

mainly depend upon this, *viz.*, whether the local biggah was smaller than the ordinary biggah. Upon this point the lower Courts have come to the conclusion that the defendants have not made out their contention. In second appeal we cannot interfere with this finding of fact.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Pigot.

MAHOMED HOSSEIN (ONE OF THE DEFENDANTS) *v.* PURUNDUR MAHTO,
ON HIS DEATH HIS SON, HEM LAL MAHTO (PLAINTIFF).*

1885
January 26,

Limitation—Suit to set aside sale held in execution of a decree—Execution Act XV of 1877 (Limitation Act), ss. 4 and 14 and Sch. II, Art. 12—Civil Procedure Code (Act XIV of 1882), ss. 311, 312.

If in an application for execution the Court erroneously holds that the application is not barred and orders a sale, the order, though erroneous and liable to be set aside in the way presented by the procedure law, is not a nullity, but remains in full force until set aside, and a sale held in pursuance of such order is, until set aside, a valid sale; a suit to set aside such a sale is governed by Art. 12, cl. (a) of Sch. II of Act XV of 1877.

The word "disallowed" in s. 312 of the Civil Procedure Code has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under s. 311 are taken.

On the 15th June 1878, a judgment-debtor filed a petition objecting to execution of a decree against him proceeding on the ground that the decree was barred. On the 18th November 1878, that objection was overruled and certain of his property sold. Against the order overruling his objection the judgment-debtor appealed, and ultimately on the 13th January 1880 the order was set aside by the High Court, and the decree was held to have been barred. Pending these proceedings the judgment-debtor also, on the 17th December 1878, applied, under the provision of s. 311 of the Civil Procedure Code (Act XIV of 1882), to set aside the sale on the ground of material irregularity, but that application was ultimately rejected on the 17th May 1879, and the sale was confirmed on the 21st May 1879.

On the 2nd April 1880, the judgment-debtor applied to set aside the sale, on the ground that the decree, in execution of which it had taken place,

* Appeal from Appellate Decree No. 985 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 26th of March 1883, reversing the decree of Baboo Jogesh Chunder Mitter, Roy Bahadour, Subordinate Judge of that district, dated the 25th of March 1882.

1885 had been held to be barred, and though an order setting aside the sale was made by the Original Court, it was subsequently set aside by the High Court on the 13th April 1881, as having been made without jurisdiction. The judgment-debtor now brought a suit on the 4th January 1882, upon the same grounds to set aside the sale and recover possession.

MAHOMED
HOSSEIN
v.
PURUNDUR
MAHTO.

Held, that the suit was barred.

THE facts of this case, so far as they are material, were as follows:—On the 18th November 1878, certain property belonging to Purundur Mahto, the father of the respondent, who was the plaintiff, but who died pending the appeal, was put up for sale in execution of a decree obtained by one of the defendants against him, and purchased by the present appellant, Mahomed Hossein. On the day on which the sale took place, and immediately prior thereto, an objection raised by Purundur Mahto by a petition filed on the 15th June 1878, objecting to the sale proceeding on the ground that the execution of the decree was barred by limitation, was overruled. After the sale Purundur filed an appeal against the order, finding that the execution of the decree was not barred, and also applied to have the sale set aside on the ground of material irregularity in publishing it, &c. The latter application was filed on the 17th December 1878, was rejected on the 17th May 1879, and, though an appeal was preferred against such rejection, the order of rejection was confirmed on the 24th March 1880, and the sale was ultimately confirmed on the 21st May 1880, and a certificate granted to the purchaser, the present appellant.

On the 5th July 1879 the Judge decreed the appeal preferred against the order of the 18th November 1878 finding that the decree was not barred, and held that the decree was barred; and though an appeal was preferred to the High Court, the decision of the Judge upon this point was upheld, and that appeal dismissed on the 13th January 1880.

The judgment-debtor, Purundur, thereupon, on the 2nd April 1880, applied to the Subordinate Judge to have the sale set aside upon the ground that the decree, in execution of which the sale had taken place, had been found to be barred, and that application was granted on the 13th September 1880; but an appeal being preferred, the order then passed was set aside by

the High Court on the 13th April 1881, upon the ground that it was made without jurisdiction.

Purundur, thereupon, on the 4th January 1882, instituted the present suit for the purpose of setting aside the sale, and having possession of the lands which had meanwhile been taken possession of by the auction-purchaser. The first Court dismissed the suit, holding that it was barred by limitation, but on appeal that decision was reversed, and the plaintiff obtained a decree.

