

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nai.

1908.
September
28.

SULTAN SAHIB MAHAKAYAR AND OTHERS (DEFENDANTS
Nos. 3, 5 TO 9), RESPONDENTS—APPELLANTS,

v

CHIDAMBARAM CHETTIAR AND ANOTHER (PLAINTIFFS
Nos. 2 AND 3), PETITIONERS—RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, s. 318 Limitation Act, Act XV of 1877, sched II, arts 178, 179—Application under s. 318 of the Code of Civil Procedure not an application for execution and falls within art. 178, sched. II of the Limitation Act.

An application by a decree-holder, under section 318 of the Code of Civil Procedure, to be put in possession of property purchased, by him at sale in execution is not an application for execution of the decree and, for purposes of limitation, falls within article 178 and not within articles 179 of schedule II of the Limitation Act. Such application is barred when presented more than three years after the grant of a certificate of sale.

Muttia v. Appasami, [(1890) I L.R., 13 Mad., 504], considered.

APPEAL against order of H. Moberly, District Judge of South Arcot, in interlocutory application No. 134 of 1907.

In execution of a razinamma decree passed on the 26th February 1895, immoveable property was brought to sale and purchased by the plaintiffs, to whom a sale certificate was granted on the 3rd August 1900. The second and third plaintiffs made an application for delivery of possession under section 318 of the Code of Civil Procedure in 1907.

The other facts necessary for the report appear in the judgment.

The District Judge held that article 179, schedule II of the Limitation Act, applied to the case and that the application, though brought more than three years after the grant of the certificate, was not barred, as it should be considered to be an application for execution and was made within three years of the preceding application for execution. He accordingly directed delivery of possession.

The defendants appealed.

T. R. Venkatarama Sastri for appellants.

* Civil Miscellaneous Appeal No. 262 of 1907.

K. Srinivasa Ayyangar for respondents.

JUDGMENT.—The decree-holder purchased in an execution sale in 1899 certain property of the judgment-debtor and in 1900 obtained a sale certificate. The decree was not completely satisfied by the sale, and further proceedings were taken to which it is not necessary to refer, otherwise than to say that, they may be taken to have arisen out of applications for execution or to take steps in aid of execution. Then, in 1907 the decree-holder for the first time applied for delivery of possession of the property to which he became entitled by virtue of his sale certificate of 1900.

The question is, whether his application is within time? and the case has been argued on the footing that the answer must be in the affirmative if article 179 of schedule II of the Limitation Act is applicable to the case, and, in the negative, if it is not applicable, article 178 being in that event the appropriate article.

We are of opinion that article 178 is the article applicable, and that the application for delivery of possession is not one for the execution of a decree. In *Muttia v. Appasami*(1) it is true one of the learned Judges expressed an opinion that article 179 would decide whether an application under section 318 of the Civil Procedure Code is or is not within time, and the other learned Judge also expressed an opinion that an application under section 318 of the Civil Procedure Code is substantially an application for execution. But the question which they had to decide was between a period of thirty days' limitation and a period of three years. Their decision on the question of limitation would have been the same had they applied article 178 and not article 179 of schedule II of the Limitation Act. We cannot therefore take this case as a decision on the point before us.

There is no case to which we have been referred which actually decides this question on a consideration of the difference between the two articles, but the Bombay High Court has held more than once that article 178 ought to be applied, (*Basapa v. Marya*(2), *Hannantrav Pandurang Joglekar v. Subji Girmaji*(3), and *Kashinath Trimbak Joshi v. Duming Zuran*(4)) in the case of an application under section 318 of the Civil Procedure Code, and we think these decisions are right.

MILLER
AND
SANKARAN-
NAR, JJ.
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SULTAN
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BARAM
CHETTIAR.

(1) (1890) I.L.R., 13 Mad., 504.

(2) (1879) I.L.R., 3 Bom., 433.

(3) (1884) I.L.R., 8 Bom., 257.

(4) (1893) I.L.R., 17 Bom., 228.

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It is clear that an application by a decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree, a direction for delivery of possession being no part of the decree, and though we may be bound by a number of decisions to hold that such an application raises a question relating to the execution of the decree, it does not follow, and we do not think, that it is an application for execution. To hold that it is an application for execution might involve injustice. In a case, for instance, like that decided in *Basari v. Marya*(1) an application, though made within three years of the sale certificate, would, if article 179 is applicable, have to be held barred by limitation under that article, if not made within three years of the next preceding application to take a step in aid of execution: and so it might happen that in a case where, in execution, a sale is held say eleven years after the date of the decree, an application for possession made within three years of the sale certificate would, with reference to section 230 of the Civil Procedure Code, have to be rejected as barred by limitation if it is to be treated as an application for the execution of the decree. These consequences of applying article 179 to an application under section 318 cannot have been intended and can be avoided by applying article 178. It was contended that, in the case last suggested, the application for possession would be treated as an application in a pending execution proceeding but that is clearly not a sound contention. Apart from section 318, Civil Procedure Code, which requires an application by the purchaser, an application for execution by way of an auction sale could not contemplate delivery of possession to the applicant as a consequence of the sale.

For these reasons we reverse the order of the lower Court and dismiss the application with costs throughout.

(1) (1879) I.L.R., 3 Bom., 433.