

1897
February 25.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.*

NAZAR ALI (PLAINTIFF) v. KEDAR NATH and ANOTHER (DEFENDANT).
Act No. XV of 1877 (Indian Limitation Act) Sch. vi, Art. 12, cl. (b)—*Suit to recover property sold in execution of a decree in excess of what was saleable under the decree—Execution of decree—Limitation.*

Article 12, clause (b) of the second schedule to the Indian Limitation Act, 1877, does not apply to a suit to recover property sold ostensibly in execution of a decree, but the sale of which was in fact not authorized by the decree under which the said property purported to have been sold. *Ram Lull Moitra v. Bansa Sundari Dabia* (1), *Balwant Rao v. Muhammad Husain* (2), *Lala Moharuk Lal v. The Secretary of State for India in Council* (3), *Dakhina Churn Chattopadhyaya v. Bilash Chunder Roy* (4), *Mahomed Hossein v. Parundur Malto* (5), and *Sadayopa v. Jamuna Bha. Amal* (6) referred to. *Suryanna v. Durgi* (7) dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. Karamat Husain, for the appellant.

Mr. Roshan Lal, for the respondents.

BANERJI and AIKMAN, JJ.—The appellant Nazar Ali owned a 2½ biswas share in a certain zamindari. He mortgaged 2 biswas to Tika Ram, the respondent, on the 9th of October, 1878. On the 18th of July, 1890, Tika Ram obtained a decree for the sale of the 2 biswas. He applied for execution of that decree by sale of that share, and the Court ordered the 2 biswas share to be sold. As the property was ancestral property, the Court, under section 320 of the Code of Civil Procedure, transferred the execution of the decree to the Collector. By some mistake the Collector, on the 20th of August, 1891, sold 2½ biswas instead of the 2 biswas which he had been ordered to sell. The sale was confirmed on the 13th of November, 1891. On the 3rd of September, 1894, the plaintiff

* Second Appeal No. 1019 of 1895 from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 17th May 1895, confirming a decree of Babu Girraj Kishore Datt, Munsif of Haveli, Bareilly, dated the 5th December 1894.

(1) I. L. R., 12 Calc. 307.

(4) I. L. R., 18 Calc. 526.

(2) I. L. R., 15 All. 324.

(5) I. L. R., 11 Calc. 287.

(3) I. L. R., 11 Calc. 200.

(6) I. L. R., 5 Mad. 54.

(7) I. L. R., 7 Mad. 258.

instituted the present suit, claiming possession of a $\frac{1}{2}$ biswas share on the ground that that share had not been sold, and further that the sale of that share was null and void. Both the Courts below dismissed the suit, applying to it clause (b) of article 12 of the second schedule to Act No. XV of 1877.

The plaintiff has preferred this appeal, and it is contended on his behalf that article 12 is not applicable. In our opinion the appeal must prevail. Where a sale is in its inception void it is not necessary for the plaintiff to have that set aside which is itself a nullity. This view is supported by several rulings, of which we may quote the following:—*Ram Lall Moitra v. Bama Sundari Dagia* (1) followed by this Court in the case *Balwant Rao v. Muhammad Husain*; (2) *Lala Mobaruk Lal v. The Secretary of State for India in Council*; (3) and *Dakhina Churn Chatterpadhya v. Bilash Chunder Roy* (4). In our opinion article 12 applies to cases in which a sale would be binding on the plaintiff if not set aside. An illustration of such a case is afforded by *Mahomed Hossein v. Purundur. Mahto* (5).

In the case before us, if the Collector who sold the half biswa share claimed had no jurisdiction to sell it, the sale of that share was *ab initio* void. The power under which the Collector sold the plaintiff's property in execution of Tika Ram's decree was derived from the order made by the Court to which the application for execution was made, and which transferred the decree to the Collector under section 320 of the Code of Civil Procedure. Section 321(c) authorizes the Collector to sell only the property ordered to be sold, or so much thereof as may be necessary. The authority of the Collector was therefore confined to the sale of that property only which he was ordered by the Court to sell. In this case the Court ordered only a 2 biswa share to be sold. The Collector therefore acted *ultra vires* in bringing to sale any share in excess of 2 biswas. *Quia* the excess the sale was a nullity, and there was no necessity for the plaintiff to seek to set it aside.

(1) I. L. R., 12 Calc. 307.

(3) I. L. R., 11 Calc. 200.

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The authorities to which we have referred lay down the proposition that, if the Court which ordered the sale had no jurisdiction to do so, the sale held in pursuance of that order is a nullity. Similarly, if the officer who held the sale had no authority to sell the property, that sale would be equally a void sale. In this case, as we have said, since the Collector had no jurisdiction to sell any share in excess of that which the Court ordered to be sold, the sale of the share in question was void and not binding on the plaintiff. The lower appellate Court has relied on an unreported judgment of this Court (S. A. No. 1138 of 1893, decided on the 16th March, 1894). It does not appear that in that case the Court had acted without jurisdiction, or that the officer who held the sale had gone beyond his authority. The case is therefore clearly distinguishable. The Court of first instance has referred to a ruling of the Madras High Court (*Suryanna v. Durgi*) (1). That is, no doubt, a ruling which supports the view of the Court below, but we are unable to follow it. We observe that it not only differs from numerous rulings some of which have been cited above, but from one of the same Court (*Sadagopa v. Jamuna Bai Ammal*) (2).

We allow the appeal, and, setting aside the decree of the Court below, remand the case under section 562 of the Code of Civil Procedure to the Court of first instance with directions to re-admit it under its original number in the register and to try it on its merits.

Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

(1) I. L. R., 7 Mad. 258.

(2) I. L. R., 5 Mad. 54.