

under section 5 of the Limitation Act. But the learned District Judge has not dealt with the matter on that footing. As it appears the railway company was much to blame in the matter. We are informed that the judgment of the court of first instance had to go from office to office until it was finally decided that an appeal should be presented to the court of the District Judge of Arrah. Under these circumstances there was very little time available to the pleader to prepare the grounds of appeal. In my opinion no ground has been shown for extension of time under section 5 of the Limitation Act

I would accordingly allow these appeals, set aside the judgment and the decree passed by the court below and restore the judgment and the decree passed by the court of first instance. The appellants are entitled to their costs throughout.

ADAMI, J.—I agree.

Appeals allowed.

LETTERS PATENT.

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

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v.

MAHABIR PRASAD.*

Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908), section 231—Rent decree—execution sale—suit to avoid sale on the ground of fraud—Limitation Act, 1908 (Act IX of 1908), Schedule I, Articles 12 and 95.

Under section 231 of the Chota Nagpur Tenancy Act, 1908, "all suits.....instituted.....under this Act for which no period of limitation.....is provided elsewhere in this Act shall be commenced.....within one year from the date of the occurring of the cause of action".

*Letters Patent Appeal no. 69 of 1925, from a decision of Kulwant Sahay, J., dated the 29th April, 1925, affirming a decision of Rai Bahadur Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 12th April, 1922, reversing a decision of Maulavi Shaikh Ali Karim, Munsif of Hazaribagh, dated the 31st January, 1921.

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Held, that a suit for declaration that a sale held in execution of a rent decree has been fraudulently confirmed, and for recovery of possession, is not a suit governed by the Chota Nagpur Tenancy Act, and, therefore, that section 231 does not apply to it.

Held, further that such a suit is governed by Article 95 of the Limitation Act, 1908, which provides a period of three years for a suit "to set aside a decree obtained by fraud or other relief on the ground of fraud," and not by Article 12 which provides a period of one year for a suit to set aside, *inter alia*, "a sale in execution of a decree of a civil court or a sale in pursuance of a decree or order of a Collector or other revenue officer".

Appeal by the defendant.

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

B. C. De, for the appellant.

S. N. Roy and *S. Sahai*, for the respondents.

DAWSON MILLER, C. J.—In this case the plaintiffs were the kashtkars of a holding in mauza Manjura consisting of 8.43 acres. They were in default in the payment of their rent, a rent suit was brought against them and a decree was passed in favour of the present defendant. The decretal amount was in round figures Rs. 52. Before the sale, which took place under the provisions of the Chota Nagpur Tenancy Act, the plaintiffs appear to have paid into court, at different times, certain sums on account of the decretal amount, and at the date of the sale of the property in execution of the decree, which was on the 3rd December, 1917, there was still a balance of Rs. 11-5-0 due. On the 29th December, 1917, that is within a month of the date of the sale, the plaintiffs sent this sum to the defendant's mukhtar as payment of the balance due under the decree. Under the provisions of section 212 of the Chota Nagpur Tenancy Act the judgment-debtor in such cases, or any one who claims under a title acquired before the sale, may, within a period of 30 days from the date of the sale, apply to have it set aside on depositing in court 5 per cent. of the purchase

price together with the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may from the date of the proclamation have been received by the decree-holder. The plaintiffs did not comply strictly with the provisions of that section because they did not deposit the money in court. They did however pay the money to the decree-holder who was himself the purchaser of the property at the auction sale. Therefore the defendant was the only person interested in the sale apart from the plaintiffs themselves at that time. The plaintiffs in such circumstances might reasonably expect that they would get back their property, for they had paid the small balance that was due within a month of the date of the sale. So far however from getting their property back the defendant, who was their landlord and decree-holder in the rent suit, actually applied for confirmation of the sale and the sale was accordingly confirmed. Whether the defendant remained in possession of the holding, or for how long, if at all, he remained in possession, is not very clear from the facts disclosed in the case; but we are told that the landlord has since that date, and sometime apparently before the suit was brought, settled the land with other tenants, but whether those other tenants have actually got possession, or whether the plaintiffs are still in possession, again we do not know. The plaintiffs prayed in the present suit that it may be held that the defendant got the sale fraudulently confirmed and that the order confirming the sale should be set aside, and they further asked that if in the opinion of the court the plaintiffs are considered out of the possession of the disputed land, then khas possession may be awarded to them.

Two points arose for consideration in the trial court, first, whether the circumstances which I have detailed amounted to a fraud on the part of the landlord against his tenants and, if so, whether the sale should be set aside, that is to say whether the title to

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the land should be restored to the plaintiffs, and, secondly, whether even if the plaintiffs were in law or equity entitled to get back possession of the land, they were not barred by limitation having brought their action more than one year after the date of the sale.

