

## APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Beverley.

SARODA CHURN CHUCKERBUTTY AND OTHERS (DEFENDANTS) v.  
MAHOMED ISUF MEAH (PLAINTIFF.)\*

1885  
March 10.

*Execution of decrees which is barred by limitation, Sale under—Sale certificate, Effect of—Act XIV of 1882, ss. 244, 316—“Subsisting decree,” Meaning of—Costs.*

The words “subsisting decree” in the proviso to s. 316 of the Code of Civil Procedure refer to a decree which is unreversed and in full force, and not to a decree the execution of which is not barred by limitation.

Where a decree under which a sale takes place remains unreversed, and the sale under it has been confirmed, a sale certificate will operate as a valid transfer of the property sold, notwithstanding that the sale has actually taken place at a time when execution of the decree is barred by limitation.

This was a suit brought to set aside a sale held in execution of an *ex-parte* decree for arrears of rent due in respect of an under-tenure, obtained by the defendants against the plaintiff. This decree was not appealed from; at the execution sale the defendants themselves became the purchasers of the under-tenure at the price of one rupee, and the sale was duly confirmed and a certificate granted to the purchasers. The plaintiff in the present suit alleged that no notice of the sale had been given as directed by s. 59 of Bengal Act VIII of 1869, and that he had no knowledge of any of the execution proceedings, and further stated that execution of the defendants' decree had been taken out at a time when execution of the decree was barred by limitation.

The defendants denied these statements, and contended that no suit would lie to set aside the sale.

The Munsiff found that the sale had not been published in accordance with s. 59 of Bengal Act VIII of 1869, and that the sale notification had been fraudulently concealed from the plaintiff, adding “that it further appeared that after the decree had

\* Appeal from Appellate Decree No. 1474 of 1883, against the decree of Baboo Juggutlurubh Mozoomdar, Subordinate Judge of Farridpore, dated the 19th of March 1883, reversing the decree of Moulvi Mohabat Ali Munsiff of Gcalundo, dated the 12th of September 1881.

"been barred by limitation, the *mehal* in default was sought to be sold by auction, and was sold accordingly. Consequently, according to s. 316 of the Code of Civil Procedure when the decree was not in force at the time of the sale, the said sale could not transfer the right of the plaintiff to the defendants," and he therefore gave the plaintiff a decree.

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The defendants appealed to the Subordinate Judge, who held that under s. 244 of the Code no separate suit would lie to set aside the sale; but dismissed the appeal on the ground that the decree was not "subsisting" at the time of the sale, and that, therefore, the sale certificate under s. 316 of the Code did not operate to pass the title in the property to the purchaser.

The defendants appealed to the High Court.

Baboo *Iswar Chandra Chakrabarti* for the appellants contended that the words "subsisting decree" in the proviso to s. 316 of the Code of Civil Procedure meant merely a decree which had been unreversed—*Mahomed Hossain v. Kokil Singh* (1); and that the Judge having found the suit could not lie acted in granting the plaintiff a decree.

Baboo *Kalibissen Sen* for the respondent.

Judgment of the Court (PIGOT and BEVERLEY, JJ.) was as follows:—

This appeal arises out of a suit to set aside the sale of a certain *jote* in execution of a decree, on the ground that the sale had been brought about fraudulently without proper notification, and at a time when the execution of the decree was barred by limitation. On the part of the defendants it was contended, amongst other things, that no separate suit would lie to set aside the sale. The Court of first instance found that the sale notification had been fraudulently suppressed, and held that a separate suit would lie to set it aside; and the Munsiff further held that inasmuch as execution of the decree was barred at the time of the sale, the sale certificate, under the proviso to s. 316 of the Code of Civil Procedure, could not operate to create a valid transfer of the property sold. He, therefore, gave the plaintiff a decree.

(1) I. L. R., 7 Calc., 91.

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The Subordinate Judge, on the other hand, relying on the case of *Chowdhry Wahed Ali v. Mussamut Jumae* (1), and on the case of *Viraraghava Ayyangar v. Venkatacharyar* (2), held that no separate suit would lie; but he dismissed the appeal on the ground that the decree was not subsisting at the time of the sale, and that therefore the sale certificate under s. 316 did not operate to pass the title to the purchaser.

It is contended here that this decision is wrong in law; that the words "subsisting decree" in s. 316 mean a decree unreversed and in full force, and not a decree, the execution of which is not barred by limitation; and further that, when the Subordinate Judge found that a separate suit would not lie, he was wrong to grant the plaintiff a decree.

We think that these contentions must prevail.

The cases of *Mahomed Hossein v. Kokil Singh* (3), and *Mungul Pershad Dikhit v. Grija Kant Lahiry* (4), are authority for holding that the sale certificate operated as a valid transfer, notwithstanding that the sale actually took place at a time when execution was barred by limitation. The decree under which the sale took place was a good decree, and is in force up to the present time; and the sale which took place under it has been confirmed, and must be held to be a valid sale.

Then the question arises whether this separate suit would lie to set aside the sale on the ground of fraud; and on this point we agree with the decision in *Viraraghava Ayyangar v. Venkatacharyar* (2); we think the question raised is certainly one relating to the execution of the decree, and that it is between the parties to the suit in which the decree was passed.

We think, therefore, that the decree of the lower Appellate Court must be reversed, and the plaintiff's suit be dismissed. But having regard to the circumstances of the case and the conduct of the defendants, we shall follow the course taken in the Madras case cited, and in a somewhat similar case of *Paranjpe v. Kamade* (5), and shall direct that each party do bear his own costs throughout.

*Appeal allowed.*

(1) Suth. P. C., 680.

(3) I. L. R., 7 Cal., 91.

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

(4) I. L. R., 8 Cal., 51.

(5) I. L. R., 6 Bom., 148.