

and what was laid down by Mr. Justice Macpherson, after a careful consideration of the texts bearing upon the question, in *Jodoo-nath Dey Sircar v. Brojonath Dey Sircar* (1). Of course, if it turns out at the time of partition that the mother has already obtained her proper share, she will be entitled to nothing more.

We are, therefore, of opinion that the decree of the Court below is right, and that the appeal should be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

ISWAR PERSHAD GURGO AND OTHERS (PLAINTIFFS) v. JAI NARAIN GIRI (DEFENDANT.)*

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Possession, Suit for—Auction-purchaser, Suit by, for possession—Execution Proceedings—Possession, Application for by auction-purchaser—Sale certificate—Limitation Act (XV of 1877), Sch. II, Art. 138—Civil Procedure Code (Act XIV of 1882), s. 318.

A suit by an auction-purchaser to obtain possession of land, the subject-matter of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution proceedings, and that such attempt has been unsuccessful.

In the case of *Lohit Coomar Bose v. Ishan Chunder Chuckerbutty* (2), it was not intended to hold that under no circumstances would such a suit lie, but that so long as the means provided by s. 318 of the Civil Procedure Code are open to a purchaser, he is bound to have recourse to that section rather than to bring a fresh suit.

THIS was a suit to obtain possession of property sold in execution of a decree on the 22nd April 1876. The decree was obtained by the father of the plaintiffs against the defendant, and the purchaser was one Nobin Chunder Mitter who was an am-mookhtar of the plaintiffs' father, and who purchased benami for him. Nobin Chunder Mitter obtained the sale certificate on the 11th May 1876. The plaintiffs alleged that, after obtaining the sale certificate, Nobin Chunder Mitter, on the 5th October 1876, applied for possession, but was met by an objection made by

* Appeal from Appellate Decree No. 2274 of 1884, against the decree of H. Gillon, Esq., Judge of Midnapore, dated 8th of September 1884, reversing the decree of Baboo Kedar Nath Mozoomdar, Second Subordinate Judge of that district, dated the 28th of August 1883.

(1) 12 B. L. R., 385.

(2) 16 C. L. R., 202

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one Kadumbini Dossee, the wife of the debtor. That objection was overruled on the 2nd March 1877 and possession was ordered to be given to Nobin Chunder Mitter. Subsequent to this Kadumbini instituted a suit against Nobin Chunder to compel him to execute a *kobala* in her favor, and on the institution of that suit Nobin Chunder Mitter did not proceed to take possession. That suit was ultimately dismissed by the High Court on special appeal. In June 1879, Nobin Chunder Mitter died, and on the 31st May 1880, his son and heir Shorut Chunder Mitter executed a *ladavipotro* in favor of the plaintiffs by which he disclaimed all right to the property, and admitted that his father's purchase was benami for their father. After the death of their father the plaintiffs applied for the issue of a sale certificate to them, and obtained it on the 4th March 1881, and possession was ordered to be given to them. Upon this, the defendant again objected that the application was made more than three years after the date of the sale, and that objection was upheld, and the order for delivery of possession was set aside. The plaintiffs accordingly instituted this suit on the 11th January of 1883 through the Manager of the Court of Wards, setting out the above facts, and stating that at the time of the application on behalf of the plaintiffs for the sale certificate they were unaware of the grant of a sale certificate having been previously made to Nobin Chunder Mitter.

The defendant contended in his written statement that, as the plaintiffs' application for possession to be given them in the execution proceedings had been held to be barred by limitation, the suit would not lie, and that their right to obtain possession was gone. Upon the merits he pleaded that, upon the property being put up for sale, it had been arranged between Nobin Chunder Mitter and the am-mookhtar of Kadumbini Dossee that the former was to be allowed to purchase the property at a low figure, and that he was afterwards to convey it to Kadumbini, receiving a premium for his share in the transaction; that in accordance with that arrangement the property which was worth Rs. 16,000 or 17,000 had been sold for Rs. 35 only, and that under the circumstances the plaintiffs were not entitled to the benefit of the sale,

The first Court held that the suit was maintainable, and was not barred by limitation, and found that the agreement alleged by the defendant was not proved, and accordingly gave the plaintiffs a decree. The lower Appellate Court, without going into the merits of the case, reversed that decision upon the ground that the suit would not lie as the plaintiffs were bound by s. 318 of the Code of Civil Procedure, to obtain possession in the execution proceedings, and that the application must be made within three years from the issue of the certificate of sale in accordance with Art. 178 of Sch. II of the Limitation Act.

Against that decision the plaintiffs now specially appealed to the High Court.

Mr. Pugh, Baboo Bhubani Churn Dutt, Baboo Taruk Nath Palit and Baboo Jogesh Chunder Dey, for the appellants.

Baboo Rash Behari Ghose, and Baboo Jugut Chunder Banerji, for the respondent.

The following cases were referred to during the arguments :—

By Mr. Pugh—*Seru Mohun Bania v. Bhagoban Din Pandey* (1); *Govind Ragunath v. Govinda Jagoji* (2); *Krishna Lall Dutt v. Radha Krishna Surkhel* (3); *Shama Charan Chatterji v. Madhub Chandra Mookerji* (4); *Jagan Nath v. Baldeo* (5); *Kristo Govind Kur v. Gunga Pershad Surmah* (6); and *Mozuffer Wahid v. Abdus Samad* (7).

