

APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice
Chandavarkar.*

1901.
July 17.

DAMODAR BHAUSHET SONAR (ORIGINAL PLAINTIFF), APPELLANT, v.
VINAYAK TRIMBAK (ORIGINAL DEFENDANT NO. 3), RESPONDENT.*

*Civil Procedure Code (Act XIV of 1882), sections 310A, 311, and 312—
Execution sale—Application to set aside sale—Application rejected—
Confirmation of sale—Suit to set aside sale.*

A judgment-debtor having applied under section 310A of the Civil Procedure Code (Act XIV of 1882) to set aside an execution sale, the application was rejected and the sale was confirmed under section 312. Subsequently the judgment-debtor brought the present suit against the auction-purchaser, the judgment-creditor, and the assignee of the auction-purchaser, to set aside the sale.

Held, that where an order is passed under section 312 confirming the sale, it is an order passed against the judgment-debtor though no application under section 311 has been made. Therefore, under the last paragraph of section 312, no suit will lie to set aside the sale on the ground of irregularity.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri, reversing the decree of M. H. Krishnarao, Subordinate Judge of Chiplún.

Suit to set aside a sale held in execution of a Small Cause Court decree.

The decree in question had been obtained by Trimbak Krishnaji (defendant No. 2) against the plaintiff. In execution Trimbak had caused to be sold for Re. 1 a one-third share in certain mortgaged land belonging to the plaintiff. The execution-sale took place on the 6th December, 1897.

On the 6th January, 1898, the plaintiff brought the amount of the decree into Court and applied to have the sale set aside under section 310A of the Civil Procedure Code (XIV of 1882). The Court, however, on the 4th August, 1898, after inquiry, refused the application as being beyond the prescribed period by one day, and it confirmed the sale.

On the 8th December, 1898, the plaintiff brought this suit to set aside the said sale, alleging that there had been material

* Second Appeal No. 679 of 1900.

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irregularity in the conduct of the sale and that Triambak (defendant No. 2) had fraudulently caused the said property to be sold in one lot, and that defendant No. 1 had purchased it for Re. 1, while it was really worth Rs. 1,500. He further stated that he had been unable to apply for the postponement of the sale, as at the date of the sale the Subordinate Judge was on leave.

The first defendant pleaded that he had purchased the property at the execution-sale which was duly held, and that on the 5th January, 1899, he sold it to one Vinayak Triambak (defendant No. 3).

Defendants Nos. 2 and 3 pleaded that the sale having been confirmed, this suit was barred by section 312 of the Civil Procedure Code. They denied that there had been any irregularity or fraud in conducting the sale, and stated that the land being subject to a mortgage of Rs. 600, the equity of redemption was not worth more than Re. 1, and that the plaintiff had therefore sustained no loss by the sale.

The Subordinate Judge set aside the sale and decided that the plaintiff should recover possession of the one-third share of the land from the defendants.

On appeal by defendant No. 3, the Judge reversed the decree and dismissed the suit, holding that, although there was material irregularity in the conduct of the sale and that substantial loss had been thereby caused to the plaintiff, the suit was barred by the positive rule contained in the last paragraph of section 312 of the Civil Procedure Code (XIV of 1882).

The plaintiff preferred a second appeal.

Scott (Acting Advocate-General, with *M. V. Bhat*) for the appellant (plaintiff):—Our application under section 310A to set aside the sale was rejected as time-barred, and the sale having been confirmed under section 312, no application under section 311 could be made. There was simply an *ex parte* order confirming the sale. The Judge has taken a wrong view of section 312. That section precludes a party against whom an order is passed from bringing a suit. But no order was ever passed against us under that section. Both the lower Courts have clearly found

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that there was material irregularity in the conduct of the sale, and we had thereby suffered substantial loss. The present suit is therefore maintainable.

Narayan F. Gokhale for the respondent (defendant No. 3) was not called upon.

JENKINS, C.J. :—Where an order is passed under section 312 confirming a sale, it is an order against the judgment-debtor, though no application under section 311 had been made. Therefore under the last paragraph of section 312, no suit will lie of the kind there described. This appeal must accordingly be dismissed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Cundy and Mr. Justice Fulton.

DALSUKHRAM NAGINDAS AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. KALIDAS SANKHALCHAND AND ANOTHER
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Partnership—Dissolution of partnership—Notice—Acknowledgment of debt by one partner—Indian Contract Act (IX of 1872), sections 251 and 264—Limitation Act (XV of 1877), section 21.

The two defendants carried on business under the firm of Kalidas Sankhalchand. They owned two printing presses, one at Ahmedabad and one at Bombay. They had had dealings with the plaintiffs since 1878, and the accounts between them had been adjusted from time to time and signed by one or other of the defendants on behalf of their firm acknowledging the amount due to the plaintiffs. The last adjustment was signed in December, 1894, and this suit was filed in 1897 for Rs. 1,023 then admitted to be due. The first defendant admitted the claim. It appeared that in 1892 the defendants had quarrelled, and by arbitration the presses were divided, the Ahmedabad press being given to the first defendant and the Bombay press to the second defendant. At the time of this suit the books and outstanding still remained to be divided. The second defendant now alleged that the partnership had been dissolved in 1892 to the plaintiff's knowledge, and contended that he was not bound by the acknowledgment signed in 1894 by the

* Second Appeal No. 58 of 1901.