

a family and a minor succeeds, the *Kazi* shall not remove him but shall appoint another to discharge the duties of the office during his minority. Mr. Tyabji's *Principles of Muhammadan Law*, page 410, also states clearly :

"Where an infant or person of unsound mind is purported to be appointed as a *mutawalli* his appointment is void. Where the office of *mutawalli* devolves upon a person who is a minor, the Court may appoint another *mutawalli* to act in his place during his minority."

In the present case the plaintiff's right is based not upon succession but upon appointment and her minority appears to be fatal to the claim. In my opinion this appeal should be dismissed with costs.

KULWANT SAHAY, J.—I agree.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mullick and Bucknill, J. J.*

RADHA KISHUN LAL

v.

KASHI LAL.\*

1923.

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ZOHRA  
v.  
SAIYID  
MUZTABA  
HUSAIN.

DAWSON  
MILLER,  
C. J.

1923.

June, 25.

*Execution sale—suit to set aside, maintainability of—decree for possession against auction purchaser and judgment-debtor, effect of—Limitation Act 1908 (Act IX of 1908), schedule I, Article 181.*

Order XXI of the Code of Civil Procedure, 1908, is not exhaustive of the procedure for setting aside an execution sale.

Where the decree-holder purchased property in execution of his decree, and subsequently a third person sued the auction-purchaser and the judgment-debtor for a declaration of his title to the property and for possession, and obtained a decree, held, that the effect of the decree in favour of the

\* Appeal from Appellate Order No. 31 of 1923, from an order of J. F. W. James, Esq., I.C.S., District Judge of Patna, dated the 8th February, 1923, confirming an order of Babu Krishna Sahay, Subordinate Judge of Patna, dated the 1st April, 1923.

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third person was to set aside the execution sale and revive the decretal debt, and that no formal order setting aside the sale was necessary.

An application for execution of a decree having been made on the 22nd August, 1917, two items of property were put up for sale and sold on the 21st January, 1918, the first item being purchased by *A* the decree-holder. The sale of the first item was confirmed on the 20th April, 1918, and the sale of the second item was eventually set aside on the 12th April, 1920. In the meantime, on the 24th May, 1919, a third person had sued *A* and the judgment-debtor for a declaration of his title to the first item and for possession and had obtained a decree. *A* thereupon again applied on the 19th July, 1921, for execution of the entire decree. This application was dismissed for default on the 7th September, 1921, and on the 24th *idem A* made his third application for execution. *Held*, that Article 181 of the Second Schedule to the Limitation Act, 1908, applied, and that the application was not time-barred.

*Nannu Lal v. Bhagwan Das*(1), *Juramu Muhammad v. Jathi Muhammad*(2) and *Subbu Reddi v. Ponnambalu Reddi*(3), referred to.

Appeal by the judgment-debtor.

The facts of the case material to this report were as follows:—

The first application for the execution of the decree, which was for a sum of Rs. 1,158, was filed on the 22nd August, 1917. On the 21st January, 1918, the decree-holder brought to sale the property described as lot No. 1 in the sale proclamation and purchased it himself for Rs. 400. Lot No. 2 was knocked down for a sum of Rs. 960 and was purchased by a third party. On the 20th April, 1918, the sale of lot No. 1 was confirmed, but the sale of lot No. 2 was set aside on the ground that the judgment-debtor had no saleable interest in the property. There was then an appeal against this order to the District Judge of Patna who, on the 20th June, 1918, reversed the lower Court's order and confirmed the sale of lot No. 2. The

(1) (1917) I. L. R. 39 All. 114.

(2) (1917-18) 22 Cal. W. N. 750.

(3) (1919) 49 Ind. Cas. 359.

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judgment-debtor then took proceedings under Order XXI, rule 90, and finally, on the 27th April, 1919, he succeeded in getting the sale of lot No. 2 set aside for irregularity. That order was affirmed in appeal by the District Judge on the 12th April, 1920.

The next execution case, namely, No. 231 of 1921, was registered on the 19th July, 1921, but was dismissed for default on the 7th September, 1921. The third execution case, out of which the present appeal arose and which was registered as No. 316 of 1921 on the 24th September, 1921, sought to recover the whole judgment debt.