The learned Munsif before whom the case came for trial arrived at the conclusion that there was undoubtedly fraud on the part of the defendant and he considered that the defendant was wrong and fraudulent in getting the sale confirmed in spite of the fact that full payment of the sums due to him had been made within one month of the sale. He considered, however, that the suit was barred by limitation although he does not specify under which article of the Limitation Act, or whether under any provision of the Chota Nagpur Tenancy Act the suit was barred.

The matter went on appeal to the Subordinate Judge, the plaintiffs contending in that appeal that the suit was not barred by limitation. The finding of fact that the defendant had got the sale fraudulently confirmed was not disputed, that finding being apparently accepted by the defendant on appeal. In the result the learned Subordinate Judge came to the conclusion that neither section 231 of the Chota Nagpur Tenancy Act nor Article 12 of the Limitation Act applied to the case but that Article 95 of the Limitation Act was the Article applicable. That Article provides for a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, the period of limitation being three years from the date when the fraud becomes known to the party wronged.

From that decision there was a second appeal to this court which came for hearing before Kulwant Sahay, J. He agreed with the finding of the lower appellate court that the case was governed by Article 95 of the Indian Limitation Act and not by Article 12 or by section 231 of the Chota Nagpur Tenancy Act. A further point was urged before him, namely, that under the Chota Nagpur Tenancy Act no provision is

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actually made for having a sale confirmed and therefore the sale was complete on the 3rd December and required no confirmation, and that any fraud which may have been perpetrated by the defendant was not a fraud bringing about the sale and that the sale as such was free from fraud, the fraud alleged having occurred subsequently. This point, if it could be established, and if the defendant could satisfy the court that the fraud perpetrated by him was something altogether apart from the sale, was a point which he could have taken in first appeal when the plaintiffs appealed from the decision of the Munsif on the ground of limitation, for it is obvious that although he might not have been able to support the Munsif's decision on the ground of limitation, still he could have supported it upon this ground of fraud by urging before the Subordinate Judge that, although the Munsif may have been wrong in the view he took, still his decision was right because there was in fact no fraud connected with the sale. The point, however, was not taken and it appears quite clearly from the decision of the Subordinate Judge that the findings of fact in the court below were not challenged by the defendant, and the only question debated in the appeal was whether the suit as held by the trial court was barred by limitation. Mr. Justice Kulwant Sahay accordingly refused to entertain the point in second appeal and, in my opinion, he was perfectly justified in doing so. The point is not one entirely in bar of the suit. It is undoubtedly a point of law but it is a point that depends to some extent upon questions of fact and it is certainly a point which was open to the defendant in the first appellate court. If he did not choose to raise such a point when he might have, I do not think it can be said that he is of right entitled to raise such a point in second appeal. Moreover, looked at from an equitable point of view it seems to me quite clear in this case that the defendant having accepted the balance of the decretal amount due to him impliedly undertook to retransfer the

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property to the plaintiffs, or at all events not to go on with the sale and have it confirmed as in fact he did. That he practised a fraud I do not think can be disputed, and therefore I am certainly not prepared to interfere with the decision come by the learned Judge of this court.

With regard to the second point here again I think that the decision of Kulwant Sahay, J., should be affirmed. Section 231 of the Chota Nagpur Tenancy Act places a limitation period of one year upon all suits and applications instituted or made under this Act for which no period of limitation is provided elsewhere in the Act. It is, to my mind, quite clear that a suit of the present nature is not a suit under the Chota Nagpur Tenancy Act. The right to sue for the possession of land and the right to ask for a declaration that a sale has been fraudulently confirmed are not rights arising under the Chota Nagpur Tenancy Act. It is true that the Act in some cases takes away the right to sue for setting aside a sale but it nowhere grants that right although to some extent it limits it. Then with regard to the Limitation Act, Article 12 under which one year's limitation is prescribed is with regard to cases of a sale in execution of a decree of the Civil Court, and if the matter stood there, there is no doubt that it might apply to the present case; but Article 95 seems to be a more specific article in so far as sales are concerned. That article applies to suits to set aside a decree obtained by fraud or for other relief on the ground of fraud. If the sale therefore which it is sought to have set aside is obtained on the ground of fraud then I think that the more specific Article 95 ought to be applied and that the more general article must be governed by that which is more specific. It is upon this ground that Kulwant Sahay, J., dismissed that part of the appeal and, in my opinion, he was quite right.

This appeal will be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.