

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAGHUNATH PRASAD AND OTHERS (DEFENDANTS) v. KANIZ RASUL
AND ANOTHER (PLAINTIFFS).*

1902
May 14.

Execution of decree—Civil Procedure Code, sections 320 et seqg.—Sale held by Collector, but afterwards set aside—Suit by auction purchaser to have sale confirmed—Limitation—Act No XV of 1877 (Indian Limitation Act), Schedule II, Article. 14.

In execution of a decree which had been transferred to the Collector for execution under the provisions of section 320 of the Code of Civil Procedure, certain immovable property was sold by auction on the 22nd of September, 1891. But the judgment-debtors applied to the Collector to have the sale set aside, and on the 30th October, 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. The order of the Collector setting aside the sale was on appeal confirmed by the Commissioner on the 4th of May, 1892. After the setting aside of the sale the judgment-debtors, on the 14th of December, 1891, with the permission of the Collector, mortgaged the bulk of property. The mortgage money was paid into Court in discharge of the decree, and satisfaction of the decree was entered up, and on the 21st of December, 1891, the execution case was struck off. On the 12th of September, 1894, the auction purchaser, who after the sale had been set aside had withdrawn the purchase money paid in by her, brought a suit to have the sale in her favour confirmed. *Held* that, inasmuch as the plaintiff's claim involved the setting aside of the Collector's order of the 30th of October, 1891, by which the sale to the plaintiff had been set aside, the suit was barred by limitation, having regard to article 14 of the second schedule to Act No. XV of 1877. *Malkarjun v. Narhari* (1) and *Banke Lal v. Jagat Narain* (2), referred to, *Ayyasami v. Sumiya* (3) and *Debi Charan v. Bari Bahu* (4) held not to be of effect since the ruling of the Privy Council in *Malkarjun v. Narhari*. *Moti Lal v. Karrabuldin* (5) distinguished.

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

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) and Babu *Durga Charan Banerji*, for the appellants.

Messrs. *Abdul Raouf* and *R. Malcomson*, for the respondents.

BANERJI, J.—The defendants Nos. 4 and 5 obtained a decree against the defendants Nos. 1, 2 and 3, and in execution thereof caused the immovable property of those defendants to

* Second Appeal No. 29 of 1900, from a decree of Syed Muhammad Ali, District Judge of Shahjahanpur, dated the 22nd September 1899, confirming a decree of Rai Banvari Lal, Subordinate Judge of Shahjahanpur, dated the 24th of March 1896.

(1) (1900) I. L. R., 25 Bom., 337.

(2) (1900) I. L. R., 22 All., 168.

(3) (1884) I. L. R., 8 Mad., 82.

(4) Weekly Notes, 1894, p. 78.

(5) (1897) I. L. R., 25 Calc., 179.

1902

RAGHUNATH
PRASAD
v.
KANIZ
RASUL.

be attached. That property being ancestral, execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure. On the 22nd of September, 1891, the property was sold by auction and was purchased by the present plaintiff. The judgment-debtors applied to the Collector to have the sale set aside, and thereupon, on the 30th of October, 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. This order of the Collector was confirmed by the Commissioner on appeal on the 4th of May, 1892. After the setting aside of the sale the judgment-debtors mortgaged, on the 14th of December, 1891, the bulk of the property, with the permission of the Collector, to the defendants Nos. 6 and 7. The money raised by this mortgage was paid into Court in discharge of the decree, and satisfaction of the decree was entered up, and on the 21st of December, 1891, the execution case was struck off as satisfied. On the day following that of the dismissal of the plaintiff's appeal to the Commissioner, she withdrew from Court the amount of sale proceeds which she had paid in. On the 11th of March, 1893, the defendant No. 9 obtained from the judgment-debtors a sale deed of a part of the property sold by auction. On the date on which the mortgage in favour of the defendants Nos. 6 and 7 was made, and on the date on which the sale to the defendant No. 9 took place, there was no subsisting sale in favour of the plaintiff of the property comprised in the said mortgage and sale. On the 12th of September, 1894, the plaintiff brought the present suit, and she asked that the sale in her favour of the 22nd of September, 1891, be confirmed, that the order of the revenue court setting aside the sale, in so far as it affected her rights, be declared ineffectual, and that possession of the property purchased by her be delivered to her. At the time she brought her suit the whole of the sale proceeds had, as stated above, been received back by her from the Court, and no part of it was either in deposit with the Court or was tendered by her for payment to the parties entitled to receive it. The Courts below have decreed the claim.

