that when consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused and by section 126 of the Transfer of Property Act it is provided that a gift may also be revoked in any of the cases "save one of failure of consideration" in which, if it were a contract, it might be rescinded. I agree that if this were a voidable contract and not void *ab initio* it would have to be set aside before a suit for possession could be maintained and further that Bhagela Kuer could not transfer the mere right to sue but the answer to the appellants' argument appears to me to be that, if the facts alleged by the respondents should be made out, there was never any consent at all to the gift within the meaning of section 19 of the Indian Contract Act and although Bhagela Kuer may have permitted her signature to be written on the document in question she never in fact consented thereto. This I think is the effect of the well-known rule laid down in *Foster* v. *Mackinnon* (1).

Although, in my opinion, this point should be decided against the appellants it follows on the earlier findings arrived at that the appeal should be allowed, the judgment and decree of the officiating Subordinate Judge should be set aside, and the suit dismissed with costs, here and in the Court below.

MULLICK, J.—I agree.

Appeal allowed.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.

RAMDHURI CHOWDHURI

v.

DEONANDAN PRASAD SINGH.*

1922.

July, 10.

Limitation Act, 1908 (*Act IX of 1908*), *Schedule 1, Articles 166 and 181—application to set aside execution*

*Letters Patent Appeal No. 94 of 1921.

(1) (1868-69) L. R. 4 C. P. 704.

1922.

RAMDHURI CHOWDHURI v. DEONANDAN PRASAD SINGH.

sale—Limitation—terminus a quo—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 47 *and Order XXI, rule* 90—*Second Appeal—fraud, refusal by lower court to draw inference of, whether may be questioned.*

An application to set aside a voidable sale held in execution of a decree under the Code of Civil Procedure, 1908, is governed by Article 166 of the Limitation Act, 1908, even when the application purports to be under Order XXI, rule 90, and section 47, and the ground for setting aside the sale is said to be fraud.

The period of limitation for such an application runs from the date of the sale and not from the date on which the applicant became aware of the sale unless it is shewn that knowledge of the sale was fraudulently concealed from him.

Rahimbhoy Habibhoy v. *Turner*(1), referred to.

A wilful mis-statement by the decree-holder of the value in the sale proclamation is not necessarily a fraudulent act although it may be sufficient evidence in particular cases to justify an inference of fraud.

Where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the High Court, in second appeal, to consider whether as a matter of law, such an inference is justified by the facts found. But where the court which is the ultimate judge of fact refuses to draw an inference of fraud upon the facts so found, that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud.

Appeal by the decree-holders.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Sultan Ahmed (with him *Kulwant Sahay* and *Sireshwar Dayal*), for the appellants.

P. K. Sen (with him *Siva Narain Bose*), for the respondents.

DAWSON MILLER, C. J.—This is an appeal under the Letters Patent from a decision of Ross, J., dated the 6th November, 1921. The appellants as first

(1) (1893) I. L. R. 17 Bom. 341, P.C.

mortgagees of certain property sued and obtained a decree in execution of which, on the 31st January, 1918, they put up the property for sale and purchased it themselves. About two years later, in February, 1920, the respondent, one of the judgment-debtors, applied to set aside the sale under Order XXI, rule 90, and section 47 of the Civil Procedure Code. At the hearing of the application no point was made by the judgment-debtor, the present respondent, that notice of the application for execution required by Order XXI, rule 22, of the Code was not issued or properly served and no evidence was taken before the Munsif, who heard the application, on this point. It was contended, however, that the order of attachment was not properly proclaimed, nor a copy deposited in the Collectorate as required by Order XXI, rule 54, and that the notice of the sale proclamation required by rule 66 of that Order was not properly served upon the respondent or a copy deposited at the Collectorate. The respondent also alleged fraud on the part of the appellant in concealing from him the fact of the sale and claimed that the limitation period for his application did not begin to run until he became aware of the sale which was less than a month before the application was made. The Munsif found that the notice required under Order XXI, rule 66, was served on the *karpardaz* of the respondent and not on the respondent personally and that the sale proclamation was not sent to the Collector of the district for publication under Order XXI, rules 67 and 54. He also found that the property was purchased at a very low price by the appellant and from the way the processes were served and the inadequate price he concluded that fraud had been practised on the respondent. There was no evidence as to when the respondent first obtained knowledge of the sale but he accepted the statement in his petition that the petitioner obtained this knowledge for the first time on the 2nd February, 1920, which was less than a month before the application was filed. He accordingly held that the application was not time-barred and set aside the sale.

1922.

RAMDHURI CHOWDHURI v. DEONANDAN PRASAD SINGH.

DAWSON MILLER, C. J.

