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Magistrate because in his opinion that officer could pass an adequate sentence." The case of *Queen-Empress* v. *Havia Tellapa* (1) is to the same effect. I set aside the order of the first class Magistrate, dated the 17th of December, 1903, returning the case to the Tahsildar Magistrate, and direct that the first class Magistrate dispose of it himself, passing such judgment, sentence or order as he thinks fit and as is according to law.

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February 5.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

JWALA SAHAI (DEFENDANT) *v.* MASIAT KHAN (PLAINTIFF) *

Execution of decree—Sale in execution of property not belonging to the judgment-debtor—Suit by owner of property so sold to recover possession —Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 12 and 144.

Where in execution of an order under section 412 of the Code of Civil Procedure for payment of Court fees certain immovable property was sold as the property of the persons liable under such order, which in fact did not belong to them, but to a third person, who had no notice of the sale, it was *held* that the true owner of the property so sold was competent to treat the sale as a nullity and to bring his suit for recovery of possession at any time within 12 years from the date when he lost possession. *Malkarjun* v. *Narhari* (2) distinguished. *Nathu* v. *Badri Das* (3), *Balwant Rao* v. *Muhammad Husain* (4) and *Sukhdeo Prasad* v. *Jamna* (5) referred to.

THE facts out of which this appeal arose are as follows:—

The creditors of one Net Ram instituted a suit against him in 1889 and obtained a decree for payment of a sum of money. In execution of that decree the decree-holders put up for sale certain immovable property belonging to Net Ram, and it was purchased by one Sanwal. The sale was duly confirmed in favour of Sanwal, who was put into possession on the 12th of February 1890. During the pendency, however, of the litigation between Net Ram and his creditors, Net Ram had

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* Second Appeal No. 68 of 1902, from a decree of Babu Ramdhan Mukerji, Subordinate Judge of Bareilly, dated the 15th of October 1901, confirming a decree of Pandit Bishambar Nath, Munsif of Aonla-Faridpur, dated the 20th of July 1901.

(1) (1886) I. L. R., 10 Bom., 196.
(2) (1900) I. L. R., 25 Bom., 337.
(3) (1883) I. L. R., 5 All., 614.
(4) (1893) I. L. R., 15 All., 324.
(5) (1900) I. L. R. 23 All., 60.

executed a deed of gift of the property in question in favour of his sons Ganga and Kirpa, and on the 3rd of May 1889 the donees had obtained entry of their names in the village records on the admission of their father. Thereafter Ganga and Kirpa instituted a suit in *forma pauperis* to have the sale to Sanwal set aside. That suit was dismissed on the 4th of November 1889, and upon its dismissal the Court made an order under section 412 of the Code of Civil Procedure directing the unsuccessful plaintiffs to pay the court fees which would have been payable by them if they had not been permitted to sue as paupers. On the 1st of December 1891 an application for execution of this order was made to the Court on behalf of Government. It was prayed that execution of the decree for unpaid court fees might be levied on the two unsuccessful plaintiffs by attachment and sale of the property which they had unsuccessfully attempted to recover from the auction purchaser Sanwal. The application was allowed; notice of it was duly sent to Ganga and Kirpa, who, having no interest in the property, did not appear, and eventually the property was sold on the 21st of September 1892 as the property of Ganga and Kirpa, and was purchased by one Jwala Sahai.

In June 1901 Sanwal Singh sold the property in question to one Masiat Khan, who thereupon brought the suit out of which this appeal has arisen, in which he sought to recover from Jwala Sahai possession of the property purchased by him with mesne profits. The defendant's contention was that the plaintiff was not entitled to a decree for possession of the property in suit until he should get the sale of the 21st of September 1892 set aside, and that a suit for that purpose was barred by limitation under the provisions of article 12 of the second Schedule to the Indian Limitation Act, 1877. The Court of first instance (Munsif of Aonla-Faridpur) gave the plaintiff a decree, and this decree was on appeal confirmed by the Subordinate Judge of Bareilly. The defendant thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

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BURKITT and AIKMAN, JJ.—The facts out of which this litigation has arisen present some peculiar, and indeed we might say unique features.

