

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885.
April 15.

MAHOMED SAYAD PHAKI, (ORIGINAL PLAINTIFF), APPELLANT, v. NAV-ROJI BA'LA'BHA'I AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.

Limitation—Limitation Act XV of 1877, Sch. II, Art. 12, Cl. (a), and Art. 36—Decree—Sale in execution—Land described by boundaries in proclamation of sale—Land so described really comprising two separate lots—Suit by purchaser of one lot to set aside sale or for compensation—“Falsa demonstratio.”

On the 17th November, 1877, a certain piece of land described in the proclamation of sale as “Survey No. 294, Pot No. 3, measuring 24½ *gunthás*,” the boundaries of which were also set forth, was sold by auction in execution of a decree obtained by the first defendant against defendants Nos. 2, 3 and 4, and purchased by the plaintiff. The boundaries, as stated, really included another piece of land, Survey No. 294, Pot No. 4, which comprised 3 acres 2½ *gunthás*. This latter piece of land was put up for sale on the following day, and was purchased by defendant No. 5. On 28th November, 1877, the plaintiff applied to the Court to have the sale set aside and his money returned, unless he was put in possession of all the land included in the boundaries mentioned in the proclamation; but his application was refused, and the sale was confirmed on 20th July, 1878. The plaintiff on the 3rd July, 1881, brought the present suit, praying that he might be put into possession of the land as described in the certificate of sale, which was identical with the proclamations, and included Pot No. 4, or that the first defendant might be ordered to pay him the amount of his purchase-money, with interest. Both the lower Courts rejected the plaintiff's claim. On appeal to the High Court,

Held, confirming the decree of the Court below, that the suit, regarded as one to set aside the sale, was barred by Act XV of 1877, Sch. II, art. 12, cl. (a).

It was contended in the Courts below and on second appeal that the plaintiff was, at any rate, entitled to damages or compensation because of the land as defined by the survey number proving to be of less acreage than that included in the boundaries, and the lower Court had held such a claim as barred also under article 36, Sch. II of the Limitation Act XV of 1877.

Held, that the suit, regarded as one for compensation, was not barred, as three years had not elapsed since the confirmation of the sale when the suit was brought—article 36 applying only to suits for compensation for tortious acts independent of contract. But the claim for compensation was not maintainable, as the property offered for sale was sufficiently identified by the description as “Survey No. 294, Pot No. 3, containing 24½ *gunthás*,” and the statement of boundaries, so far as it was inaccurate, might be properly regarded as “*falsa demonstratio*.”

THIS was a second appeal against the decision of W. H. Crowe, Acting District Judge of Thána.

At an auction sale held on 17th November, 1877, in execution of a decree obtained by the first defendant against defendants Nos. 2, 3 and 4, the plaintiff purchased a piece of land described in the *yádi* accompanying the first defendant's application for execution and also in the proclamation of sale, as "Survey No. 294, Pot No. 3, containing $24\frac{3}{4}$ *gunthas*." On the next day survey No. 294, Pot No. 4, which had almost the same description of boundaries as that of Survey No. 294, Pot No. 3, was sold and purchased by defendant No. 5. On the 28th November, 1877, the plaintiff applied to the Subordinate Judge at Násik to have the sale to him set aside and the purchase-money refunded to him, unless he was put into possessions of Pot No. 4, which was included in the boundaries mentioned in the proclamation of sale. This application was rejected, and the sale was confirmed on 20th July, 1878. The plaintiff made another unsuccessful application on the 29th August, 1878.

The plaintiff now brought the present suit in 1881 against the defendants, praying that he might be put into possession of the land as described in his certificate of sale, or, in the alternative, that the first defendant might be ordered to pay him Rs. 1,816, the amount of the purchase-money, with interest.

The Subordinate Judge at Kalyán, in the Thána District, disallowed the plaintiff's claim. The plaintiff appealed, but the lower Appellate Court confirmed the decree of the Court of first instance, with the following remarks:—"It is not alleged that there was any express assertion that the property sold was the property of the execution-debtors, nor is there any contention that the property was not that of the execution-debtors. If the plaintiff could have shown that the execution-debtors had no interest in the property sold, he would have been entitled to set aside the sale summarily under section 313 of the Civil Procedure Code (XIV of 1882) * * * *. Here there was no fraud or misrepresentation on the part of the decree-holder. The land was correctly described as Survey No. 294, Pot No. 3, and its area and approximate value stated* * * *. He did not sue to set aside the sale within the period fixed by the Limitation Law (Act XV of 1877), Sch. II, art. 12, cl. (a), viz.,

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one year from the date of confirmation of the sale. The sale was confirmed on the 20th July, 1878, and this suit was filed on 3rd July, 1881, and does not contain a prayer to set aside the sale. So, also, if it be deemed a suit for damages, it is clearly barred under article 36 of the same Act * * * * *. The case is clearly one to which, in my opinion, the maxim 'caveat emptor' must be held to apply. The plaintiff is not entitled to any relief in the present suit. I affirm the decree of the lower Court, and reject this appeal, with all costs."

Against this decision the plaintiff preferred a second appeal to the High Court.

