

## APPELLATE CIVIL.

*Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.*

SESHAGIRI RAO AND EIGHT OTHERS (PETITIONERS NOS. 1 TO 4,  
5, 6, 7 AND 8), APPELLANTS,

1919.  
August  
15 and 19.

v.

SRINIVASA RAO AND TWELVE OTHERS (RESPONDENTS NOS. 1 TO 9,  
11, 12, 13 AND 15), RESPONDENTS.\*

*Limitation Act (IX of 1908), Arts. 166 and 181—Exonerated defendants—Sale of properties, including share of exonerated defendants—Application to set aside sale—Limitation.*

In a decree awarding maintenance a charge was created on the shares of some of the defendants in lands belonging jointly to them and the appellants, but the shares of the latter were expressly exonerated. In execution of the decree, however, the lands were sold by Court auction, including the shares of the appellants therein. On an application by them a year and seven months later to set aside the sale of their shares.

*Held* that article 181, and not article 166, of the Limitation Act applied, and that the application was not barred.

APPEAL against Appellate Order of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Appeal Suit No. 303 of 1917, preferred against the decree of T. A. SUBBAYYA PILLAI, the District Munsif of Conjeeveram, in Civil Miscellaneous Petition No. 1016 of 1916, in Original Suit No. 19 of 1904.

The material facts appear from the judgment.

*C. V. Ananta/krishna Ayyar* and *C. Sitaramayya* for the appellants.

*S. Ranga Achariyar* and *S. Vaidyanatha Ayyar* for the respondents.

The JUDGMENT of the Court was delivered by

MOORE, J.—There is no dispute as to the facts in this case. MOORE, J.  
A suit for maintenance was brought by one Yamuna Bayee. Some of the present appellants were defendants Nos. 9 to 12 in the suit and were added as supplemental defendants, as they belonged to a divided branch of the family. Yamuna Bayee obtained a decree for maintenance against defendants Nos. 1 to 8, and the maintenance awarded was made a charge on the shares of defendants Nos. 1 to 8 in certain properties.

\* Appeal against Appellate Order No. 76 of 1918.

SESHAGIRI  
RAO  
v.  
SHINIVASA  
RAO.  
MOORE, J.

The appellants and their three-fourths share of the properties were expressly exonerated under the decree. In 1906, the decree-holder applied for execution of the decree against defendants Nos. 1 to 8 only and no notice of the execution proceedings was taken out to the appellants Nos. 1 to 4. Certain lands were attached as belonging to the first defendant in the suit and on 26th January 1910, 3 acres 84 cents of land in Shrotriyam Thenambakkam village, including the three-fourths share of the appellants, were sold in Court auction and purchased by one Murugesan Chetti, the present ninth respondent. The sale was confirmed on 16th July 1910, and a sale certificate issued to the auction purchaser on 18th November 1910, delivery of the properties being given on 16th December 1910. On 25th July 1911 (a year and seven months after the sale) the appellants filed a suit, Original Suit No. 378 of 1911, in the Conjeeveram District Munsif's Court, to set aside the auction sale and for partition and recovery of their three-fourths share, alleging that the sale was invalid so far as their share of the properties was concerned. The District Munsif dismissed the suit, on the ground that as the plaintiffs were parties to the suit in execution of which the sale was held, it was barred by section 47 of the Code of Civil Procedure. The District Munsif's decision was affirmed on appeal by the District Judge. In Second Appeal No. 356 of 1914, the High Court remanded the suit to the Court of first instance for disposal as a proceeding under section 47 of the Civil Procedure Code, the question whether the application was barred by limitation being left open. The lower Courts have dismissed the application as barred by article 166 of the Limitation Act. Hence the present appeal.

Mr. Anantakrishna Ayyar, for the appellants, contends that the lower Court erred in applying article 166 of the Limitation Act, and that the article applicable is article 181, which provides a period of three years from the time when the right to apply accrues in the case of an application to which no period of limitation is provided elsewhere in the schedule or by section 48 of the Civil Procedure Code. In our opinion the application is governed by article 181, and not by article 166, of the Limitation Act and is consequently not barred by limitation, as it was made within the period prescribed by article 181. The appellants were parties to the suit (see the explanation to

section 47 of the Code of Civil Procedure), but were not parties to the decree under which they were exonerated, no notice of the application for attachment and sale of the properties was admittedly given to them, and they were strangers to the execution proceedings.