The property which is in dispute belonged to one Net Ram, whose creditors instituted a suit against him in 1889 and obtained a decree for payment of a sum of money. In execution of that decree the creditors attached and put up for sale the property now in dispute, and on June 20th, 1889, it was purchased by one Sanwal. The sale was duly confirmed to Sanwal, who was then put into possession by the Court Amin on February 12th, 1890. But during the pendency of the litigation between Net Ram and his creditors the former had executed a deed of gift of the property in suit in favour of his sons Ganga and Kirpa, who on the admission of their father, procured entry of their names on May 3rd, 1889, as proprietors of the property in the *khewat*, their father's name being erased. Thereupon the two sons instituted a suit *in formâ pauperis* to have the sale to Sanwal set aside. That suit was dismissed on November 4th, 1889. The Court which dismissed the suit made the order prescribed by section 412 of the Code of Civil Procedure, directing the unsuccessful plaintiffs to pay the court fees which would have been payable by them if they had not been permitted to sue as paupers. This order amounted to a decree in favour of Government against the two unsuccessful plaintiffs for the amount of the court fees, and it could be executed by attachment and sale of any property they possessed. Accordingly, on December 1st, 1891, an application for execution was made to the Court on behalf of Government. It was prayed that execution of the decree for unpaid court fees should be levied on the two unsuccessful plaintiffs by attachment and sale of the property which they had unsuccessfully attempted to recover from the auction purchaser Sanwal. The application was allowed, notice of it was duly sent to the two unsuccessful plaintiffs Ganga and Kirpa, who, having no interest in the property, naturally did not take the trouble of appearing. Eventually the property was sold on September 21st, 1892, as being the property of Ganga and Kirpa, and was purchased by Jwala Sahai, the defendant-appellant here.

The cause of this blunder is quite clear. As already mentioned, Ganga and Kirpa had obtained entry of their names in the *khewat* in succession to their father Net Ram, and were so recorded when execution proceedings consequent on the order under section 412 commenced. Those proceedings being between Government and Ganga and Kirpa only, no notice of them was served on the auction purchaser, Sanwal, as Government had no claim on *him* for the unpaid court fees. He therefore was ignorant of the proceedings, not having up to that time applied for entry of his name. The Government officials then finding Ganga and Kirpa recorded as proprietors of this property applied to the Court to have it sold to recover the court fees payable by Ganga and Kirpa. The application was presented, the property was sold, and, as already mentioned, was purchased at auction by the appellant Jwala Prasad, who was duly put into possession.

The consequence then is that though Ganga and Kirpa were unsuccessful in their suit to recover possession of this property from Sanwal, it was nevertheless sold behind Sanwal's back to discharge a debt due to Government from Ganga and Kirpa. It was sold to pay a debt due from persons who were not in possession of it and who had been held by the Court not to have any right to or interest in it. The action taken by the Government officials, however innocent, has occasioned much injustice, the Government demand for the court fees due to it having been satisfied out of the proceeds of the sale of the property of a person who was not liable to satisfy it. This litigation has resulted from that unfortunate blunder. The present suit was instituted by the respondent Masiat Khan, who in June 1901 purchased the property from Sanwal, the original auction purchaser. He sues Jwala Sahai, the auction purchaser at the sale in September 1892, and prays for a decree for possession of the property and for mesne profits. Both the lower Courts have given him a decree as prayed. The appellant Jwala Sahai now comes here in second appeal. The only plea he urges is that the plaintiff respondent, Masiat Khan, is not entitled to obtain a decree for possession until he shall have had the sale of September 21st, 1892, set aside, and he contends

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that a suit for that purpose is barred by the limitation rule contained in Article 12 of the second schedule to the Limitation Act, No. XV of 1877.

The learned vakil for the appellant addressed a very able argument to us, in which he urged that this case was concluded by the judgment of their Lordships of the Privy Council in the case of *Malkarjun* v. *Narhari* (1). His contention was that as the appellant had got possession under his purchase at the sale held on September 21st, 1892, it was incumbent on the plaintiff to have that sale set aside before he could recover possession from the appellant. The learned vakil admitted that the current of authority in this Court was against him, but submitted that the judgment of their Lordships of the Privy Council referred to above was decisive and in his favour.

