

1885.

NARAYAN
VENKU
KALGUTKAR
v.
SAKHARAM
NAGU KORE-
GAUMKAR.

farmer may apply to the Collector to recover such amount on his behalf; and the Collector may, in his discretion, "recover such amount as if it were an arrear of land revenue." Such a provision would be superfluous, and would not, probably, have found a place in the A'bkari Act if the toddy drawn from toddy-producing trees had been held by the Legislature to be "land" within the meaning of any existing enactment. And although the farmer has the right of applying to the Collector, the section expressly recognizes his right also to recover the amount due to him "by suit in the Civil Court or otherwise." It was not, apparently, the intention of the Act to affect, except as provided by section 67, any right to seek a remedy by civil suit which might belong either to the farmer or to the person to whom any duty was payable.

The costs of this reference should be dealt with by the Subordinate Judge when disposing of the case.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Sir W. Wedderburn, Bart., Justice.

1885.

April 29.

SAKHA'RAM GOVIND KA'LE, APPLICANT, v. DA'MODAR AKHA'RAM GUJAR AND KESO GOVIND NANDGIRI, OPPONENTS.*

Decree—Execution—Sale in execution, the judgment-debtor being ignorant of the execution proceedings through the fraud of the decree-holder—Setting aside proceedings in execution—Civil Procedure Code (XIV of 1882), Secs. 244, 294, 311—Separate Suit—Limitation Act XV of 1877, Sch. II, Art. 166.

In 1879, D. obtained a decree against S. S. gave security for the satisfaction of the decree, whereupon D. agreed not to take proceedings in execution. In breach of this agreement, D. in the same year applied for execution, and sold certain immoveable property belonging to S., of which K. became the purchaser. K. did not apply for possession until 1883, in which year he applied for and obtained possession of the property. S. alleged that he then for the first time became aware of the sale, and that by the fraud of D. and K. he had been kept in ignorance of the execution proceedings taken by D. in breach of the above-mentioned agreement, and within thirty days after K. obtained possession, he (S.) applied for a reversal of the orders which had been passed in the aforesaid fraudulent proceedings. The Subordinate Judge held that the application was barred by article 166 of Schedule II of the Limitation Act XV of 1877, and referred the applicant to a separate suit to set aside the sale. On application to the High Court,

* Extraordinary Application, No. 93 of 1884.

Held, on the authority of *Pávanjpe v. Kánade* (1) that a separate suit would not lie, and that the relief sought by S. could only be obtained, at all events as against D., by an application under section 244 of the Civil Procedure Code (XIV of 1882).

Held, also, that article 166 of Schedule II of the Limitation Act XV of 1877 did not apply. That article as amended by section 108 of Act XII of 1879 only applies to applications made under section 311 or section 294 of the Civil Procedure Code seeking to set aside a sale on the ground of a material irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court.

THIS was an application for the exercise of the Court's extraordinary jurisdiction.

Dámodar Akhárám Gujar obtained a money decree for Rs. 130, and costs, against the applicant Sakhárám Govind Kále on the 19th of December, 1877; and on the 23rd of February, 1878, applied for execution of the decree by the sale of the applicant's lands. That application, however, was struck off the file on the 14th of August, 1879; and the judgment-debtor having furnished security for the satisfaction of the decree, the judgment-creditor undertook not to further execute the decree. In breach of this agreement, he made a fresh application for execution (No. 1385 of 1879), and caused certain lands, houses and trees, belonging to the judgment-debtor, to be sold to Keso Govind Nandgiri. The applicant alleged in his application to the Subordinate Judge, that the judgment-creditor and the purchaser had conspired to defraud him. In 1883 the purchaser applied for, and obtained possession of, the property sold, when the applicant alleged he became aware for the first time of the fraud. Within thirty days after possession of the property had been delivered to the purchaser, the applicant made the application to the Subordinate Judge, praying for the reversal of the orders which had been passed in the proceedings fraudulently taken by Dámodar and Keso. He further alleged that he was an agriculturist, and that on that ground the decree passed against him was liable to be reversed.

The Subordinate Judge of Sátára, Ráv Bahádúr Ganpatráy Amrit Mánkar, treated this as an application to set aside an auction

1885.

SAKHÁRÁM
GOVIND
KÁLEv.
DÁMODAR
AKHÁRÁM
GUJAR AND
KESO GOVIND
NANDGIRI.

(1) I. L. R., 6 Bom. 148.

1885.

SAKHARÁM
GOVIND
KÁLE

v.

DÁMODAR
AKHARÁM
GUJAR AND
KESO GOVIND
NANDGIRI.

sale; and, as it had not been presented within thirty days of the date of the sale, he rejected it as barred by article 166, Schedule II of the Limitation Act XV of 1877. The Subordinate Judge was of opinion that, if the applicant had not got information regarding the auction sale owing to the opponent's fraud, he should have brought a separate suit for the purpose of setting aside the auction sale.

The High Court granted a rule *nisi*, calling on both the judgment-creditor and the purchaser to show cause why the order of the Subordinate Judge should not be reversed, and a direction given to him to proceed with the application, and dispose of it according to law.

Ganesh Rámchandra Kirloskar for the applicant.—The circumstances of this case are similar to those in *Paranjpe v. Kánade*⁽¹⁾, and the Subordinate Judge was in error in holding this application barred—*Virarághava Ayyangár v. Venkatácháryar*⁽²⁾; *Nojabut Ali Chowdhry v. Sheikh Moha Busseeroollah Chowdhry*⁽³⁾. The case of *Mahomed Hossein v. Kokil Singh*⁽⁴⁾ does not apply, for the purchaser remained in possession in that case, and the judgment-debtor had knowledge of the sale, which he took no steps to set aside. Section 18 of Act XV of 1877 as to the effect of fraud applies to the present case, for the sale was not attempted to be enforced for three years.

