

disregard the authorities in support of the view taken by the courts below and depart from the course of decision hitherto prevailing. However weighty be the view expressed by Mr. Ameer Ali, we do not think that we should be justified in doing so. We therefore dismiss the appeal with costs.

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 SAMAN.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KISHORI LAL AND ANOTHER (PLAINTIFFS) v. KUBER SINGH (DEPENDANT).*

Act No. XV of 1877 (Indian Limitation Act), section 3; schedule II, articles 13, 14—Civil Procedure Code (1882), section 310A.—Execution of decree—Suit involving the cancellation of an order setting aside a sale—Limitation.

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 July 21.

A Civil Court acting under section 310A of the Code of Civil Procedure, 1882, set aside a sale on an application made about 14 months after the sale. The auction-purchaser more than a year after this order sued for possession of the property and for a declaration that the order under section 310A was passed without jurisdiction. *Held* that the order whether passed rightly or wrongly was not a nullity, and that the order having been passed in a proceeding other than a suit, article 13 of the second schedule to the Indian Limitation Act, 1877, barred the present suit, inasmuch as the plaintiff could not obtain a decree for possession without first having the order set aside.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J. The facts of the case are stated in the judgement under appeal, which was as follows :—

“The facts necessary for the disposal of this appeal are briefly these :—The suit under appeal was brought for the possession of the property bought in execution of a decree on the 20th September, 1901, and the sale of that property was set aside by the learned Munsif on the 26th of September, 1901. On appeal the order of the learned Munsif setting aside the sale was reversed by the lower appellate court on the 16th of January, 1902. That order of the lower appellate court was upheld by the High Court on the 4th of December, 1902. The judgement-debtor again on the 23rd of December, 1902, applied under section 310A to have the sale set aside. The learned Munsif on the 20th of April, 1903, allowed the application and set aside the sale. On appeal to the lower appellate court the order of the Munsif setting aside the sale was again reversed on the 17th of July, 1903. On second appeal to the High Court it was held that no appeal lay to the lower appellate court. After the above-mentioned proceedings a fresh suit was instituted by the plaintiff for possession of the property sold. The result of the above proceedings, it is to be noticed, was, that the property sold on the 20th of September, 1901, passed to the possession of the judgement-debtor. The decree-holder therefore brought the suit under appeal for the recovery of

* Appeal No. 161 of 1909 under section 10 of the Letters Patent.

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possession on the allegation that the Munsif had no jurisdiction to set aside the sale of the property by his order, dated the 28th of April, 1903. The court of first instance dismissed the claim on the ground that it had jurisdiction, and the decree of that court was affirmed by the lower appellate court. That court (the lower appellate court) in its judgement remarks :—' The word jurisdiction is not defined by the legislature, and it is used in different senses. In my opinion the Munsif had jurisdiction to entertain the application, dated the 23rd of December, 1903, in the sense that it was the proper court where it could lie, but it was barred by limitation [vide *Chowdhry Kesri Sahay v. Ginni Roy* (1)] and he had no lawful authority to grant it, hence he may be said to have had no jurisdiction to grant it. But the question is, whether a separate suit like the present is maintainable under the circumstances? He, however, came to the conclusion that the suit was barred by limitation. He relied on *Malharjun v. Narhari*, (2) and on *Raghunath Prasad v. Kaniz Rasul*, (3) and held that the learned Munsif had jurisdiction to pass the order which he passed on the 28th of April, 1903, and the suit ought to have been brought within one year from that date. The plaintiffs come here in second appeal, and it is argued by the learned vakil for the appellant that the suit is not barred by limitation. In my opinion the view taken by the lower appellate court is right. The learned Munsif had jurisdiction to pass the order dated the 28th of April, 1903, and that order was not a nullity. The suit on the authority of the rulings mentioned above is barred. The result is that the appeal fails and is dismissed with costs.'

Munshi *Gulzari Lal*, for the appellants, submitted that article 14, of the second schedule to the Indian Limitation Act, 1877, had no application, as the order complained of was not merely an "order of an officer of Government in his official capacity," but an order passed by a Civil Court. Article 13 was also not applicable as an order under section 310A of the Code of Civil Procedure, 1882, was an order passed in the suit. He relied on *Shankar Sarup v. Mejo Mal* (4) and *Govinda Bala v. Ganu Abaji* (5). The suit would be governed by Article 120 of the Limitation Act.

