

APPELLATE CIVIL.

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

NILAKANTA (DEFENDANT), APPELLANT,

v.

IMAMSAHIB AND ANOTHER (PLAINTIFFS), RESPONDENTS.*.

1892.
October 7.
November 11.

Limitation Act—Act XF of 1877, sched. II, arts. 62, 120—Suit by the purchaser in execution sale to recover the purchase money—Civil Procedure Code—Act XIV of 1882, s. 315—Saleable interest.

The plaintiff purchased land sold in execution of a decree in favor of the defendant, but was subsequently evicted by the son of the judgment-debtor, he now sued in 1889 to recover the purchase money paid by him, on the ground that the judgment-debtor possessed no saleable interest in the property in question. It appeared that the son of the judgment-debtor had obtained a decree in 1888 against the plaintiff and others declaring that she (the judgment-debtor) had no saleable interest in the property, and that in that suit the present defendant had given evidence in support of the present plaintiff's contention; the judgment in that suit was now admitted in evidence against the defendant:

Held, (1) that Limitation Act, sched. II, art. 120 contained the rule of limitation applicable to the suit, which was accordingly not time-barred, since the cause of action did not arise until 1888; *

(2) that the judgment above referred to was not evidence against the defendant;

(3) that the suit should be dismissed on the ground that there was no legal evidence, that the judgment-debtor whose interest in the land had been purchased by the plaintiff possessed no legal interest therein.

SECOND APPEAL against the decree of S. Subbayar, Subordinate Judge of South Canara, in appeal suit No. 136 of 1890, modifying the decree of S. Raghunathayya, District Munsif of Karkal, in original suit No. 317 of 1889.

The plaint stated that the defendant, in execution of a decree obtained by him against one Subbamma in original suit No. 255 of 1882, brought to sale in execution the mortgage right alleged to belong to the judgment-debtor in two pieces of land which were purchased by the plaintiff on the 9th October 1882. The greater part of the first plaintiff's purchase money was paid to the defendant in satisfaction of his decree. The plaintiff now sued to recover this amount from the defendant on the ground that the judgment-debtor had at the time of the sale no saleable interest in

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the property in question. It appeared that the judgment-debtor's son, who was an infant at the time of the sale, subsequently obtained a decree in original suit No. 65 of 1887 on the file of the District Munsif of Udipi against the present plaintiff No. 1 and others, whereby the decree was set aside on the ground, *inter alia*, that his mother possessed no saleable interest in the land, and that possession had subsequently been recovered from the present plaintiff. The cause of action was stated in the plaint to have arisen on 4th February 1889, which was the date when the decree passed in the first-mentioned suit by Subbamma's son was affirmed on appeal. The defendant raised the plea, *inter alia*, of limitation. In the lower Court a copy of the judgment delivered in original suit No. 65 of 1887 was admitted in evidence for the plaintiff, and it appeared that the present defendant had given evidence in that suit supporting the allegations now made by the plaintiff. Both the lower Courts overruled the plea of limitation and passed decrees in favour of the plaintiff, which differed merely in that that of the District Munsif allowed and that of the Subordinate Judge disallowed the plaintiff's claim to interest.

The defendant preferred this second appeal.

Pattabhirama Ayyar for appellant.*

Narayana Rau for respondent No. 1.

JUDGMENT.—The first point taken in this second appeal is that the suit is barred by limitation. The argument for appellant (defendant) is that the cause of action arose at the time of the purchase by plaintiff in 1882, and therefore that the suit brought more than six years after that date is barred, whether the case is governed by article 62 or article 120 of the second schedule to the Limitation Act. In our opinion the lower Courts were right in holding that the cause of action arose at the date of the decree in original suit No. 65 of 1887, declaring that Subbamma, the judgment-debtor, whose hypothecation right plaintiff purchased, had no saleable interest in the property. Plaintiff could not have brought the present suit prior to that decree, for until then he maintained that Subbamma had a saleable interest. The present suit is really brought under section 315 of the Code of Civil Procedure, which has been held to apply to suits—*Pachayappan v. Narayana*(1). No special period of limitation is fixed

(1) I.L.R., 11 Mad., 269.

for such suits, and therefore article 120 of the second schedule to the Limitation Act applies. The decree in original suit No. 65 of 1887 was in 1888, and therefore the suit brought in 1889 is not barred.

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The next point taken on behalf of defendant in this appeal is that it had not been proved in this suit that Subbamma whose interest in the hypothecated property plaintiff purchased at the Court auction had no saleable interest. It is argued that the only evidence of this offered on behalf of plaintiff was exhibit A, copy of the judgment in original suit No. 65 of 1887, and this is no evidence against present defendant, who was no party to that suit. We think this objection to the decree must prevail. The lower Courts have apparently admitted the copy of judgment (exhibit A) as evidence against defendant, because as a witness he supported present plaintiff's contention in that suit, which the District Munsif holds makes him "constructively" a party to the suit. This is no good reason for treating a judgment in a suit, to which defendant was no party, as evidence against him of the truth of the matters it decides. The words in section 315 of the Civil Procedure Code, "when it is found that the judgment-debtor had no saleable interest in the property, &c.," must, in our opinion, be taken to mean "when it is found in some proceeding by which the judgment-creditor is bound." To compel the judgment-creditor to refund the purchase money of property brought to sale in execution merely because in some proceeding between other parties a Court has decided that the judgment-debtor had no saleable interest would be contrary to all principles of justice. On the ground that it is not proved by any legal evidence in this case that the judgment-debtor, whose interest in the hypothecation plaintiff purchased, had no saleable interest therein, we think plaintiff's suit should be dismissed. The decrees of the lower Courts are reversed and plaintiff's suit is dismissed with costs throughout.

The memorandum of objections is also dismissed with costs.