Ghanashám Nilkanth Nádkarni for the purchaser.—This is not a case for the exercise of extraordinary jurisdiction. The purchaser was no party to the fraud, which consisted, as alleged by the applicant, in executing the decree after acceptance of the sureties given by the judgment-debtor, in breach of the agreement by the judgment-creditor, not to proceed with the execution. The Subordinate Judge was right in referring the applicant to a separate suit—*Ganga Pershad Sahu v. Gopál Singh*⁽⁵⁾; *Sukhai v. Daryai*⁽⁶⁾; *Diwan Singh v. Bharat Singh*⁽⁷⁾; *Azim-ud-Din v.*

(1) I. L. R., 6 Bom., 148.

(2) I. L. R., 5 Mad., 217.

(3) 11 Beng. L. R., 42.

(4) I. L. R., 7 Calc., 91.

(5) I. L. R., 11 Calc., 136.

(6) I. L. R., 1 All., 374.

(7) I. L. R., 3 All., 206.

Baldeo⁽¹⁾; *Umbika Churn Chuckerbutty v. Dwárkanúth Ghose*⁽²⁾; and *Ramessuri Dasse v. Doorgadáss Chatterjee*⁽³⁾.

1885.

SAKHÁRÁM
GOVIND
KÁLE

o.
DÁMODAR
AKHÁRÁM
GUJAR AND
KESO GOVIND
NANDGIRI.

Máhádev Bháskár Chaubal for the judgment-creditor.—If a suit be allowed against the purchaser, the Court ought not to interfere in the exercise of its extraordinary jurisdiction. The judgment-creditor and the purchaser cannot be separated. Both are charged by the applicant with fraud.

BIRDWOOD, J.—The Subordinate Judge wrongly applied article 166 of Schedule II of Act XV of 1877 to the application made to him by the judgment-debtor Sakhárám Govind, as that application was not one seeking to set aside, under section 311 or section 294 of the Code of Civil Procedure, the sale of the judgment-debtor's immoveable property on the ground of a material irregularity in publishing or conducting the sale, or on the ground that the decree-holder had purchased without the permission of the Court. Moreover, the sale had already been confirmed before the application was made, whereas the application contemplated in section 311 is evidently one that can be made only before a sale is confirmed. (See section 312 and clause (16) of section 588.) Section 294 was clearly not relied on by the judgment-debtor; and it is only to cases falling under section 311 or section 294 that article 166 of Schedule II of Act XV of 1877, as amended by Act XII of 1879, applies.

The Subordinate Judge was also wrong in referring the judgment-debtor to a suit, inasmuch as the relief sought by him, at all events as against the judgment-creditor, could only be obtained on an application of the kind contemplated in section 244 (c) of the Code of Civil Procedure. The judgment-debtor sought to set aside the proceedings in execution, which had terminated in the sale of his property, on the ground that he had been kept in ignorance of those proceedings by the fraud of the judgment-creditor and others,—the judgment-creditor having (as alleged by the judgment-debtor) agreed, when the first application for execution made by him was disposed of, not to present a fresh application, as the judgment-debtor had furnished security for the

(1) J. L. R., 3 All., 554.

(2) 8 Calc. W. R., 506.

(3) I. L. R., 6 Calc., 108.

1885.

SAKHARAM
GOVIND
KALE
v.
DAMODAR
AKHARAM
GUJAR AND
KESO GOVIND
NANDGIRI.

satisfaction of the decree. The ruling in *Paranjpe v. Kanade*⁽¹⁾ applies to the present case.

We must, therefore, reverse the Subordinate Judge's order, and direct him to deal with the application afresh. Whether it will be necessary or proper for him to make any other person than the judgment-creditor a party to the proceedings for the purpose of the application, we do not now decide. The costs of this application to be costs in the application before the Subordinate Judge, and to be dealt with by him.

Order reversed.

(1) I. L. R., 6 Bom., 148.

APPELLATE CIVIL.

Before Mr. Justice Nanabhái Haridas and Sir W. Wedderburn, Bart., Justice.

LAKSHMAN, APPLICANT.*

Practice—Unregistered certificate of sale—Fresh certificate of sale granted.

On 10th July, 1883, the applicant bought at a Court sale a portion of a house for Rs. 385, and on confirmation of the sale on the 10th October, 1883, obtained the sale certificate, which, however, he did not register. On attempting to obtain possession, the applicant was obstructed. He applied for removal of the obstruction to the Subordinate Judge, and submitted with his application the unregistered certificate. The Subordinate Judge rejected the application, on the ground that the certificate was not registered. The applicant then applied for a fresh certificate, which was refused. On application to the High Court,

Held, that a fresh certificate, dated the day on which it might be granted, reciting the fact of the sale and the date thereof, should be given to the applicant, the original certificate being returned.

This was an application, under the extraordinary jurisdiction of the High Court, against the order of M. H. Scott, District Judge of Ahmednagar.

At a Court sale held on the 10th July, 1883, the applicant purchased, for Rs. 385, one-half of a certain house, and on the 10th October, 1884, after confirmation of the sale he obtained the sale certificate. He subsequently obtained an order for possession. On attempting to take possession of the premises,

*Extraordinary Civil Application, No. 48 of 1885.