The reason for the decree-holder's claiming to recover the whole amount of the judgment debt was that one Firangi Lal brought a suit against the decree-holder (who was the auction-purchaser of lot No. 1) and against the judgment-debtor, for a declaration of title to lot No. 1 and for possession, and on the 24th May, 1919, he obtained a decree the effect of which was to set aside the sale of the 21st January, 1918, in respect of that lot.

Both the Courts below held that this third application for execution was not barred by limitation. The judgment-debtor accordingly preferred this second appeal against the order of the District Judge, dated the 8th February, 1923.

*Tribhuan Nath Sahay*, for the appellant.

*Janak Kishore*, for the respondent.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

The only point in the case is, whether Article 181 of Schedule 2 of the Indian Limitation Act of 1908 applies to the case. On behalf of the judgment-debtor a number of authorities have been cited to show that under the present Civil Procedure Code the auction-purchaser cannot bring a suit to recover from the decree-holder the auction-purchase money on the ground that the judgment-debtor had no saleable interest in

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the property and that the only remedy open to the auction-purchaser is to apply under Order XXI, rule 91, to have the sale set aside. In support of this contention our attention has been drawn to *Nannu Lal v. Bhagwan Das* (1), *Juranu Muhammad v. Jathi Muhammad* (2) and *Subbu Reddi v. Ponnambala Reddi* (3).

Now these authorities have really no bearing on the question before us. Here the decree-holder himself is the auction-purchaser. There is no prayer for the refund of the auction-purchase money and the only question is, whether by reason of the litigation which took place after the sale and by reason of the decree in favour of Firangi Lal, the execution proceedings can be said to have been revived and the present execution case may be regarded as a continuation of the former execution proceedings. If Article 181 applies, then the decree-holder can get time either from the date on which Firangi Lal got his decree, namely, the 24th May, 1919, or on the date on which the sale of lot No. 2 was finally set aside, namely, the 19th April, 1920. In either case the application will be within time and, in my opinion, there can be no doubt that this is a case to which Article 181 should apply. The effect of the decree, in favour of Firangi Lal, was to set aside the sale and no formal order to that effect was required. The decree-holder and the judgment-debtor were both parties to the suit and, therefore, they are bound by the order. The argument that under the present Civil Procedure Code no sale can be set aside, except by a resort to the procedure of Order XXI is, in my opinion, not well founded; nor is it necessary that the execution Court should formally cancel the order of satisfaction which was recorded after the sale of lot No. 1, before the decree-holder can proceed to recover the debt which has been revived in consequence of the decree declaring the sale of lot No. 1 to be invalid.

(1) (1917) I. L. R. 39 All. 114. (2) (1917-18) 22 Cal. W. N. 760.

(3) (1919) 49 Ind. Cas. 359.

It is not necessary to cite many authorities in support of the proposition that the present case belongs to a class to which Article 181 is applicable; but the following cases are in point and will suffice: *Keramat Ali v. Nagendra Kishore Ray* (1) and the decision of their Lordships of the Privy Council in *Maharaja Rameshwar Singh v. Homeshwar Singh* (2).

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The result is that the decree of the District Judge is affirmed and the appeal is dismissed with costs.

BUCKNILL, J.—I agree.

*Appeal dismissed.*

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## APPELLATE CIVIL.

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*Before Mullick and Bucknill, J.J.*

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MAHANTH RAMRUP GOSHAIN

v.

MAHABIR SHAH.\*

1923.

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June, 27.

*Code of Civil Procedure, 1908 (Act V of 1908), section 11, Order IX, rule 13—Ex parte decree, application to set aside on ground of suppression of summons—dismissal of application—suit for declaration that decree is void for fraud, maintainability of.*

Where an application to set aside an *ex parte* decree on the ground of non-service of summons has been dismissed the defendant is not entitled to institute a suit for a declaration that the decree is null and void on the ground of fraud unless he can show that there were other grounds of fraud apart from the service of processes.

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\* Appeal from Appellate Decree No 1173, of 1921, from a decision of Babu Jatindra Chandra Bose, Subordinate Judge of Saran, dated the 27th May, 1921, reversing a decision of Balu Atal Bihari Saran, Munsif of Chapra, dated the 23rd August, 1920.

(1) (1916-17) 21 Cal. W. N. 571.

(2) (1920-21) 25 Cal. W. N. 317.