

APPELLATE CIVIL.

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

VENKATALINGAM (PLAINTIFF), APPELLANT,

v.

VEERASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1893.
April 28.
September 13.

*Limitation Act—Act XI of 1877, sch. II, arts. 137, 138—Purchase at Court auction—
Suit for possession of land—Date of cause of action—Construction of enactment.*

In a suit for possession of land instituted on 1st April 1891, it appeared that the land in question had been purchased by the plaintiff in a Court auction held in execution of a decree on 20th June 1878, and that the sale to the plaintiff was confirmed on 31st March 1879, which was the date upon which the certificate issued. The plaintiff failed to prove that the judgment-debtor was out of possession at or subsequently to the date of the sale :

Held, that the suit was governed by Limitation Act, sch. II, art. 138 ; that "the date of the sale" in that article means the date of the actual sale not the date of the confirmation of the sale and that accordingly the suit was barred by limitation.

SECOND APPEAL against the decree of B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 433 of 1891, confirming the decree of V. Krishnamurthi Pantulu in original suit No. 109 of 1891.

Suit for land. The property in question was brought to sale in execution of the decree in original suit No. 654 of 1878 and had been purchased at Court auction by the present plaintiff on 20th June 1878. The sale was confirmed and certificate issued on 31st March 1879. Delivery of the property, however, was not made through the Court or otherwise, and the auction purchaser now sued to recover the property in question. The plaint was filed on 1st April 1891 and the defendants raised a plea of limitation. This plea prevailed in the Lower Courts. The Subordinate Judge observed that an averment in the memorandum of appeal filed in his Court to the effect that the defendants had been out of possession for four years after the sale did not appear in the plaint and appeared to have been made as an after-thought in order to bring the suit within Limitation Act, sch. II, art. 137.

* Second Appeal No. 1441 of 1892.

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The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Sriranga Charyar for respondents.

JUDGMENT.—The facts of this case as found by the Courts below are shortly these :—Appellant purchased the land in dispute at the Court-sale held in execution of the decree in original suit No. 654 of 1873 on the file of the District Munsif of Narsapur. The property was put up to sale and knocked down to appellant as the highest bidder on the 20th June 1878. It was, however, on the 31st March 1879 that the sale was confirmed. The sale certificate bears that date whilst this suit was brought on 1st April 1891. The question for determination is whether the Courts below are right in holding that the suit was barred by article 138 of the second schedule of the Act of Limitation. For appellant (plaintiff) it is urged first, that there is no evidence to show that the judgment-debtor was in possession of the property in dispute at the date of the Court-sale, and that even if that article applied, the sale referred to in the third column is not the actual sale but the sale which has been confirmed and became absolute.

Article 137 premises an execution sale at the time when the judgment-debtor is out of possession, and article 138 presupposes a case in which the judgment-debtor is in possession of the property sold. According to the former the time from which the period begins to run is when the judgment-debtor becomes first entitled to possession and according to the latter time runs from the date of the sale. Referring to appellant's contention that defendants were out of possession for four years after the sale, the Subordinate Judge observes that the plaint did not state so, and that the allegation in the memorandum of appeal was an after-thought. The first issue fixed in this case was whether the suit was barred, and it was thus open to appellant to have proved that the judgment-debtor had been out of possession for four years after the sale, but he tendered no evidence on the point. The *onus* of proof was on appellant, and we cannot say that the Subordinate Judge was in error in considering his allegation as untrustworthy, especially when the plaintiff himself stated before the District Munsif that he asked the defendants to quit the land in dispute until four or five years after taking the certificate and not subsequently.

The next question is whether assuming that article 138 is

applicable to this suit, the claim is barred. If the word sale in the third column of that article means actual sale, the claim is clearly barred; but, if it means the sale which is confirmed the suit is in time. In its plain ordinary meaning the word sale means the auction-sale itself, and it is used in article 166 in that sense. Article 12, which refers to a sale that is confirmed, indicates also that the Legislature intentionally used the word without any qualification.

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But it is argued that under section 316 of the Code of Civil Procedure the title to the immovable property purchased vests in the purchaser from the time when the sale is confirmed and not before, and as no purchaser can sue for possession before the property passes to him the term sale in column 3 of article 138 must be taken to signify as in article 12 the sale which is confirmed. The direction in section 316 of the Code of Civil Procedure concerning the date on which the title to immovable property purchased at a Court-sale vests is not to be found in Act X of 1877, of which the corresponding section provides for the grant of a certificate, stating "the name of the person who, at the time of sale, is declared to be the purchaser and the date of such sale." With reference to that section it has been held that when the sale is confirmed it relates back to the auction-sale, and the property vests in the purchaser from the date of such sale. It was so held by the High Court at Calcutta in *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal*(1), and by a Full Bench of the same Court in *Bhyrub Chunder Bundopadhya v. Soudamini Dabee*(2). It was by Act XII of 1879 that the clause "title shall vest in the purchaser from the time when the sale is confirmed" was introduced into section 316. Though it was then open to the Legislature to have altered the word sale in the third column of article 138 of the Limitation Act, yet they have not done so. The same word cannot mean the actual sale in one place and the sale which is confirmed in another place in the same Act. The omission to alter the word sale into sale which is confirmed may be due to oversight, but the result of the grammatical interpretation must in law prevail when there is no ambiguity. We observe also that the sale in this case took place in June 1878, whereas section 316 was not modified till 1879.

(1) I.L.R., 14 Calc., 644.

(2) I.L.R., 2 Calc., 145.

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We are of opinion that the Courts below are right in holding that the suit is barred by article 138 of the Indian Limitation Act, and we dismiss this appeal with costs.

APPELLATE CIVIL.

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

1893.
July 12.

VENKATASUBBU AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

APPUSUNDRAM (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 20—Suit for money—Payment on account of principal within the period of limitation—Evidence of such payment by writing made after period expired.

The obligee of a registered mortgage bond, dated 30th January 1875, sued in February 1891 to recover from the obligor the principal and interest remaining due thereunder. In bar of limitation the plaintiff relied on entries of part-payments from time to time in an account written by the defendant. These part-payments were made at such times as to keep alive the obligee's right of suit up to the date of the last of them. The last of these payments was made on a date which was less than six years (the period of limitation for the suit) before the date of institution of the suit, but it was not entered in the defendant's accounts until after the date when the claim would otherwise have been barred by limitation:

Held, that the provisions of Limitation Act, section 20, were satisfied, and that the suit was not barred by limitation.

APPEAL against the judgment of Mr. JUSTICE BEST sitting on the Original Side of the Court in civil suit No. 32 of 1891.

The facts of the case appear sufficiently for purposes of this report from the judgment of Mr. JUSTICE BEST.

BEST, J.—The suit is for Rs. 4,442-5-6, balance of principal and interest due to plaintiff under the registered mortgage bond A, dated 30th January 1875, executed by first defendant for a sum of Rs. 9,100. Second defendant is the son of first defendant. Defendants pleaded that they were entitled to credit for a further sum of Rs. 191-4-11 being amount of assessment and quit-rent

* Original Side Appeal No. 30 of 1892.