SESHAGIRI  
BAO  
v.  
SRINIVASA  
BAO.  
—  
MOORE, J.

It is not disputed that under the terms of the decree the Court had no power to sell the appellants' three-fourths share in the properties. The sale was void for want of jurisdiction [vide *Raghunath Das v. Sundar Das Khetri*(1), *Shyam Mandal v. Satinath Banerjee*(2) and *Shivbai v. Yesoo*(3)]. If an execution sale is a nullity (i.e., is made without jurisdiction or is void *ab initio*) article 166 has in our view no application, and the residuary article 181 should be applied. We are justified in our conclusion by the decision in *Ramavenkatasubbier v. Subramania Chettiar*(4). In that case, the facts were that the plaintiff had taken a mortgage from a member of the judgment-debtor's family and had obtained a decree for sale of the one-sixth share of the joint family properties, to which his mortgagor was entitled. Under the decree, however, a one-fourth instead of one-sixth share was brought to sale and purchased by the plaintiff decree-holder. The learned Judges (WALLIS, U.J., and SPENCER, J.) held, that the sale, in so far as it purported to sell more than the one-sixth share awarded by the decree, was made without jurisdiction, according to the principle laid down by the Privy Council in *Malkarjun v. Narhari*(5). The learned vakils for the ninth respondent's (the auction purchaser's) vendees relied on the decision in *Muthiah Chettiar v. Bava Sahib*(6). In that case, the decree directed the sale of items in a particular order. They were, however, sold in a different order. It was held, that an application to set aside the sale on the ground that it took place contrary to the direction in the decree was one under section 47 of the Civil Procedure Code and would be governed by article 166. *Muthiah Chettiar v. Bava Sahib*(6) is, however, clearly distinguishable, as it was the judgment-debtor who moved the Court to have the sale set aside. The facts of the present case are

(1) (1915) I.L.R., 42 Calo., 72 (P.C.).      (2) (1917) I.L.R., 44 Calo., 954.

(3) (1919) I.L.R., 43 Bom., 235.

(4) Second Appeal No. 389 of 1914 (unreported).

(5) (1901) I.L.R., 25 Bom., 337 (P.C.).      (6) (1914) 27 M.L.J., 605.

SESHAGIRI  
RAO  
v.  
SRINIVASA  
RAO.  
MOORE, J.

certainly different. The appeal is accordingly allowed with costs payable by the ninth respondent.

The District Munsif is directed to restore the appellants application to set aside the sale to his file and dispose of it according to law.

K.R.

## APPELLATE CRIMINAL.

*Before Mr. Justice Kumaraswami Sastri.*

ANGAPPA MUDALI AND ELEVEN OTHERS (PETITIONERS),

v.

RAMAPURAM PERUMAL CHETTY AND RAMAPURAM  
KRISHNAPPA CHETTY (COUNTER PETITIONERS).\*

1919,  
August  
7 and 19.

*Criminal Procedure Code (Act V of 1898) ss. 133, 135, 138 and 139—Issue of notice by Subdivisional Magistrate—Option to appear and show cause before a second-class Magistrate—Appointment of a jury—Verdict submitted to Subdivisional Magistrate—Jurisdiction in Subdivisional Magistrate to deal with verdict and dispose of case.*

A Subdivisional Magistrate, who issues notice under section 133, Criminal Procedure Code, calling upon a person to do something within a specified time, or to appear before another Magistrate to have the order set aside, is not deprived of his jurisdiction, but has power to deal with the matter under section 139, Criminal Procedure Code, on receiving the verdict of the jury appointed by him under section 138. The word 'Magistrate' in section 139 (1) refers to the Magistrate who issued notice.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to revise the order of N. KOLL PILLAI, the Subdivisional First-class Magistrate of Sankari, in Miscellaneous Case No. 9 of 1919, dated the 21st day of February 1919.

The counter-petitioners own a cotton ginning factory at Tiruchengodu. The residents of the locality complained of the working of the factory during nights and filed a petition under section 133, Criminal Procedure Code, before the Subdivisional Magistrate of Sankari to prohibit the nuisance. The Magistrate, after recording evidence and reading the police report, issued

\* Criminal Revision Case No. 134 of 1919.