The lower Appellate Court was of opinion that Art. 12 of Sch. II of the Limitation Act did not apply on the ground that the execution sale was in reality a nullity, as the decree being barred by limitation the Court had no jurisdiction to direct any sale in execution thereof; and that, even if Art. 12 did apply, the provision of s. 14 entitled the plaintiff to deduct the period from the 2nd April 1880, to the 13th April 1881, when he was endeavouring by litigation to set aside the sale. That Court also held that the sale could not be said to have been confirmed on the 21st May 1879, as that order was appealed against, and the appeal was not disposed of up till the 24th March 1880, and that the action of the Court in confirming the sale could not affect the right of the parties.

The defendant, Mahomed Hossein now specially appealed to the High Court.

Mr. *C. Gregory* and Baboo *Jogendro Chunder Ghose* for the appellant.

Baboo *Taruck Nath Palit* for the respondent.

The judgment of the High Court (MITTER and PIGOT, JJ.) was as follows:—

The facts of this case are briefly as follows:—In 1878, execution of a money decree against the plaintiff was taken out, and the property in dispute was attached. On the 15th June 1878, a petition was filed by the plaintiff, objecting to the proceedings in execution on the ground that the decree was barred by limitation. On the 18th November 1878, the Court executing the decree overruled this objection, and the property in dispute was sold at auction for Rs. 90. Against this order the plaintiff preferred an appeal.

1885
 . MAHOMED
 HOSSEIN
 v.
 PURUNDUR
 MAHTO.

1885
 MAHOMED
 HOSSEIN
 v.
 PURUNDUR
 MAHTO.

Of the 17th December 1878, before the appeal was heard, the plaintiff made an application under s. 311 of the Code of Civil Procedure to set aside the sale on the ground of material irregularity in conducting it. This application was rejected on the 17th May 1879, and the sale was confirmed on the 21st May following.

The appeal against the order of the Original Court overruling the plea of limitation was heard on the 5th of July 1879, and the Appellate Court decreed the appeal, holding that the decree was incapable of execution as barred by limitation. This decision was confirmed by the High Court on second appeal on the 13th January 1880. On the 24th March following, the District Judge on appeal confirmed the order of the lower Court rejecting the plaintiff's petition under s. 311 of the Civil Procedure Code.

On the 2nd April 1880, the plaintiff made an application to the Original Court to set aside the sale, on the ground that the decree at the time it was held was barred by limitation. The Court apparently acting under s. 316 of the Civil Procedure Code, set aside the sale on the 13th September 1880. On the 13th April 1881 this Court, on the motion of the defendant, set aside the order of the 13th September 1880 as passed without jurisdiction.

The present suit was brought on the 4th January 1882 for possession of the property in dispute, which was sold on the 13th November 1878 by setting aside the said sale.

The Court of first instance dismissed the suit, but the District Judge on appeal has, reversing the decree of the lower Court, awarded a decree in favor of the plaintiff. Against the decision of the District Judge, the present appeal has been proffered by the auction-purchaser.

The parties joined issue upon the question whether the defendant auction-purchaser was or was not a mere benamidar for the defendant decree-holder. Both Courts have concurrently found that it had not been established that he was benamidar of the decree-holder. That question being one of fact, is therefore no longer open in this second appeal.

One of the grounds upon which the suit was dismissed by the Subordinate Judge was that it was barred by limitation under

clause (a) of Article 12 of the second schedule of the Limitation Act, which says that in a suit to set aside a sale in execution of a decree, the period of limitation is one year from the date when the sale is confirmed.

The lower Appellate Court is of opinion that this article is not applicable, because the execution sale in this case was a nullity. The District Judge holds that the decree being barred by limitation the Court had no *jurisdiction* to direct any sale in execution thereof. One of the contentions of the defendant auction-purchaser, before the District Judge, was that the decree was not barred by limitation, and that as he was not a party to the proceeding in which it was held that it was so barred, he was not bound by the decision arrived at in it. But the District Judge overruled this contention on the ground that he purchased the property when that proceeding was pending, and that therefore on the doctrine of *lis pendens* he was bound by the final decision in that proceeding.

The District Judge was further of opinion that, even if the article in question be held to be applicable, the present suit would not be barred by limitation. He arrives at this conclusion in the following way: In the first place he thinks that the date of the confirmation of the sale is not the 21st of May 1879, when the Court in which the sale was held, held a proceeding confirming the sale. He is of opinion, therefore, that upon the proper construction of s. 312 of the Civil Procedure Code, the Court had no power to confirm the sale then. But the date when the sale should be held to have been confirmed according to the provisions of the Civil Procedure Code, was the 24th of March 1880, when the District Judge dismissed the appeal in the proceeding under s. 311.

