APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar, and Mr. Justice Davies.

1895.
November 5.
December 4.
1896.
October 2.

KADAR HUSSAIN (PLAINTIFF), APPELLANT,

v.

HUSSAIN SAHEB AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 12 (a)—Dispossession.

Limitation Act, sched. II, art. 12 (a) is not applicable to a case in which dispossession is the cause of action and in which the plaintiff was not a party to, or bound by, the sale :

Held, accordingly, that a suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881, was not barred by limitation.

SECOND APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in appeal suit No. 299 of 1893, reversing the decree of ·G. Jagannadha Rau, District Munsif of Razam, in original suit No. 4 of 1893.

The plaintiff sued to recover a moiety of certain land which had been sold in November 1881, in-execution of a decree in original suit No. 290 of 1878, on the file of the District Munsif of Vizianagaram.

The District Munsif passed a decree for plaintiff, but his decree was reversed on appeal by the District Judge, who held that the suit was barred by limitation.

The plaintiff-preferred this second appeal which came on for hearing before Collins, C.J., and Parker, J., who made the following order of reference to the Full Bench :—

ÓRDER OF THE REFERENCE TO FULL BENCH.—The following are the facts which give rise to this reference :—

Plaintiff's paternal uncle Dada Miyya owned half an Inam land, and plaintiff's father owned the other half. Dada Miyya mortgaged his half to defendant's father in 1870. Defendant's father obtained a decree upon this mortgage in suit No. 290 of 1878, and the property mortgaged was ordered to be sold. The sale took place in November 1881, but by some mistake the whole

land was sold instead of Dada Miyya's half share. Defendant's father purchased the land and was put in possession. Plaintiff brought this suit on November 25th, 1892, to recover possession of his half share.

The District Judge on the strength of the Ruling in *Suryanna* v. *Durgi*(1), held that the suit was governed by article 12 (a) of the Limitation Act and that the suit was barred.

There are however various decisions in which it has been held that article 12 of the Limitation Act does not apply to suits in which the plaintiff was not a party to, and not bound by, the sale sought to be set aside. See *Sadagopa* v. *Jamuna Bhai*(2), *Haji* v. *Atharaman*(3), (which was a decision by the same Bench); *Nilakandan* v. *Thandamma*(4), *Nathu* v. *Badri Das*(5), *Parekh Ranchor* v. *Bai Vakhat*(6) and *Vishnu Keshav* v. *Ramchandra Bhaskar*(7).

The ground of decision appears to be that article 12 is inapplicable to suits in which dispossession is the cause of action, since dispossession may not have taken place till some time after the confirmation of the sale.

The decision in *Suryanna* v. *Durgi*(1) has been recently doubted by a Bench of this Court in *Narasimha Naidu* v. *Ramasami*(8).

The question referred to the Full Bench is whether article 12 (a) of the second schedule of the Limitation Act is applicable to a case in which dispossession is the cause of action and in which plaintiff was not a party to, or bound by, the sale.

The reference came on for hearing before the Full Bench.

R. Subramania Ayyar for appellant, argued that *Suryanna* v. *Durgi*(1) was wrongly decided and referred to *Narasimha Naidu* v. *Ramasami*(8).

Ramachandra Rau Saheb for respondent, contended that when a man knows that his property was put up for sale and sold in execution of a decree of Court, he ought to object before the sale is confirmed, and accordingly that, in the absence of proof of fraud, whereby the confirmation of the sale was concealed from the

(1) I.L.R., 7 Mad., 258.   (2) I.L.R., 5 Mad., 54.
(3) I.L.R., 7 Mad., 512.   (4) I.L.R., 9 Mad., 460.
(5) I.L.R., 5 All., 614.   (6) I.L.R., 11 Bom., 119.
(7) I.L.R., 11 Bom., 130.   (8) I.L.R., 18 Mad., 478.

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plaintiff as was found to be the case in *Parekh Ranchor* v. *Bai Vakhat*(1), the plaintiff was bound by the one year's rule.

The Full Bench (Collins, C.J., Shephard, Subramania Ayyar and Davies, JJ.) delivered the following judgment.

JUDGMENT.—In the circumstances stated we think there can be no doubt that article 12 (*a*) of the second schedule of the Limitation Act cannot properly be applied to the suit brought by the plaintiff.

Whatever was the intention of the parties who took part in the execution sale, that transaction could not affect the title of the plaintiff, and therefore it was not necessary for him to have the sale set aside.

We cannot agree with the decision in *Suryanna* v. *Durgi*(2) which was also a case of a sale in execution of a decree.

[After the delivery of the above judgment the decree of the District Court was set aside, and the appeal was remanded to be disposed of on the merits.]

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

RANGAYYA CHETTIAR (PLAINTIFF), APPELLANT,

v.

PARTHASARATHI NAICKAR AND OTHERS (DEFENDANTS Nos. 1 to 7), RESPONDENTS.*

Mortgage—Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree holder for inadequate price—Right of puisne mortgagee—Improvements—Interest.

A mortgaged land to B and then to C. B sued on his mortgage and obtained a decree for sale without joining as defendant C, of whose mortgage he had notice; D the son of the decree-holder became the purchaser in execution and improved the land at a considerable cost. C now sued the sons and representatives of A and B (both deceased), on his mortgage and sought a decree for sale:

Held, (1) that the plaintiff was entitled to a decree for sale subject to the right of the representatives of B, if the purchaser did not elect to redeem;

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(1) I.L.R., 11 Bom., 119.   (2) I.L.R., 7 Mad., 258.   * Appeal No. 121 of 1895.