

REVISIONAL CIVIL.

1904
February 11.*Before Mr. Justice Knox and Mr. Justice Aikman.*KESRI NARAIN AND OTHERS (DECREE-HOLDERS, AUCTION PURCHASERS) v.
ABUL HASAN (JUDGMENT-DEBTOR).**Civil Procedure Code, sections 318 and 335—Execution of decree—Sale—Auction purchaser obstructed by third party—No application under section 335 presented within 30 days, but fresh application under section 318—Application barred—Act No. XV of 1877 (Indian Limitation Act), Schedule II, article 167.*

Certain purchasers at a sale of immovable property in execution of a decree applied under section 318 of the Code of Civil Procedure for delivery of possession of the property purchased, but resistance was offered, according to the amin, by some third persons to their being put into possession. The purchasers did not thereupon make any application for an inquiry under section 335 of the Code, but after the expiry of the period of limitation for such an application put in a fresh application for delivery of possession.

Held by Aikman, J. (Knox, J., *dubitante*) that no such application would lie, but the auction purchaser must bring a separate suit to determine his right to the property. *Mullia v. Appasami* (1) and *Narain Das v. Hazari Lal* (2) distinguished. *Vinaykrav Amrit v. Deorao Govind* (3) followed.

IN execution of a decree for money Kesri Narain and others decree-holders purchased certain immovable property. The sale was confirmed on the 7th of October 1901. On the 22nd of July 1902, the auction purchasers applied to the Court under section 318 of the Code of Civil Procedure for an order for delivery of possession, and the Court ordered the amin to put the applicants into possession of the property. The amin, however, returned the warrant unexecuted reporting that a person other than the judgment-debtor resisted the purchasers in getting possession. The purchasers did not, as they might have done, apply to the Court under section 335 of the Code of Civil Procedure to inquire into the matter of the resistance; but, after the expiry of the thirty days allowed for making such an application, they made, on the 23rd of December 1902, a fresh application to be put into possession. The Court executing the decree (Subordinate Judge of Allahabad) rejected this second application for possession because no application under

* Civil Revision No. 10 of 1903.

(1) (1890) I. L. R., 13 Mad., 504. (2) (1895) I. L. R., 18 All., 233.
(3) (1887) I. L. R., 11 Bom., 473.

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section 335 of the Code had been made within the time limited by law. Against this order the purchasers applied in revision to the High Court.

Babu *Durga Charan Banerji*, for the applicants.

Babu *Satya Chandra Mukerji*, and Babu *Sital Prasad Ghose*, for the opposite party.

AIKMAN, J.—The applicants purchased certain immovable property at a sale held in execution of a decree for money. The sale was confirmed on the 7th October 1901. On the 22nd July 1902, the applicants applied to the Court under section 318 of the Code of Civil Procedure for an order for delivery of possession. The Court ordered the amin to put the applicants into possession of the property. The amin returned the warrant unexecuted, reporting that a person other than the judgment-debtor resisted the purchasers in getting possession. Upon this it was open to the purchasers to apply to the Court under section 335 of the Code to inquire into the matter of the resistance and pass such order thereon as it should think fit. Article 167 of the second schedule to the Limitation Act fixes a period of thirty days, counting from the date of the resistance, within which such an application must be presented. The purchasers did not within the time allowed by law make any application under section 335. On the 23rd December 1902 they made a fresh application to be put into possession. The learned Subordinate Judge, by his order, dated the 10th January 1903, rejected this application. The purchasers ask this Court to interfere in revision. In my judgment this application ought not to be granted. I think the lower Court was right in rejecting the second application made to it. If a purchaser at a sale in execution of a decree fails within the period allowed by law to apply to the Court to inquire summarily into the matter of the resistance to his getting possession, I hold that he is relegated to his remedy of a civil suit against the person resisting him. It is true that in the case of *Muttia v. Appasami* (1) an opinion was expressed that there is nothing to prevent a purchaser who is resisted in his attempt to get possession of the property purchased from making a fresh application

(1) (1890) I. L. R., 18 Mad., 504.

for delivery without making any complaint under section 334 of the Code. That was a case in which the purchaser was resisted not by a third party but by the judgment-debtor. On the other hand, in the case of *Vinayakrav Amrit v. Devrao Govind* (1) an order of a subordinate Court refusing, as in this case, a second application for delivery of possession was sustained. It was remarked in that case that to grant a second application "would virtually make clause 167 of the Statute of Limitation a dead letter." The case of *Narain Das v. Hazari Lal* (2) was relied on as supporting the applicants' plea, but in that case the question as to whether a second application under section 318 of the Code would lie was not expressly decided. For the above reasons I am of opinion that the only remedy open to the purchasers is to bring a regular suit against the person resisting him, and I would reject this application with costs.

KNOX, J.—I am inclined to the view that the application for delivery of possession under section 318 is substantially an application for execution of a decree by ordering delivery of possession of the property purchased. It is true that the ruling of *Muttia v. Appasani* differs from the case before us somewhat, still I hold the principle therein contained is the principle which should govern this case. However, in view of the expression of my learned brother the application must be rejected.

BY THE COURT:—

The application is rejected with costs.

(1) (1887) I. L. R., 11 Bom., 473. (2) (1895) I. L. R., 18 All., 233.

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