The Subordinate Judge on appeal found that the sale proclamation was duly made and published but that a copy was not sent to the Collector of the district as required by rules 54 and 67 of Order XXI. He also found that the notice required under rule 66 was not served upon the respondent but upon his *karpardaz*. These defects he considered to be irregularities but not sufficient to vitiate the sale. He further found that the price which the property fetched at the sale was lower than its fair price but did not consider that there was any evidence proving anything done by the decree-holder which had the effect of reducing the price. It must be taken therefore, in my opinion, that he considered the respondent had suffered no substantial injury, within the meaning of Order XXI, rule 90, by reason of such irregularities as existed. He also found that there was no evidence on the record to prove any fraud practised by the appellant, and that there was no proof that the respondent was kept from knowledge of the sale by any fraud of the decree-holder. In considering the question of the inadequacy of price he stated that he could not agree with the learned Munsif in holding that fraud was practised simply because the property sold did not fetch its proper price at the sale. On the question of limitation he pointed out that there was no evidence to prove how and when the judgment-debtor got knowledge of the sale and that the allegation made in the petition had not been substantiated and the respondent himself gave no evidence. He accordingly held that the application was barred by limitation and rejected it, allowing the appeal.

The respondent then moved this Court in revision to set aside the Subordinate Judge's order relying mainly upon the ground, which had not been urged either before the Munsif or the Subordinate Judge, that notice of the application for execution, which was made more than a year after the decree, had not been properly served upon him, and that the sale was accordingly made without jurisdiction and void. He also contended that upon the findings come to fraud

ought to have been presumed. The learned Judge considered that on the facts disclosed a case of fraud had not been made out and agreed with the lower appellate Court that irregularity in the service of notice, in itself, did not amount to fraud. He stated however, that in the absence of any finding of the actual value of the property he would have remanded the case for a finding on this question had it been necessary to do so but as he set aside the sale upon the ground next mentioned, he did not take this course. On the question of non-service of the application for execution he was referred to the peon's return of service which had been accepted by the executing Court as a proper service when it was made and had not been put in evidence at the trial. From this it appeared that the notice had been tendered to the respondent's *karpardaz* who refused to accept it and that it was afterwards served by affixing it to the door of the respondent's house. In certain circumstances such a service might be regular and effective but there was nothing to show on the face of the return whether the respondent himself had refused to accept it or whether any attempt had been made to ascertain his whereabouts before affixing it to the door of his house and no evidence was before the Court to show the exact circumstances under which the service came to be made. The learned Judge, however, considered himself justified in deciding this question upon the peon's return alone and came to the conclusion that no proper service has been made with the result that the sale was bad for want of jurisdiction. He appears to have treated the application ,which was in fact an application to set aside the sale, as an application of some other nature. Although it seems clear that the limitation period for an application to set aside a sale under the Civil Procedure Code is 30 days under Article 166 of the Limitation Act, the learned Judge thought that as the case was one coming under section 47 of the Act it was not governed by Article 166 but by Article 181 for which the limitation period is three years and the application was, therefore, not barred by limitation.

1922.

RAMDHURI CHOWDHURI v. DEONANDAN PRASAD SINGH.

He considered, further, that the proper procedure was by way of appeal and not by way of revision, and treating the application as an appeal he allowed it and ordered the sale to be set aside. From this decision the present appeal is brought.

DAWSON MILLER, C. J.

The first observation which falls to be made upon this judgment is that the application now under consideration was both in form and substance, an application for setting aside a sale in execution of a decree under the Civil Procedure Code. There was no contention from first to last either in the trial Court or before the Subordinate Judge that the sale was void *ab initio* and there was not a scrap of evidence to support such a contention. The fact that the application itself was headed as one under Order XXI, rule 90, and section 47 of the Code can make no difference in this respect. Article 181 of the Limitation Act applies only to applications for which no period of limitation is provided elsewhere in the schedule, but all applications for setting aside a sale in execution of a decree under the Code are governed by Article 166, even though the ground for setting aside should be fraud or any other reason. All applications to set aside a sale in one sense come within section 47 of the Code as that section provides that all questions arising between the parties and relating to the execution of the decree shall be determined by the executing Court. The effect, however, of Article 166 of the Limitation Act cannot be evaded merely by stating in the application itself that it is brought under section 47 as well as under Order XXI, rule 90. It would appear therefore that the present application is time-barred unless it can be shown that the respondent's right to set the sale aside was concealed from him by the fraud of the appellant. In such a case under section 18 of the Limitation Act the time would only begin to run when the respondent first became aware of the fraud. This he alleged in his petition was less than a month before he filed the application although the property had been sold two years earlier. Fraud has been

