be

(1) I.L.R., 5 Mad., 113.

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allowed. But as a matter of fact, the application made by the appellant was expressly made with reference to section 318 of the Code, for delivery of possession of the property purchased. It was in no sense a complaint either under section 328 or under section 334 of the Code. The mere fact of the Court below applying these sections to the case is not sufficient to deprive the appellant of the right of appeal that he might otherwise possess. Section 334 is solely for the benefit of a purchaser at a sale in execution, and read with section 328 it is very clear that it is not imperative on the part of such purchaser to complain of resistance or obstruction; as pointed out by West, J., in *Balwant Santaram v. Babaji* (1), the language of section 328 is that the decree-holder "may," not that he "must," proceed in the way indicated. There is, therefore, nothing to prevent the decree-holder or purchaser who has been obstructed or resisted in his attempt to get possession of the property decreed or purchased (as the case may be) from making a fresh application for delivery, without making any complaint under sections 328 or 334 of the Code.

The question is one relating to the execution of the decree between the representative of the original decree-holder (now assignee) and one of the defendants in the suit. It falls, therefore, within section 244 of the Code of Civil Procedure and is appealable. The fact of the decree-holder having subsequently become the purchaser of the property makes no difference, as has been held by this Court in *Vīraraghava v. Venkata* (2) and *Vallabhan v. Pannuni* (3).

Being a question falling within section 244, it must be decided by the Court executing the decree and not in a separate suit; consequently the Lower Court's order is erroneous in that it leaves the matter in dispute for settlement in a regular suit to be brought by the appellant as purchaser.

The Subordinate Judge is also in error in saying that the purchase by the decree-holder was in 1884. The sale took place on the 9th May 1885, but it was not confirmed till 2nd August 1886, and the first order for delivery of the property to the purchaser (now appellant) was made on the 12th January 1887.

The case must be remanded for disposal by the Lower Court unless, as contended by respondent No. 1, the application is barred

(1) I.L.R., 8 Bom., 602. (2) I.L.R., 5 Mad., 217. (3) I.L.R., 12 Mad., 454.

under article 167 of schedule II of the Limitation Act. That article is, however, inapplicable for, as already pointed out, this was not a complaint of resistance or obstruction, but an application for delivery of possession in execution of a decree, the limitation period for which is three years under article 179 of schedule II.

The Lower Court's order must, therefore, be set aside and the case remanded for disposal on the merits.

Respondent No. 1 must pay the appellant's costs of the appeal. The rest of the costs incurred hitherto will be provided for in the order to be passed by the Subordinate Judge.

MUTTUSAMI AIYAR, J.—I am also of opinion that the matter in dispute between the purchaser at the Court-sale and the judgment-debtor should be determined under section 244 of the Code of Civil Procedure. Having regard to the language of section 334, I am unable to uphold the contention that the Court-sale operated to satisfy the decree in original suit No. 4 of 1882 and that a subsequent agreement regarding the purchase prior to the delivery of possession under section 318 does not relate to the execution of the decree. The purchaser in this case was the decree-holder and the party obstructing the delivery of possession was a judgment-debtor, and the oral agreement set up in justification of the obstruction prevents in effect the completion of the purchase by transfer of possession. By declaring in section 334 that the provisions of Chapter XIX relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him are applicable to resistance or obstruction to the purchaser of any immoveable property at a Court-sale obtaining delivery of the property purchased, the Legislature regarded such delivery as a step in execution of the decree. When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of section 244. The intention of the Legislature in such cases seems to be, as pointed out by the late Chief Justice in *Viraraghava v. Venkata*(1) to prevent matters in execution becoming the cause of fresh litigation. I may also here draw attention to the fact that section 334 renders the provisions of the

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(1) I.L.R., 5 Mad., 217.

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For these reasons I think an appeal lies and concur in the order proposed by my learned colleague. I do not consider that the question of limitation under article 167 arises, for the application for delivery under section 318 is substantially an application for execution of the decree by ordering delivery of possession of the property purchased.

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Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMASAMI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUBBUSAMI (DEFENDANT No. 2), RESPONDENT.*

Court Fees Act—Act VII of 1870, sched. I, art. 1, sched. II, art. 17.

In a suit upon a hypothecation bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent :

Held, that the Court fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Acting Subordinate Judge of Tanjore, in appeal suit No. 829 of 1888, reversing the decree of W. Gopalachariar, District Munsif of Tiruvadi, in original suit No. 101 of 1888.

The plaint set out that defendant No. 1 had executed to plaintiff No. 1 (who with plaintiff No. 2 was the manager of their undivided Hindu family) on 22nd October 1882 a hypothecation bond for Rs. 900, that certain payments had been made and credited towards the amount of the bond, and the prayer of the plaint was as follows :—

“ We therefore pray for a decree for the recovery of the
“ amount undermentioned due on the said hypothecation bond,
“ together with the subsequent interest and the costs of the suit,
“ making the property hypothecated liable, as also the body of

* Second Appeal No. 1136 of 1889.