Branson, (*Pándurang Balibhadra* with him), for the appellant:— This is a suit for breach of contract and for recovery of compensation. The property set up for sale was misrepresented by the judgment-creditor to the prejudice of the appellant, and, therefore, the judgment-creditor is liable to make compensation to the purchaser—see *Fránji Besanji Dustur v. Hormasji Pestanji Fránji* ⁽¹⁾—for the assertion on his part amounted to a warranty of title in the judgment-debtor; see also *Whittemore v. Whittemore* ⁽²⁾; *In re Turner and Shelton* ⁽³⁾. The principle of these English cases has been followed in *Suleman Vadu v. Trikamji Velji* ⁽⁴⁾. The plea of limitation cannot be raised here, as the suit, having been brought within three years from the date of the confirmation of the sale, viz., 28th July, 1878, is within time.

Mánekshá Jehángirshá for respondents.—This was not a case for breach of contract or warranty, and no compensation can be recovered. The appellant bought the property with full knowledge of its extent and worth. The suit was a suit to set aside the sale, and, not having been brought within one year from the confirmation of the sale, was barred. Under the former Civil Procedure Code the judgment-creditor was not held responsible if the debtor was found to have no title to the property sold. To render a vendor liable to a purchaser there must be an express covenant on the part of a vendor—*Sugden's Vendors and Purchasers*, p. 610 (ed. 14). The present Code of Civil Procedure

(1) I. L. R., 2 Bom., 258.

(2) L. R., 13 Ch., Div., 130.

(3) L. R., 8 Eq., 608.

(4) 12 Bom. H. C. Rep., 10, A. C. J.

entitles a purchaser to the refund of his money when no title at all is found out in the judgment-debtor, but such is not the case here.

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SARGENT, C.J.—The plaintiff in this suit was the purchaser at auction sale on 17th November, 1877, in execution of a decree passed in favour of the first defendant against defendants Nos. 2 to 4, of a piece of land described in the *yádi* accompanying the first defendant's *darbhást*, also in the proclamation of sale, as Survey No. 294, Pot No. 3, containing 24¼ *gunthás*, and to be worth Rs. 75, and also described by boundaries, which, as a fact, included also Survey No. 294, Pot No. 4, which comprises 3 acres 2¼ *gunthás*. On 28th November, 1877, plaintiff applied to the Subordinate Judge at Násik to have the sale set aside and his money returned, unless he was put in possession of the land included in the boundaries mentioned in the proclamation. This application was refused, and the sale was confirmed on 20th July, 1878.

The plaintiff filed the present suit on 3rd July, 1881, praying that he might be put into possession of the land as described in the certificate of sale, which was identical, in terms, with the proclamation, or that the execution-creditor, the first defendant, might be ordered to pay him Rs. 1,816, the amount of purchase-money, with interest. Both the Courts below rejected this claim. Although the plaint does not ask in express terms to have the sale set aside, it impliedly does so—in the event of plaintiff's not being put into possession of the lands described in his certificate of sale—by praying that the purchase-money may, in that case, be restored to him. However, regarding the suit as one to set aside the auction sale, it was properly held by the District Judge to be barred by Act XV of 1877, Sch. II, art. 12, cl. (a).

It was contended, however, both in the Courts below and on second appeal, that the plaintiff was entitled, at any rate, to recover damages from the first defendant, or, as it has been termed on second appeal, compensation by reason of the land as defined by the survey number proving to be of less acreage than that included in the boundaries. The District Judge held that the suit, regarded as one for damages, was barred by article 36 of Schedule II

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of the Limitation Act XV of 1877. That article, however, applies only to compensation for tortious acts independent of contract. Whereas here, if the first defendant is to be made liable to make compensation, it must be on the ground that, under the circumstances, he is bound by the contract of sale, as was the case in *Frámji Besanji Dustur v. Hormasji Pestonji Frámji*⁽¹⁾, where the judgment-creditor was held responsible to the purchaser for the description in the proclamation. As three years had not elapsed since the confirmation of the sale when the present suit was brought, it was not, viewed as one for compensation, barred; but the claim for compensation cannot, we think, be sustained. The property offered for sale was, we think, sufficiently identified by the description as "Survey No. 294, Pot No. 3, containing 24½ *gunthás*," and the boundaries, so far as they were inaccurate on the north and west, may be properly regarded as "*falsa demonstratio*." Moreover, it is impossible to suppose that the plaintiff, who lived close by the lots in question and actually purchased the lot, Survey No. 294, Pot No. 4, described in the proclamation by the same boundaries as Pot No. 3 in another name on the following day, was not aware that the boundaries included the two lots when he purchased on 17th November, 1877. We must, therefore, confirm the decree, with costs.

Decree confirmed.

(1) I. L. R., 2 Bom., 258.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KISANDAS BUDHMAL, PLAINTIFF, v. P. HALPIN, DEFENDANT.*

1885.
July 9.

Jurisdiction—Suit against a soldier—Army Act (Stat. 44 and 45 Vic., cap. 58) of 1881, Sec. 144, Proviso—Execution.

A suit for recovery of a debt will lie in a Civil Court against a soldier in Her Majesty's service up to judgment, under proviso to section 144 of the Army Act (Stat. 44 and 45 Vic., cap. 58), however small may be the amount of the debt. The question, whether the defendant is a soldier or not, arises only when the plaintiff seeks to execute his decree.

* Civil Reference. No. 15 of 1885.