

1918

BINHARI LAL

v.

BALDEO
NARAIN.

minor he had nothing whatever to do with the suit or the proceedings in execution. I have already said he himself came into court and made the application for the stay of the sale on the 13th of April, and put in an affidavit. The application showed that he had appointed the vakil to act for the minor of whom, he, Gaya Prasad, was the guardian. It seems to me, therefore, that the application of the 4th of May, was in order, and that the court has failed to exercise its jurisdiction in not accepting it because it came to a wrong decision on a point of law. Undoubtedly if it had decided, as I think it should have decided, it should have accepted the application. I, therefore, setting aside the order of the court below, pass the order which I think it should have passed, *i. e.*, I direct that the money paid into court be made over to the purchaser and the sale be set aside. The applicant will have his costs throughout.

Application allowed.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

LALA RAM (PLAINTIFF) v. THAKUR PRASAD (DEFENDANT).*

Civil Procedure Code (1908), section 60(c); order XXI, rule 92—Execution of decree—Sale in execution—House of an agriculturist—Objection not taken at time of sale, but in answer to a suit for possession by the auction-purchaser—Estoppel.

Held that a judgment-debtor, who could and ought to have raised objections to the sale of his property at the time of the sale, could not be permitted long after the sale had been confirmed to raise the same objections in answer to a suit by the auction purchaser for possession of the property purchased by him. *Umed v. Jas Ram* (1), *Pandurang Balaji Bagave v. Krishnaji Govind, Parab* (2) and *Dwarkanath Pal v. Tarini Sankar Ray* (3) followed.

THE facts of this case were as follows:—

In execution of a decree obtained against one Thakur Prasad a house belonging to him was sold by auction on the 23rd of November, 1910. The purchaser obtained formal, but not actual, possession. He accordingly brought the present

* Second Appeal No. 1840 of 1916, from a decree of Piare Lal Katara, Subordinate Judge of Mainpuri, dated the 13th of April, 1916, confirming a decree of Prem Behari, Munsif of Mainpuri, dated the 25th of May, 1915.

(1) (1907) I. L. R., 29 All., 612. (2) (1908) I. L. R., 28 Bom., 125.

(3) (1907) I. L. R., 84 Cal., 189.

suit to obtain physical possession of the house which he had purchased. The suit was resisted on the ground that the house in question was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of section 60 (c) of the Code of Civil Procedure. The suit was on this ground dismissed, and on appeal the decree of the first court was affirmed. The plaintiff appealed to the High Court raising two questions. The first was that the lower appellate court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of clause (c) of section 60; and, secondly, even if the house was of the description mentioned in that clause, whether, after the sale and confirmation of sale, it was open to the defendant to question the validity of the sale and the title which the plaintiff had acquired under it.

Munshi *Baleshwar Prasad*, for the appellant.

Munshi *Girdhari Lal Agarwala*, for the respondent.

BANERJI and RYVES, JJ.:—This appeal arises out of a suit brought by the plaintiff appellant for possession of a house which originally belonged to the defendant respondent. In execution of a decree obtained against the said defendant the house was sold by auction so far back as the 23rd of November, 1910, and it was purchased by the plaintiff. He obtained formal delivery of possession, but as he did not get actual possession, he brought the present suit. The claim was contested on the ground that the house claimed was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of section 60 (c) of the Code of Civil Procedure. This objection prevailed in the courts below and the suit was dismissed. The plaintiff has preferred this appeal and he raises two questions. The first is that the lower appellate court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of clause (c) of section 60; and, secondly, even if the house was of the description mentioned in that clause whether, after that sale and confirmation of sale, it was open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it. As

191b

LALA RAM
v.
THAKUR
PRASAD.

1918

LALA RAM
v.
THAKUR
PRASAD.

regards the first point, the lower appellate court says that it was a fact not disputed that the defendant was a tenant and that the house in dispute was an appurtenance to his tenancy. We must accept this statement of fact as correct and assume that the house in dispute is an appurtenance to the tenancy of an agriculturist as such. If an objection had been taken before the auction sale it ought not to have been sold; but the question which arises is whether after the sale and the confirmation of the sale its validity can now be questioned by the defendant, as against whom the sale has become conclusive by reason of its confirmation: Under order XXI, rule 92, after a sale has taken place and has been confirmed the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant judgment-debtor was not aware of the execution proceedings. As between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold. If objection had been raised on behalf of the defendant before the auction sale, the court would have had jurisdiction to consider and decide whether the property was of the description mentioned in section 60(c), and if it had decided that the property was liable to sale and no appeal had been preferred against such decision, the sale of the property could never be questioned. In the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant after the lapse of so many years from the date of the sale to contend that the sale ought never to have taken place and conveyed no title to the purchaser. This view is supported by the decision of this Court in *Umed v. Jas Ram* (1), and also by the decision referred to in the judgment in that case. The rulings of the Bombay High Court in *Pandurang Balaji Bagave v. Krishnaji Govind Parab* (2) and of the Calcutta High Court in *Dwarkanath Pal v. Tarini Sankar Ray* (3) are to the same effect. The only case in which a contrary view appears to have been held is the unreported

(1) (1907) I. L. R., 29 All., 612. (2) (1903) I. L. R., 28 Bom., 125.

(3) (1907) I. L. R., 34 Calo., 199.

judgment of a single Judge of this Court in Second Appeal No. 327 of 1910, decided on the 16th of January, 1911. In that case the learned Judge held that an objection as to attachment and sale could not be made before the auction sale. We are unable to agree with this view, and we do not feel ourselves justified in following that ruling in the face of the other rulings to which we have already referred. The result is that we allow the appeal, set aside the decrees of the courts below and decree the plaintiff's suit with costs in all courts.

Appeal allowed.

Befo e Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

WAZIR ALI AND ANOTHER (DEFENDANTS) v. ALI ISLAM (PLAINT FF).
Act No. IX of 1908 (Indian Limitation Act), schedule I, article 148—*Limitation—Usufructuary mortgage—Redemption—Right of purchaser of equity of redemption in part of the mortgaged property.*

A purchaser of the equity of redemption in a part of the mortgaged property is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who, having purchased another portion of the mortgaged property, has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of this description is that provided by article 148 of schedule I to the Indian Limitation Act. *Ashfaq Ahmad v. Wazir Ali* (1) followed. *Jai Kishan Joshi v. Budhanand Joshi* (2) referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows :—

On the 21st of December, 1864, one Iradat-ullah made a usufructuary mortgage of certain shares in four villages, one of which was the village Gangapur. The equity of redemption in one of the mortgaged villages, namely, Pul Ratni, was sold by auction and purchased by one Mazhar Ali in 1874. He sold it in 1882, and the share which he purchased ultimately came to one Sarju Singh. In 1887, Sarju Singh brought a suit for redemption and got a decree for redemption of all the four mortgaged villages and obtained possession in 1891. The present appellants Wazir

* Second Appeal No. 1395 of 1916, from a decree of I. B. Mundi, District Judge of Azamgarh, dated the 24th of August, 1916, confirming a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 18th of February, 1916.

(1) (1889) I. L. R., 14 All., 1. (2) (1915) I. L. R., 38 All., 138.

1918

JALA RAM
of
THAKUR
FRASAD.

1918
July, 2.