

1887

BASUDEO
NARAIN
SINGH
v.
SULOJY
SINGH.

of that order not being appealed from, it became final. The question disposed of by it is, therefore, no longer an open question between the decree-holder and the appellants before us. We, therefore, set aside the decision of the lower Appellate Court so far as the appellants are concerned. We do not interfere with the decision of the lower Appellate Court so far as the original judgment-debtors are concerned, as they have not appealed against it.

The appellants are entitled to recover the costs of this appeal and in the lower Appellate Court from the respondents. We assess the costs of both hearings at Rs. 50.

K. M. C.

Appeal allowed.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1887
May 23,

KISHORI MOHUN ROY CHOWDHRY AND OTHERS (PLAINTIFFS) v.
CHUNDER NATH PAL AND OTHERS (DEFENDANTS).^a

Possession, Suit for—Suit for possession by purchaser at sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 11, 318—Concurrent remedies—Limitation (Act XV of 1877), Art. 138, Sch. II.

A purchaser at a sale in execution not having applied to the Court for possession under s. 318 of the Code of Civil Procedure, brought a regular suit to obtain possession of the property purchased: *Held* that, although a remedy might be open to the plaintiff under s. 318, still he was not precluded from bringing a regular suit, the remedies being concurrent.

The words "the date of the sale," in the third column of Art. 138, Sch. II of the Limitation Act, 1877, signify the date of the actual sale, and not that of the confirmation of such sale.

ON the 20th July, 1883, the plaintiffs brought a suit to recover possession of certain lands and a house standing thereon, alleging that the house and land formerly belonged to one Chunder Nath Pal, and that they had purchased the same at two separate auction sales held in execution of decrees against

^a Appeal from Appellate Decree No. 179 of 1886, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 6th of October, 1885, affirming the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of that district, dated the 28th of February, 1884.

Chunder Nath Pal; the house being purchased at a sale held on the 18th July, 1871, and the sale confirmed on the 22nd August, 1871; the land being purchased at a sale held on the 26th July, 1871; and that they had taken possession and retained possession of these properties for two years, but had subsequently been dispossessed by the defendants.

1887
 KISHORI
 MOHUN ROY
 CHOWDHRY
 v.
 CHUNDER
 NATH PAL.

The defendants contended that the plaintiffs, not having been put into possession through the Court under s. 318 of the Code, were, therefore, debarred from bringing a regular suit for possession; they denied that the plaintiffs had ever been in possession of the properties, and pleaded limitation as far as the claim to the house was concerned.

The Subordinate Judge found that the plaintiffs had never been in possession of the property, and that the claim as regards the house was barred, twelve years having elapsed since the date of the sale of the 15th July, 1871; and that as the plaintiffs had not applied to the Court for possession of the land under s. 318 of the Code, no suit would lie. He, therefore, dismissed the suit.

The plaintiffs appealed to the District Judge, who affirmed the finding of the lower Court as to the plaintiffs never having obtained possession of the properties after the sale, and also on the point of limitation; holding on the question under s. 318 that the authorities showed "that in all cases in which an auction-purchaser had been allowed to bring a suit for possession, he has had to show that he has done his best in the execution department first, and that he had either obtained possession and been subsequently dispossessed, or that his efforts to obtain possession had been infructuous;" and finding that the plaintiffs had failed to show any such efforts, he dismissed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Sharada Ghurn Mitter* for the appellants, contended that the suit would lie without first having recourse to an application under s. 318, citing *Iswar Pershal Gurgo v. Sai Narain Giri* (1); *Krishna Lall Dutt v. Radha Krishna Surkhel* (2), and *Seru Mohun Bania v.*

(1) I. L. R., 12 Cal., 169.

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

1887 *Bhagoban Din Pandey* (1), and contending that on the point of limitation, limitation ran from the date of confirmation of the sale. KISHORI MOHUN ROY CHOWDHRY v. Baboo *Hari Mohun Chuckerbati* and Baboo *Srinath Banerjee*, for the respondents, contended that the suit would not lie, citing CHUNDER NATH PAL. *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (2), and that limitation ran from the date of the actual sale—*Kalee Dass Neogee v. Hur Nath Roy Chowdhry* (3); *Bhyrub Chunder Bundopadhya v. Soudamini Dabee* (4).

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This is a suit to recover possession of two parcels of property purchased by the plaintiff at auction sales some years ago. One of them was purchased at an auction sale on the 18th July, 1871, and the sale was confirmed on the 22nd August, 1871. The second parcel was purchased on the 21st July, 1871, within twelve years of suit, which was instituted on the 20th July, 1883. So that as to the first parcel, that is to say the house, the question arises whether the suit is barred by limitation, it being admitted that the auction sale took place more than twelve years before suit, although the sale was confirmed on a date which would bring it within twelve years. As to that a question arises as to the meaning of the word "sale" in Art. 138 in the second schedule to the Limitation Act. That Article provides that in a suit by a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale, the limitation is twelve years from the date of sale. The only question is, whether the word "sale" means auction sale, or when the sale was confirmed. In ordinary language "sale" means auction sale, that is to say, the transaction which completes the contract, although the conveyance is not complete until a subsequent time when the sale is confirmed. That being the ordinary meaning of the word, it is necessary to look into the Limitation Act to see how the word is used. Apparently it is used for the first time in Art. 12, where in a suit to set aside any of the sales

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

(3) W. R. (1864), 279.

