

FULL BENCH.

1876
December 21.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

RAM KISHAN (PLAINTIFF) v. BHAWANI DAS (DEFENDANT).*

Sale in Execution—Right of Attaching Creditor to Sale-proceeds—Suit for money received by the defendant for the plaintiff's use—Limitation—Act VIII of 1859, s. 270—Act IX of 1871 (Limitation Act), sch. ii, 15, 26, 60, 118.

Certain immovable property was attached in execution of a money-decree held by *A*, dated the 22nd August, 1871, on the 1st April, 1872. The same property was subsequently attached in execution of a decree held by *B*, dated the 19th August, 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of this decree. The Munsif directed that the proceeds of the sale should be paid to *B*. *A*, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that *A* was entitled to the proceeds, reversed the Munsif's order. *A* then obtained an order from the Munsif directing *B* to refund the money, which he did, and it was paid to *A*. *B* sued *A* to recover the money by establishment of his prior right to the same, and for the cancelment of the Judge's order, alleging that the same was made without jurisdiction.

Held (by a majority of the Full Bench) that the suit was one for money received by the defendant for the plaintiff's use, and was therefore governed by cl. 60, sch. ii of the Limitation Act.

Per STUART, C. J., and SPANKIE, J.—That the suit was not such a suit, but was one for which no period of limitation was provided elsewhere than in cl. 118 of the schedule, and that it was therefore governed by that clause.

Held by the Division Bench that *A* was not entitled, as the first attaching creditor, to the sale-proceeds.

The plaintiff in this suit claimed to recover from Bhawani Das, defendant, certain money, being the part proceeds of a sale in execution of decree, by the establishment of his prior right to the same, and to render ineffectual a miscellaneous order made by the Judge of Mainpuri in another suit, dated the 7th November, 1872. He alleged that the defendant had illegally realized the proceeds from him under the said order, which was made without jurisdiction. On the 12th March, 1867, Ram Singh, defendant

*Special Appeal, No. 1226 of 1875, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 23rd September, 1875, reversing a decree of Muhammad Nizam Ali Khan, Munsif of Etah, dated the 5th April, 1875.

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in the two suits instituted by the present plaintiff and defendant, gave the plaintiff a bond for the payment of money in which he charged certain immoveable property with such payment. The plaintiff obtained a decree on this bond on the 19th August, 1871, which directed that the property should be sold in satisfaction of the charge. Bhawani Das, who had obtained a money-decree against Ram Singh on the 22nd August, 1871, caused the property to be attached in execution of his decree on the 1st April, 1872. The plaintiff subsequently caused the property to be attached in execution of his decree. The property was sold in execution of the plaintiff's decree on the 20th July, 1872. Bhawani Das claimed the whole of the sale-proceeds on the ground that he had first attached the property. The Munsif ordered that the plaintiff's decree should be satisfied out of the sale-proceeds, and the balance paid to Bhawani Das. On appeal by Bhawani Das, the Judge of Mainpuri, on the 7th November, 1872, declared that he was entitled to the whole of the proceeds, and reversed the Munsif's order. Bhawani Das then obtained an order from the Munsif directing the plaintiff to refund the money, which he did, and it was paid to Bhawani Das on the 26th March, 1873.

In the present suit Bhawani Das, defendant, contended in the Court of first instance that the suit was barred by limitation. The Court of first instance held that the suit was brought within time, and being of opinion that the plaintiff was entitled to recover the money in suit gave him a decree for the same. The lower appellate Court also held that the suit was not barred by limitation, but being of opinion that the defendant was first entitled to be paid out of the sale-proceeds, by reason of his having first attached the property, it dismissed the plaintiff's suit.

On special appeal by the plaintiff to the High Court, it was contended by him that as the sale was ordered in execution of his decree to satisfy a charge declared by the decree, the defendant, the holder of a money-decree only, was not entitled to be first paid out of the sale-proceeds by reason of prior attachment.

The Court (Pearson and Spankie, JJ.) referred the case to a Full Bench, the order of reference being as follows :-

The ground of appeal is valid and is supported by two precedents which have been brought to our notice (1). But it is contended on the part of the respondent that the suit is barred by cl. 26, sch. ii, Act IX of 1871. We refer to a Full Bench the question whether that clause is applicable to the present suit, or, if not, which clause of that schedule is applicable.