We are unable to accede to that contention. It seems to us that the facts in the case just mentioned are so entirely different from those in this that the rule therein laid down by their Lordships is not applicable here.

The facts in the case in 25 Bom., 337, were that a creditor obtained a money decree against his debtor, who died before execution was levied. When execution was taken out it was necessary under section 248 of the Code of Civil Procedure to serve notice of it on the representative of the deceased judgment-debtor. By a blunder on the part of the Court notice was served on the nephew (who had no interest) and not on the daughters, the true representatives of the deceased debtor. The property was sold in satisfaction of the decree, and was purchased by a person who held a mortgage over it. On suit many years afterwards by the daughters against the mortgagee for an account and for redemption, he relied on the title he had acquired by his purchase at the judicial sale. The main question between the parties was whether the sale was a nullity, as notice of the execution proceedings had not been given to the true representatives of the mortgagor-debtor. The plaintiffs, the daughters, contended that the sale was a nullity which it was not necessary for them to have set aside.

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

In deciding against the contention of the plaintiffs their Lordships remark that the decree had been partially, though to a minute extent, executed against the debtor whose estate was liable to make good the balance:—"To enforce this liability was within the jurisdiction of the Court." Their Lordships then discuss the form of the application to be made for execution against the estate of a deceased judgment-debtor, and adverting to the fact that application was made against a person who was not the legal representative of the deceased, they say:—"It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception," and hold that by impleading the nephew wrongfully as the legal representative of the deceased judgment-debtor the execution Court had not lost its jurisdiction. "In so doing the Court was exercising jurisdiction. It made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right." And again:—"The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debts, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law." Their Lordships, as to the case before them, held it was "necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage," and add:—"There can be no question that the omission to serve notice on the legal representative is a serious irregularity sufficient by itself to enable the plaintiff to vacate the sale," and their Lordships point out that the plaintiffs had deliberately refused to make such a claim. It must be borne in mind that in the case from which the above extracts have been made a decree had been regularly passed against the debtor, and execution of that decree was being had against his estate liable (after his death) to be taken in execution under the decree. That being so, their Lordships hold that the mistake of the execution Court as to the representative of the debtor was but a "serious irregularity," and that the sale, though liable to be vacated, was not a nullity.

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But in commenting on the case of *Basawantapa* v. *Ramu* their Lordships (at page 348) remark that in it "the plea of bar by time under Article 12 of the Limitation Act was set up; and it was held that the article did not apply because the sale was a nullity, and there was no need to set it aside. In that case neither the debtor, nor his estate, were ever made subject to the decree of the Court, the liability never was established, and the process of execution had nothing to rest upon. The Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has established the debtor's liability and is in the process of working it out against his estate." So in the present case no process of execution whatever was taken out against the auction purchaser, Sanwal. His estate was not made subject to any decree, no liability was established against him for the debt of Ganga and Kirpa, therefore the process of execution against his estate had nothing to rest upon. It therefore follows, to use the words of their Lordships cited above, that the Court had not the jurisdiction which it purported to exercise. The sale was nullity, and none the less so because the Court did not purport to exercise any jurisdiction in execution over Sanwal or over his property. It purported to sell the property in suit as belonging to Ganga and Kirpa and not as the property of Sanwal. In those execution proceedings as against Ganga and Kirpa there was no irregularity whether serious or otherwise. As against *them* the proceedings were perfectly regular. But in these proceedings, so far regular, the execution Court had no jurisdiction to seize on and sell the property of a third party in execution of the decree held by Government for court fees against Ganga and Kirpa. That sale, held without jurisdiction as far as Sanwal's property is concerned, is, in our opinion, a nullity, which the respondent was not obliged to have set aside before he could recover possession of property from which his assignor had been wrongfully dispossessed. To hold otherwise might in our opinion be productive of great and irretrievable injustice. For it might well be that the person whose property was wrongfully sold to satisfy a demand for which he was not liable had no notice (as here) of the proceedings, and might have been absent (say on pilgrimage)

for years. On returning he would not only find his property sold behind his back, but also would find himself precluded, under the provisions of Article 12 of the second schedule to the Limitation Act, from suing to recover it. The case of an execution proceeding in which the property attached by the Court is liable to satisfy the demand of the decree-holder is very different.