The first question which we have to determine in this appeal, which has been preferred by the mortgagees, the second purchaser

Daya Kishan and one of the judgment-debtors, is whether the claim was barred by limitation on the date on which it was brought. It is clear that it was brought after one year from the 30th of October, 1891, the date on which the sale in favour of the plaintiff had been set aside by the Collector. It was also beyond one year from the date on which the order of the Collector was confirmed by the Commissioner. It was contended on behalf of the respondent that the order of the Collector, dated the 30th of October, 1891, was not an order setting aside the sale. The order, as stated above, was passed on an application to set aside the sale and ran as follows:—"I will give the judgment-debtors a fresh chance, and hereby fix the 20th of December for a new sale." This order clearly implies that the sale which had already taken place was set aside. That being so, before the plaintiff could succeed in this suit, it was necessary for her to get the order of the Collector dated the 30th of October, 1891, out of her way. Whilst that order stands good, her suit for possession cannot be maintained. This principle was affirmed by their Lordships of the Privy Council in the recent case of *Malkarjun v. Narhari* (1). That was a case in which, after an auction sale had taken place, a suit was brought for the redemption of a mortgage. Their Lordships of the Privy Council observed at page 348:—"It is then necessary for the plaintiff to set aside the sale in order to clear the ground for redemption of the mortgage." Similarly it is necessary in this case for the plaintiff to set aside the order by which the sale in her favour was set aside by the Collector in order to clear the ground for her suit for recovery of possession. It is true that the plaintiff does not in so many words ask that the order of the Collector should be set aside, but she does pray for a declaration that the order be declared ineffectual, so far as it is prejudicial to her rights. That amounts in effect to a prayer to set aside the order of the Collector, and, as we have already said, without such a prayer and without having the order of 30th of October, 1891, set aside, the plaintiff cannot obtain a decree for possession. The order of the Collector is an order of an officer of Government in his official capacity, and as it is not an order to which

1902

 RAGHUNATH
 PRASAD
 v.
 KANTZ
 RAJUL.

(1) (1900) I. L. R., 25 Bom., 337.

1902

RAGHUNATH
PRASAD
v.
KANIZ
RASUL.

any other article in schedule (ii) of the Limitation Act expressly applies, it falls within article 14 of that schedule. The suit is therefore one to set aside an order of an officer of Government in his official capacity not otherwise expressly provided for, and having been brought after one year from the date of the order, is barred by limitation. The learned counsel for the respondents referred to the ruling of the Madras High Court in *Ayyasami v. Samiya* (1), and the decision of this Court in *Debi Charan v. Bari Bahu* (2). Having regard to the ruling of the Privy Council to which we have referred above the observations made in those cases cannot be held to have any force. The learned counsel also referred to the ruling of the Privy Council in *Moti Lal v. Karrabuldin* (3). That case is clearly distinguishable from the present. That was a suit between two rival auction purchasers of the same property in execution of different decrees, and the question was whether a valid title was acquired by the second purchaser after the sale in favour of the first purchaser. In such a suit no question arose as to the setting aside of a sale or of an order of Court. In support of the view taken above I would refer to the dictum of the late learned Chief Justice Sir Arthur Strachey in *Banke Lal v. Jagat Narain* (4), which was a somewhat similar case. He observes:—
“The previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order.” For the above reasons I would allow this appeal, and setting aside the decrees of the Courts below, dismiss the plaintiff’s suit with costs.

AIKMAN, J.—I am also of opinion that this appeal must succeed. In the first place, I agree with my learned colleague, for the reasons set forth by him, in holding that the plaintiff’s suit was beyond time. In the next place, I hold that at the time the mortgagees took their mortgage and the appellant vendee bought a part of the property, there was nothing to prevent the judgment-debtors transferring the property in the manner in which they did, and the judgment-debtors were capable

(1) (1884) I. L. R., 8 Mad., 82.

(2) Weekly Notes, 1894, p. 78.

(3) (1897) I. L. R., 25 Calc., 179.

(4) (1900) I. L. R., 22 All., 168.

of conferring, and did confer, a good title by the deeds which they executed. In support of this view I would refer to what was said by the late learned Chief Justice Sir Arthur Strachey in the case of *Banke Lal v. Jagat Narain* (1), at page 174. His view is likewise entirely in accord with the principle of the decision of their Lordships of the Privy Council in the well-known case of *Nawab Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (2). I agree in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of the Courts below are set aside, and the plaintiff's suit is dismissed with costs in all Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

1902

May 17.

Before Mr. Justice Blair.

EMPEROR v. NABBU KHAN.*

Criminal Procedure Code, sections 110 et seqq.—Security for good behaviour—Power of Court to assign geographical limits within which the sureties required must reside.

Held that a Court in ordering security for good behaviour to be given with sureties is competent to assign some geographical limits within which the sureties required must reside. *Queen-Empress v. Rahim Bakhs* (3) referred to.

THE facts of this case were briefly as follows:—

Security for good behaviour was demanded of two persons, Nabbu Khan and Mosul Singh, residents of Mirzapur. After the usual proceedings they were ordered to furnish their own bonds for Rs. 500 each, with two sureties in Rs. 1,000 each, to be of good behaviour for one year. It was further ordered that the sureties should be resident within the limits of the Mirzapur Municipality. Against this order Nabbu Khan and Mosul Singh appealed to the District Magistrate, who declined to interfere. They thereupon applied in revision to the High Court, where it was contended that the Joint Magistrate had no power to specify in his order the place where the sureties must reside.

* Criminal Revision No. 268 of 1902.

(1) (1900) I. L. R., 22 All., 168. (2) (1887) L. R., 15 I. A., 12.
(3) (1898) I. L. R., 20 All., 206.