Munshi *Hanuman Parshad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Ram Parshad*, for Bhawani Das, respondent.

PEARSON, TURNER, and OLDFIELD, JJ., concurred in the following opinion :—

To determine what period of limitation is applicable to a suit we must look to the nature of the relief sought. In the case before us the principal relief sought is the recovery of the money. Although the plaint claims the cancelment of the Judge's order and the declaration of plaintiff's prior right, these claims are subsidiary to the principal relief sought, and, indeed, since it is alleged in the plaint that the order impugned was not passed by a competent Court, it was unnecessary for the plaintiff to claim that it should be cancelled. Cl. 15, sch. ii of the Limitation Act is clearly inapplicable, for that clause refers to suits brought to cancel the orders of competent Courts, it being declared that limitation runs from the date of the final order of a Court competent to pass the order.

If the Judge's order was passed by a Court which was not competent to pass it, the plaintiff is entitled to rely on the order of the Munsif as the only valid order, and in virtue of that order to contend that the money was wrongfully taken by the defendant. We do not say that the plaintiff may not be required to prove that the Munsif's order was right, that he was entitled to the priority which that order recognized. This must depend on the defence set up to his claim. Looking to the substantial relief sought, it appears to us that this suit must be regarded as a suit for money had and received to the plaintiff's use. It is then governed by cl. 60 of the schedule to the Limitation Act. If it is not a suit for money had and received to the plaintiff's use, then it falls under cl. 118 of the schedule, and in either case it has been brought within time.

(1) S. A., No. 228 of 1875, decided the 13th May, 1875, and S. A., No. 601 of 1875, decided the 18th August, 1875.

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SPANKIE, J.—The claim was to get back a sum of money which the defendant had unlawfully and illegally realized from the plaintiff under an illegal and improper order of the Judge passed in appeal on the miscellaneous side. The Judge had no jurisdiction in the matter, there being no appeal, and the plaintiff seeks to have the order nullified. The suit is based on the plaintiff's preferential right to recover the money, being the proceeds of an auction-sale, he holding a decree which gave him a lien over the property, and which ordered its sale in satisfaction of the decree. In satisfaction of the decree the property was sold in due course, and the entire decretal amount was made over to the plaintiff by the Munsif, who rejected the claim of the defendant, a third party, to be paid the sale-proceeds. The defendant appealed (there being no appeal), and the Judge reversed the Munsif's order, declaring defendant entitled to the amount. The defendant then obtained an order from the Munsif, directing plaintiff to refund the sale-proceeds that he had received, and plaintiff did so, and defendant realized the money. Such is a brief abstract of the plaint, and it will be seen that the suit is really one for a declaration of the plaintiff's preferential right to the sale-proceeds as against the defendant, who also claims them, to have the Judge's order declared a nullity, and to get a refund of the money paid in consequence of that order from the defendant.

It was contended by respondent before the Division Bench that cl. 26, sch. ii, Act IX of 1871, bars the suit. We are asked whether that clause is applicable to the suit, or if not applicable, what clause is so.

In my opinion cl. 26, for taking or damaging moveable property, does not apply to the suit. There is nothing in the claim which could be brought under this clause of sch. ii. Nor is the plaintiff claiming any damages.

I was disposed to consider that cl. 15 might apply. But on fuller consideration I do not think it is applicable. A suit under this clause is brought to alter or set aside a decision or order of the Civil Court in any proceeding other than a suit, where the Court was competent to determine it finally. The Court therefore must