Mr. *G. W. Dillon*, for the respondent, contended that the case in 10 Bombay Law Reporter, 749, was opposed to the ruling in *Raghunath Prasad v. Kaniz Rasul* (3) and that section 3 of the Limitation Act clearly laid down that a 'suit' did not include an 'application,' and therefore an order under section 310A which was passed on an application would be covered by Article 13 of the Limitation Act.

(1) (1902) I. L. R., 29 Calc., 626.

(3) (1902) I. L. R., 24 All., 467.

(2) (1900) I. L. R., 25 Bom., 337.

(4) (1901) I. L. R., 23 All., 313, 323.

(5) (1903) 10, Bom. L. R., 749.

Munshi *Gulzari Lal* was heard in reply.

STANLEY, C. J., and BANERJI, J.—The facts of this case are these:—The suit is one for the recovery of property which was bought by the plaintiffs at a sale in execution of a decree on the 20th of September, 1901. This sale was set aside by the Munsif on the 26th of September, 1901. On appeal the order of the Munsif setting aside the sale was reversed by the lower appellate court on the 16th of January, 1902, and this order was upheld by the High Court on the 4th of December, 1902. Then the judgement-debtor, on the 23rd of December, 1902, applied to the Munsif under section 310A of Act XIV of 1882 to have the sale set aside, and his application was granted on the 28th of April, 1903, and the sale was set aside. An appeal was preferred, and the order of the Munsif setting aside the sale was reversed on the 17th of July, 1903, but on second appeal to the High Court, it was held that no appeal lay to the lower appellate court and the decision of that court was reversed. The order of the Munsif of the 28th of April, 1903, accordingly stood affirmed.

The suit out of which this appeal has arisen was then preferred by the plaintiffs on the 6th of August, 1907. They claimed possession of the property which had been sold to them, alleging that the Munsif had no jurisdiction to set aside the sale to them by the order of the 28th of April, 1903.

The learned Judge of this Court, from whose decision this appeal has been preferred, agreeing with the lower courts, dismissed the plaintiffs' claim, holding that the Munsif had jurisdiction to pass the order of the 28th of April, 1903, and that the plaintiffs' suit was barred by limitation, it not having been brought within one year from the date of that order.

We are of opinion that the decision of the learned Judge of this Court is correct, and that Article 13 of Schedule 11 of the Limitation Act is applicable to this case. It is obvious that the plaintiffs cannot obtain a decree for possession without first having the order of the Munsif of the 28th of April, 1903, set aside. This order, whether it was passed rightly or wrongly, cannot be treated as a nullity. We have then to see what period of limitation is prescribed for a suit to have such an order set aside. It is contended on behalf of the appellants that a period

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of limitation is not expressly provided in the schedule to the Limitation Act, and that article 120 which allows a period of six years within which to bring a suit is applicable. We are of opinion that the article which is applicable is article 13. Article 12 provides a period of one year's limitation for a suit to set aside, amongst others, a sale in execution of a decree of a Civil Court. Article 13 provides the same period of limitation for a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. "Suit" is defined in section 3 of the Act as not including an appeal or an application. "Suit" therefore in the article does not include an application in a suit. The article applies to an order in any proceeding other than a suit, and as an application is excluded from a 'suit,' it applies to an order in a proceeding on an application. If after the words "other than a suit" the words "or application in a suit" had been added to the article, it would be different. Now the order of the Munsif setting aside the sale was an order in a proceeding other than a suit and article 13 is in our opinion applicable. If this were not so, we should have a period of one year allowed for the institution of a suit to have a sale in execution of a decree of a Civil Court set aside, while for a suit to have an order setting aside a sale cancelled, the period would be six years. This was clearly, we think, never intended. This is unlike the case of *Shankar Sarup v. Mejo Mal* (1). In that case the suit was brought under the provisions of section 295 of the Code of 1882, and it was not therefore necessary to set aside the order for distribution passed under that section.

We think that the decision of the learned Judge of this Court, which is in agreement with the decisions of the courts below, is correct and dismiss this appeal with costs.

Appeal dismissed.

(1) (1901) I. L. R., 28 All., 313.