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

(4) I. L. R., 2 Calc., 141.

there mentioned, limitation runs from the date that the sale is confirmed or would, otherwise, have become final and conclusive, had no such suit been brought. So that, upon the face of the Schedule, we have a distinction between the sale and the confirmation of sale, that is to say, we have the contract to sell, that is the bidding at the auction which forms the contract, and the confirmation which does not take place until some time after.

Art. 166 deals with this matter. On an application to set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court, we have it that the time from which limitation is to run is the date of the sale. It is clear that the date of the sale in this Article must mean the date of the auction sale, that is to say when the bidding took place, because a suit to set aside that sale might be brought before the sale is confirmed. So that the word "sale" there must mean the time of the auction sale. Then we have it that, in the Schedule to the Act, "sale" has a different meaning from "confirmation of the sale." Under Art. 12, in a suit to set aside the sales therein mentioned, limitation begins to run from the confirmation of the sale, whereas in Art. 138 the word "sale" only is used. Therefore we think the word "sale" must have the same meaning as in the other portions of the Schedule and which it has in common language, that is the date of the auction sale.

The auction sale in this case took place on the 18th July, 1871. The suit was not brought until the 20th July, 1883; that is more than twelve years after the sale, and therefore in our opinion the suit, as far as this part of the case is concerned, is barred by limitation, and the suit must be dismissed.

The other part of the case is to recover possession of the land on which this house stands. The suit was instituted within twelve years from the date of sale.

The only question which arises on this part of the case is that it is held by the lower Appellate Court that this suit cannot be maintained until it is shown that the plaintiff has exhausted any remedy that he would have under s. 318 of the Civil Procedure Code, which gives the auction-purchaser a speedy remedy to

1887

KISHORI
MOHUN ROY
CHOWDHRY
v.
CHUNDER
NATH PAL.

1887
 KISHORI
 MOHUN ROY
 CHOWDHRY
 v.
 GHUNDER
 NATH PAL.

obtain possession of the land which he has purchased if it is in the possession of the judgment-debtor, and it may be taken to be admitted that there are cases which take different views of this matter. In our opinion that forms no answer to the action, because we think that, though there may be a remedy under s. 318 which the auction-purchaser may put in force, still the ordinary remedies are open to him notwithstanding, and the remedies are concurrent.

We think that this is abundantly clear from s. 11 of the Code of Civil Procedure, which lays down that persons may have recourse to the Civil Courts for the trial of all suits of a civil nature, unless their cognizance is expressly taken away. This remedy has not been taken away by the Legislature, and therefore the other remedy is concurrent only. Art. 138 of the Limitation Act refers to this very kind of case, so that it is clear that in the contemplation of the Legislature at that time this class of suits could be maintained. Therefore, so far as principle is concerned, this suit can be maintained, and proceedings not having been taken under s. 318, is no answer. In several cases the opposite view is indicated, but in no recent cases has it been laid down that the action cannot be maintained.

In the case of *Seru Mohun Bania v. Bhagoban Din Pandey* (1), McDONELL and TOTTENHAM, JJ., decided that such a suit could be maintained. And in a case which has not been reported, but which has been referred to in a subsequent decision by TOTTENHAM and AGNEW, JJ.—*Iswar Pershad Gurgu v. Jai Narain Giri* (2)—WILSON and BEVERLEY, JJ., who decided that case, distinctly held that the suit was maintainable, and put no limitation to its being maintainable. In the case before TOTTENHAM and AGNEW, JJ., they say that they agree with WILSON and BEVERLEY, JJ., in their judgment in which they unreservedly said that the action is maintainable. They only qualify their opinion by saying that they would have referred the case to the Full Bench, had they not found that the Chief Justice in a similar judgment, to which he had been a party, did not intend to say, that the action was not main-

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

(2) I. L. R., 12 Calc., 169.

tainable on any terms whatever, but that it was necessary that before a suit is brought other remedies should be exhausted—See *Lalit Coomar Bose v. Ishan Chunder Chuckerbutty* (1). WILSON and BEVERLEY, JJ., in their judgment, considered that that case was not in point as the purchaser had not perfected his title.

In this particular case the same remark applies, but, speaking for myself, I should like to say that in any decision which limits the jurisdiction of these Courts, unless the jurisdiction is expressly taken away, I do not agree; and that in my opinion whether the remedy under s. 318 has or has not been put in force, the plaintiff, who has purchased the property and has been refused possession of it, has a right to come to the Civil Court and obtain possession of that property. We have examined the cases bearing on this matter, and we find the balance in favor of that view. Therefore we do not refer this case to the Full Bench.

So far, therefore, as the action for the land is concerned, the suit can be maintained and this suit must be decreed, there being no other defence but this technical one.

The result is that the appeal will be dismissed as far as regards the house, and it will be decreed as far as the land is concerned.

Under the circumstances of this case, and in order to save the trouble of taxation, we think that each party should pay his own costs of this appeal.

T. A. P.

Decree varied.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF TARINI MOHUN MOZUMDAR.

TARINI MOHUN MOZUMDAR *v.* GUNGA PROSAD CHUCKERBUTTY *alias* TINCOWRIE CHUCKERBUTTY.*

Specific Relief Act, I of 1877, s. 9—Possessory Suit—Constructive possession by receipt of rents.

The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of s. 9 of the Specific Relief Act.

* Civil Rule No. 717 of 1887, against the order of Baboo Jogendra Nath Mukerjee, Munsiff of Gailandha, dated the 19th of April, 1887.

(1) 10 C. L. R., 258.

1887

KISHORI
MOHUN ROY
CHOWDHRY
v.
CHUNDER
NATH PAL.

1887

June 15.