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have jurisdiction, which the Judge had not (1) when he reversed the Munsif's order giving the sale-proceeds to the plaintiff. The order therefore is of itself a nullity and could have no effect. But even if the Judge had had jurisdiction, I am doubtful whether the clause would have applied, as the plaintiff asks for something more than the reversal, or as he calls it, the nullification of the order. It has been suggested that cl. 60 applied; that this is a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. But I am unable to accept this view. The money was not in the first instance received by the defendant for the plaintiff. It was the plaintiff who had received it and who was compelled under legal process to refund the money. It was not the Judge who actually compelled the plaintiff to refund the money. It was the Munsif who directed the plaintiff to bring back the money to court, and it is the Munsif's order that the plaintiff should have sued to set aside on the ground that the Judge had no jurisdiction to reverse the first order of the Munsif, and therefore the Munsif's second order could not be maintained. Both plaintiff and defendant claimed the sale-proceeds as their own, one by virtue of his decree which maintained his lien on the hypothecated property ordered for sale, and the other by virtue of his prior attachment of the property sold. When defendant obtained them in consequence of the Judge entertaining an appeal to hear which he had no jurisdiction, the defendant received the money after it had been paid back into court from the Munsif's Court for his own use, and not as belonging to the plaintiff, or to be held by defendant to his use. The plaintiff may be legally entitled to the sale-proceeds, but I do not think that it can be said that the defendant received the money under circumstances which render the receipt of it a receipt to the use of the plaintiff. Even more, the plaintiff does not ask for the money on the ground of its having been so received by defendant,

(1) It has been held in the following cases that where there are rival decree-holders against the same judgment-debtor, not being parties to the same suit, an appeal will not lie by one of such rival decree-holders against an order relating to the distribution of the proceeds of the sale of the property of the judgment-debtor:—*Misree Kowur v. Mahuraj Buhsh Singh*, *Marsh.* 527 ;

Hurish Chunder Sircar v. Azimooddeen Shaha, *W. R.*, 1862-1864, p. 181 ; *Jungee Lal v. Brijo Beharee Singh*, 2 *W. R.*, Misc. 21 ; *Afzuloonissa Begum v. Parbutty Koonwur*, 2 *W. R.*, Misc. 42 ; *Choonie Lal v. Pultoo Bhukut*, 6 *W. R.*, Misc. 74, and *Gogaram v. Kartick Chunder Singh* *B. L. R.*, Sup. Vol. 1022 ; *S. C.*, 9 *W. R.*, 515.

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but he prays the Court to declare his preferential right as against defendant to recover the sale-proceeds; to nullify the Judge's order which led to his being compelled to refund the money into the Munsif's Court, and to have a decree given to him for the money against the defendant. I think with reference to the circumstances of this case that cl. 60 does not apply, and as I do not find any period of limitation provided for a suit of the nature of the one now before us, it falls within the terms of cl. 118 of the schedule and six years would be the limitation from the time when the right to sue accrued.

STUART, C. J.—I am of the same opinion as that which Mr. Justice Spankie has given, although not without hesitation. I am clear that articles 15, 26, and 60 do not apply, and there being apparently no other provision of the Limitation Act expressly applicable, the general law provided by article 118 appears to afford the only solution of the question referred to us.

Appeal allowed.

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January 11.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

ABDUL AZIZ AND ANOTHER (PLAINTIFFS) APPELLANTS v. WALI KHAN
(DEPENDANT) RESPONDENT.*

Lease of Zemindari Rights—Wrongful Dispossession of Lessee by Lessor—Suit for Compensation—Civil Court—Revenue Court—Jurisdiction—Act XVIII of 1873 (N.-W. P. Rent Act) s. 95, cl. (m)

A granted B a lease of his zemindari rights in certain villages for a term of years at a fixed annual rent. Two years before the term expired, in breach of the conditions of the lease, he dispossessed B, and thereafter made collections of rent from the agricultural tenants himself. B sued him in the Civil Court to recover the moneys so collected by him in those two years. *Held* (by a majority of the Full Bench) that the Courts of Revenue were open to B, and that, as he could obtain in such a Court the relief he sought in the suit by an application for compensation for wrongful dispossession, the Civil Courts could not, under cl. (m) s. 95 of Act XVIII of 1873, take cognizance of the suit.

Per STUART, C. J. and SPANKIE, J.—That as the matter was not one on which B could make an application to a Revenue Court of the nature mentioned in cl. (m), s. 95 of Act XVIII of 1873, the suit was properly instituted in the Civil Court.

* Special Appeal, No. 311 of 1876, from a decree of G. P. Money, Esq., Judge of Bareilly, dated the 25th November, 1875, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge, dated the 17th March, 1875.