In the second place the District Judge holds that the plaintiff is entitled under s. 14 of the Limitation Act to the deduction of the time which elapsed between the 2nd of April 1880, (when the plaintiff applied to the Subordinate Judge to have the sale set aside on the ground that the decree had been declared by the highest Court to be barred), and the 13th of April 1881, when the High Court reversed the order made by the lower Court in that proceeding in favor of the plaintiff. There is no

1885

MAHOMD
HOSSEIN
v.
PURUNDUR
MAHTO.

1885
 MAHOMMED
 HOSSEIN
 v.
 PURUNDUR
 MAHTO.

doubt, that if this period be deducted, and if the correct starting date be the 24th of March 1880, the suit would be within time.

It seems to me that the District Judge is in error in holding that this suit is not barred under clause (α) of Art. 12 of the second schedule of the Limitation Act.

The District Judge is in error in holding that, inasmuch as the Court had no jurisdiction to entertain the application of the decree-holder for the sale of the disputed property in consequence of the decree being barred by limitation, the sale itself was a nullity. Section 4 of the Limitation Act directs that an application made after the period prescribed in the Act shall be dismissed. This direction in the section in question does not take away the jurisdiction of the Court in respect of the application in any way. If the Court erroneously holds that the application is not barred, the order of the Court, though erroneous and liable to be set aside in the way prescribed in the procedure law, is not a nullity, but remains in full force until set aside. Therefore, the sale held in this case was a valid sale until it was set aside.

That being so, clause (α), Art. 12 of the second schedule of the Limitation Act clearly applies to this suit. According to the article in question the period of limitation begins to run from the time when the sale is confirmed. In this case the sale was confirmed on the 21st of May 1879. The District Judge is of opinion that the word "disallowed" in s. 312 of the Civil Procedure Code means "disallowed" by the Appellate Court. It seems to me that the section does not admit of this construction. The words of the section leave no discretion to the Court in the matter of the confirmation of the sale after the objection is disallowed. It says that the objection, being disallowed, "the Court shall pass an order confirming the sale." The objection to the sale was disallowed on the 17th May 1879, and the sale was confirmed on the 21st May following. The date of the confirmation of the sale was therefore the 21st May 1879, and not the 24th March 1880 as held by the District Judge. Taking the 21st May 1879 as the starting point, the present suit was not brought within one year, even if the time

deducted by the District Judge be held to have been rightly deducted. The suit is, therefore, barred by limitation.

The decision of the lower Appellate Court will, therefore, be set aside, and the plaintiff's suit dismissed with costs in all the Courts.

1885

 MAHOMED
 HOSSEIN
 v.
 PURUNDUR
 MAHTO.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Field.

ABILAK ROY AND OTHERS (DEFENDANTS) v. RUBBI ROY (PLAINTIFF).*

1885

 February 4.

Hindu Law—Mortgage for legal necessity by managing brother of joint family—Sale in execution of decree obtained against mortgagor alone—Rights of purchaser and other member of joint family.

A, the managing member of a joint Hindu family governed by the Mitakshara law, for joint family purposes and legal necessity mortgaged the joint family property. The mortgagee subsequently sued *A* alone upon the mortgage, obtained a decree, and had the property comprised in the mortgage put up for sale. *B*, a brother of *A*'s, who was no party to the mortgage or to the suit thereon, resisted the purchaser at the auction sale in his endeavour to get possession. In a suit by the purchaser against *B* and *A*,

Held, that *B*'s interest in the joint family property was unaffected by decree passed in the mortgage suit, and that the purchaser was not entitled to the relief he sought as regards his share.

Subramaniam v. Subramaniam (1) followed.

THE facts of this case were as follows: Hurihur Dut Roy and Jori Roy, members of a joint Hindu family governed by the Mitakshara law, borrowed a sum of Rs. 700 from one Sheo Proshad Singh upon a mortgage of a share in the joint family property, the loan being raised for legal necessity. This mortgage was dated the 13th July 1875, and covered an eight gunda, one couri, one krant share in mouzah Dihali. Afterwards Hurihur Dut Roy separated from Jori Roy. The sons of Sheo Proshad Singh, who had meanwhile died, instituted a suit on the 8th January 1879 upon the mortgage against Hurihur Dut Roy and Jori Roy, and obtained an

* Appeal from Appellate Decree No. 1808 of 1883, against the decree of Baboo Dinesh Chunder Rai, Additional Subordinate Judge of Tirhoot, dated the 13th of April 1883, reversing the decree of Mahomed Nurul Hosain, Khan Bahadur, Munsiff of Tajpore, dated the 28th of June 1882.

(1) I. L. R., 5 Mad. 125.