negatived by each of the Courts before whom the case came and the respondent has, therefore, failed to lay the foundation necessary to support the application of section 18 of the Limitation Act. Unless the knowledge of his right to apply was fraudulently concealed from him the period of limitation runs from the date of the sale. It is immaterial, therefore, when he first became aware of the sale, although in fact as the Subordinate Judge points out there is no evidence of the date when he first became aware of it. With respect to the learned Judge, whose decision is now under appeal, I do not think that he was entitled to treat the present application which, as I have already said, was in form and substance an application to set aside a sale, as a proceeding of a different nature and to hold that Article 166 of the Limitation Act had no application. The evidence was confined to such matters as would entitle the Court to set aside the sale on the assumption that it was valid until so set aside, and the only evidence before the Court was that which went to show that the sale was voidable and not void. It may be, when the facts are accurately ascertained, that the sale was void. I express no opinion upon that point, but I consider in the present case we are not in a position to decide it. The evidence is not before us to enable us to arrive at a proper conclusion and it would, in my opinion, be a dangerous precedent to establish if we were to treat the application now under consideration as one of an entirely different nature from that which it purports to be, and without any evidence at all as to the exact circumstances under which the service of the notice of the application for execution was effected, hold that the sale was a nullity merely because the peon's return, which was not put in evidence or relied upon at the trial, indicates that the service may not have been properly effected. It may be assumed that if the service of this notice had been put in issue at the hearing the proof of the peon's return would not have been sufficient to discharge the onus cast upon the appellant but for aught we know there may have been circumstances, which when known,

1922.

RAMDHURI CHOWDHURI v. DEONANDAN PRASAD SINGH.

DAWSON MILLER, C. J.

would show that the service was regular and that the respondent, although the notice was not delivered into his hand by the peon, had received it or had refused to accept it or could not be found. To justify us in declaring a sale made by the Court, in execution of its decree, to be null and void, I think we should require more cogent proof than anything which appears in the circumstances of the present case. The respondent did not put the appellant to proof of the validity of the service of notice which is now impugned, and no evidence upon the question was gone into as the appellant had no case to meet in this respect. How then can we hold that the sale was a nullity merely because a document on the record, but not used at the trial or in any way questioned, fails to establish conclusively that the service was regular. In my opinion it would be improper to do so.

The learned counsel for the respondent further argued that upon the facts found, the learned Subordinate Judge ought to have come to a conclusion that there was fraud in publishing and proclaiming the sale, and that once fraud is proved which kept the sale from the knowledge of the person entitled to question it, the onus lies upon the person committing the fraud to show that the person injured thereby and suing to recover the property had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him to bring the suit, as laid down by Lord Hobhouse in delivering the judgment of the Judicial Committee in *Rahimbhoy Habibhoy* v. *Turner* (1). Before, however, any question of onus of proof arises it must be established that a fraud was committed. The first appellate Court, which is the ultimate judge of fact in the present case, has come to the conclusion that the evidence of that which was done by the appellant does not amount to fraud. It is contended, however, that the value of the property mentioned in the proclamation was so much below its real value that fraud must necessarily be

(1) (1893) I. L. R. 7 Bom. 341.

imputed. I entirely agree that a wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud. I further agree that where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether, as a matter of law, such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact, refuses to draw an inference of fraud upon the facts found by it, that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud. The mis-statement of value in the sale proclamation is not, in my opinion, necessarily a fraudulent act, nor do the other irregularities complained of at the hearing of themselves necessarily constitute fraud. Whether, upon the whole of the circumstances disclosed, it could be inferred that fraud had or had not been committed was, in my opinion, entirely a question for the Subordinate Judge to determine and even if, upon a consideration of all the circumstances, we might have drawn a different inference and come to a different conclusion, unless that inference necessarily followed from the facts proved, we should not be entitled to disturb the findings of the first appellate Court. In the present case, I think, we are bound by those findings and as there is no finding which will bring into operation the provisions of section 18, the application is, in my opinion, governed by Article 166 of the Limitation Act and was time barred at the time when it was presented.

Whether the respondent is still in a position to treat the sale as a nullity or whether he still has any remedy open to him whereby he may obtain a declaration in favour of his title and possession on the ground that the sale was void are matters which I expressly leave open, but so far as the present application is concerned, in my opinion, it must be dismissed and the appeal allowed with costs here and before Ross, J.

1922.

RAMDHURI CHOWDHURI v. DEONANDAN PRASAD SINGH.

The judgment and decree appealed from will be set aside and the order of the learned Subordinate Judge restored.

MULLICK, J.—I agree.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Coutts and Das, J.J.

LACHMI SINGH

v.

KING-EMPEROR.*

1922.

July, 12.

Police Diaries—Investigating officer asked for certain date and names from the diary—whether accused entitled to inspect the whole diary.

Where the investigating officer was asked in the witness-box about a certain date and the names of certain persons and the court directed him to give the date and names from the diary, *held*, that the defence was entitled to inspect the entry of the date and names but was not entitled to an inspection of the whole diary.

The facts of the case material to this report are stated in the judgment of Coutts, J.

Gour Chandra Pal and *H. P. Sinha*, for the applicants.

Sultan Ahmed, Government Advocate, for the Crown.

COUTTS, J.—The ground on which this application for revision was admitted was an allegation that the investigating Police Officer read over the whole of the police diaries for the purpose of refreshing his memory and that when an application for inspection of the diary was made it was refused.

*Criminal Revision No. 376 of 1922, against an order passed by C. H. Reid, Esq., Sessions Judge of Bhagalpur, dated the 18th April, 1922, modifying an order of Babu Atulya Dhan Banarji, Subdivisional Magistrate of Madhipura, dated the 15th February, 1922.