For the above reasons we are of opinion that the case in I. L. R., 25 Bom., has no application to this appeal. On the merits we have no hesitation in agreeing with the finding of the two lower Courts. The suit being one for recovery of possession of immovable property, the limitation period applicable is that prescribed by Article 144 of the second schedule to the Limitation Act, No. XV of 1877. It was so held in the case of *Nathu* v. *Badri Das* (1), a case exactly in point here. Again in *Balwant Rao* v. *Muhammad Husain* (2), it was held that a sale held for the purpose of recovering court fees erroneously ordered to be paid was a nullity which it was not necessary to set aside. And again in the case of *Sukhdeo Prasad* v. *Jamna* (3), in which the question as to the title which a purchaser acquires under a judicial sale of property to him was discussed by one of us, reference was made to the dictum of their Lordships of the Privy Council in *Rajah Enayet Hossain* v. *Girdharee Lal* (4), to the effect that "in judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold on the part of the decree-holder or of the officer conducting the sale." And basing his judgment on that dictum and on other reported cases, the learned Judge held that "when the property of a judgment-debtor is sold in execution of a decree against him, the purchaser can acquire no higher title than the judgment-debtor would be competent to convey were he selling the property privately."

In the present case the judgment-debtors were Ganga and Kirpa. They had no interest in the property in suit. The purchaser took no higher title than they could have conveyed to him by private sale, that is to say, he took nothing

(1) (1883) I. L. R., 5 All., 614.
(2) (1893) I. L. R., 15 All., 324.
(3) (1900) I. L. R., 23 All., 60.
(4) (1869) 12 Moo., I. A., 366.

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This appeal therefore cannot be allowed. It is no doubt a hard case for the appellant, who has suffered serious loss through the blunder of the Government officials. He, however, has his remedy under section 315 of the Code of Civil Procedure. Our order is that this appeal be dismissed with costs.

Appeal dismissed.

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February 1.

MISCELLANEOUS CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

NEMI CHAND AND ANOTHER (DEFENDANTS) v. RADHA BALLABH (PLAINTIFF) AND NANNA AND OTHERS (DEFENDANTS) AND RADHA BALLABH (PLAINTIFF) v. NEMI CHAND AND OTHERS (DEFENDANTS).*

Regulation No. III of 1877 (*Ajmere Laws*) *section* 33—*Mortgage—Suit for redemption—Application of the rule of "dam dupat."*

Held that the rule laid down by section 33 of Regulation III of 1877 applies only to cases in which money is payable by the defendant to the plaintiff, and is not applicable to a suit for redemption of a mortgage. *Nawab Azimut Ali Khan* v. *Jowahir Sing* (1) referred to.

THIS was a reference made under the provisions of sections 17 and 19 of Regulation No. 1 of 1877 by the Commissioner and District Judge of Ajmere-Merwara. The facts out of which the reference arose are thus stated in the referring order:—

"Defendants 3 to 6 mortgaged (in October 1887), with possession, to defendants 1 and 2 certain immovable property, of which defendants 1 and 2 entered into possession of seven shops only. Interest was payable on the mortgage money at 10 annas per cent. per mensem. The amount of the mortgage money was Rs. 9,800. The mortgagees were to collect the rent and profits and appropriate them, firstly, to interest and secondly, to principal, with compound interest at 1 per cent. per mensem if these collections were less than the interest due under the mortgage. The mortgages were two; the first for Rs. 9,000, being a simple mortgage usufructuary, and the second for Rs. 800, a simple mortgage.

"The mortgagors mortgaged their right of redemption to third parties on July 18th, 1892. These third parties obtained

*Miscellaneous No. 99 of 1903.

(1) (1870) 13 Moo., I. A., 404, at p. 414.