By Baboo Rash Behari Ghose—*Lalit Coommar Bose v. Ishan Chunder Chuckerbutty* (8).

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

This was a suit brought by the assignees of the heir of the certificated auction-purchaser of certain immoveable property sold in execution of a decree against the defendant on the 22nd of April 1876. The plaintiffs' father was the holder of that decree, and the certified purchaser was Nobin Chunder Mitter.

(1) I. L. R., 9 Calc., 602.

(2) I. L. R., 1 Bom., 509.

(3) I. L. R., 10 Calc., 402.

(4) I. L. R., 11 Calc., 93.

(5) I. L. R., 5 All., 305.

(6) 25 W. R., 372.

(7) 6 C. L. R., 539.

(8) 10 C. L. R., 258.

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The plaintiffs allege that their father was the real purchaser and that Nobin Chunder Mitter was only benamidar for him, and this allegation has been confirmed by a *ladavipotro*, executed by the heir of Nobin Chunder after the latter's death.

The plaintiffs claim therefore both as heirs of their father who, they say, was the real purchaser, and as assignee of the heir of the ostensible purchaser.

The lower Appellate Court, reversing the decree of the Munsiff, has dismissed the suit on the ground that it is not maintainable. That Court was of opinion that the only manner in which an auction-purchaser or his assignee could obtain possession of the property sold to him, otherwise than by the voluntary act of the judgment-debtor, was by an application to the Court under section 818 of the Procedure Code; and that the plaintiffs or Nobin Chunder Mitter having failed to obtain possession in this manner within three years from the date of the sale certificate, the right to possession was barred by Art. 178 of Sch. II to the Limitation Act.

The lower Appellate Court, in holding that a regular suit for possession was not maintainable, relied upon a ruling of this Court in *Kristo Govind Kur v. Gunga Pershad Surmah* (1), which was followed in the case of *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (2). The case of *Kristo Govind Kur v. Gunga Pershad Surmah* (1) does undoubtedly lay down the law in the manner understood by the lower Appellate Court. But the learned Chief Justice, in following that decision in the case of *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (2), expressed some doubt as to its entire correctness.

On the other hand this Court held in the case of *Seru Mohun Bania v. Bhagoban Din Pandey* (3) that such a suit is maintainable: and in *Krishna Lall Dutt v. Radha Krishna Surkhel* (4), it was held that the suit was maintainable if possession given under s. 818 had been infructuous. And a Full Bench of the High Court of Allahabad in *Jagan Nath v. Baldeo* (5) dealt with such a suit as being maintainable.

Quite recently another Division Bench of this Court composed

(1) 25 W. R., 372.

(3) I. L. R., 9 Cal., 602.

(2) 10 O. L. R., 258.

(4) I. L. R., 10 Cal., 402.

(5) I. L. R., 5 All., 305.

of (WILSON and BEVERLEY, JJ.) in a case not yet reported--Appeal No. 207 of 1884, decided on the 20th July last, followed the decision in *Seru Mohun Banica v. Bhagoban Din Pandey* (1).

Our own opinion is in accordance with that decision; but with regard to the opposite rulings already cited, we felt a doubt whether we ought not to refer the question to a Full Bench. We have, however, had an opportunity of consulting the learned Chief Justice in the matter, and have his authority for saying that he had no intention of laying down that no such suit could be under any circumstances maintainable; but that so long as the means provided by s. 318 are open to a purchaser, he is bound to have recourse to that section rather than bring a fresh suit.

In the present case it appears that the purchaser did endeavour to obtain possession in the shorter and more simple manner, but that he was opposed by a third party who actually brought a suit to restrain him.

There seems, therefore, to be no reason in law why the present suit should not be maintained. The lower Appellate Court is mistaken in supposing that, because the summary remedy is no longer available, therefore the purchaser's title is extinguished.

We, therefore, set aside the decree of the lower Appellate Court and remand the appeal to be heard and decided on the merits. Costs of this appeal to abide the result.

Appeal allowed and case remanded.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BHUGWAN DASS MARWARI AND ANOTHER (DEFENDANTS) v. NUND LALL SEIN AND ANOTHER (PLAINTIFFS.)^c

Arbitration—Reference to Arbitration by Court of Appeal—Order by Appellate Court remitting case to Original Court to pass decree upon award—Appeal—Award made out of time—Arbitration award, Legality of—Civil Procedure Code (Act XIV of 1882), ss. 2, 506, 514, 582.

An appeal was preferred against a decree of an Original Court dismissing

* Appeal from Appellate Order No. 166 of 1885, against the order of L. R. Forbes, Esq., Deputy Commissioner of the Sonthal Pergunnahs, dated the 2nd of May 1885, reversing the order of W. M. Smith, Esq., Sub-Divisional Officer of Dumka, dated the 12th of September 1883, and directing him to pass a formal decree in accordance with the decree of the arbitrator, dated the 12th September 1884.

(1) I. L. R., 9 Calc., 602.

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