

decision in *Bái Kesar v. Bái Ganga* fails, and every case of alienation by a natural or *de facto* guardian as distinct from one appointed under the Act is left to be decided by the Court upon the general principles applicable to such cases, as was decided in *Rám Chunder Chuckerbutty v. Brojonáth Mozumdár*⁽¹⁾ followed by this Court in *Manishankar Pránjivan v. Bái Mulí*⁽²⁾.

The only question, therefore, for the Court in dealing with the third issue was whether the sale of the *hundi* to the plaintiff was for the benefit of the infant, and on this the Court has not expressed any distinct opinion. We must, therefore, reverse the decree of the Court below, and send back the case for the Court, to record a finding on the third issue, and to pass a fresh decision. Costs to abide the result.

Decree reversed.

(1) I. L. R., 4 Calc., 929.

(2) L. R., 12 Bom., 686.

APPELLATE CIVIL.

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

LAKSHMAN VINA'YAK KULKARNI, (ORIGINAL PLAINTIFF), APPELLANT,
v. BISANSING VALAD MANIRA'M AND ANOTHER, (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1890.
September 3.

Sale in execution of a decree—Suit to recover possession of property sold in execution—Possession of a person having no title—Limitation (Act XV of 1877), Arts. 136, 137, 138, 144, Sec. 28.

K. obtained a decree against G, and in execution purchased G.'s property on the 9th August, 1872. Plaintiff obtained a decree against K., and in execution purchased the property on the 21st August, 1882. On plaintiff's going to take possession, defendant No. 1 obstructed him, on the ground that he had purchased the property from K. at a private sale, dated the 1st September, 1876. The plaintiff thereupon, on the 6th September, 1886, brought the present suit to recover possession of the property.

Held, that articles 136 and 137 of Schedule II of the Limitation Act (XV of 1877) apply to suits brought by purchasers against third persons in possession of the land in whose favour limitation runs against purchaser, in the same way as it would against the owner with whose rights the purchaser is clothed.

Held, also, that the title of defendant No. 1 to the land in dispute being not proved, article 144 of the Limitation Act (XV of 1877) was applicable to the

* Second Appeal, No. 444 of 1889.

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plaintiff's claim, and that the suit being brought within twelve years from the date of the purchase set up by defendant No. 1, (which was held by the lower Courts not proved), the claim was not barred.

Want of possession for twelve years after the date of purchase would extinguish the purchaser's title.

Rám Prasád v. Lakhi Nárain Pradhán (1) and *Sheo Prasád v. Udai Singh* (2) referred to.

THIS was a second appeal from the decision of Ráo Bahádur A. K. Kotháre, First Class Subordinate Judge with Appellate Powers, of Dhulia, in the Khándesh District.

Suit to recover possession of land. The land in dispute originally belonged to one Gulábsing. On the 9th August, 1872, it was purchased by one Khandu at a sale held in execution of a decree against Gulábsing.

On the 21st August, 1882, the plaintiff, Lakshman, purchased the land at a sale held in execution of a decree against Khandu. He subsequently made various attempts to get possession, but was obstructed by defendant No. 1, Bisansing, who alleged that he had purchased the land from Khandu at a private sale on the 1st September, 1876.

On the 6th September, 1886, the plaintiff filed the present suit against the defendants, Bisansing and Ambidás, to recover possession of the land.

Defendant No. 1, Bisansing, set up his private purchase, dated the 1st September, 1876, and contended that the plaintiff's suit, having been brought after the lapse of twelve years from the date of purchase by Khandu, *viz.*, (9th August, 1872,) was time-barred.

Defendant No. 2, Ambidás, pleaded that he was a purchaser at an auction-sale held against defendant No. 1.

The Subordinate Judge held that as the plaintiff purchased the land in 1882, and brought the present suit in 1886, the claim was not time-barred, and that the purchase set up by defendant No. 1 was not proved. The Subordinate Judge allowed the plaintiff's claim.

(1) I. L. R., 12 Calc., 197.

(2) I. L. R., 2 All., 718.

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The defendants appealed to the District Court, and the Subordinate Judge with appellate powers found that Khandu never got possession of the land under his purchase; that the purchase by defendant No. 1 from Khandu was not proved, and held that as Khandu purchased the land in 1872, and as his claim to recover possession thereof would have been barred in 1886 when the present suit was filed, the claim of the plaintiff, who was the purchaser at a Court-sale of the right, title and interest of Khandu, was also barred. The Subordinate Judge with appellate powers, therefore, reversed the decree of the Court of first instance.

Against the decree of the District Court the plaintiff appealed to the High Court.

Mahádeo Chinnáji A'pte for the appellant.

Mahádeo Váman Bhat for the respondent.

Mahádeo Chinnáji A'pte:—Both the lower Courts have found that the sale under which defendant No. 1 claims the land, is not proved. The question to be determined in this case is, when adverse possession began to run as against the appellant. As the private sale to defendant No. 1 was held not proved, he is in the position of a trespasser, and article 144 of the Limitation Act (XV of 1877) is applicable to this case. The lower Court was wrong in holding that the appellant's claim was barred under articles 137 and 138 of the Limitation Act (XV of 1877): Starling on Limitation—Notes to article 144.

Mahádeo Váman Bhat:—As the plaintiff brought this suit in his capacity as auction-purchaser to recover possession of the property from the defendant, articles 137 and 138 of the Limitation Act govern the case. There being a special article applicable to cases of auction-purchasers, article 144, which is a general one, would not apply. In the present case, adverse possession began to run when the judgment-debtor, Khandu, became first entitled to be put in possession under his purchase in 1872—*Rám Prosád v. Lakhi Náráin Pradhán*⁽¹⁾; Starling on Limitation—Notes to Articles 137, 138.

(1) I. L. R., 12 Calc., 197.

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SARGENT, C. J.:—The property in dispute in this case belonged to one Gulábsing, against whom a decree was obtained by one Khandu, and in execution of that decree it was sold and purchased by Khandu on 9th August, 1872. Plaintiff is the purchaser of the property on 21st August, 1882, in execution of a decree against Khandu. In proceeding to take possession he was obstructed by defendant No. 1, who states that he purchased the property from Khandu on 1st September, 1876. Defendant No. 2 is a purchaser at auction-sale in execution of a decree against defendant No. 1. The Court below found that defendant No. 1's title was not proved, but that plaintiff's claim was barred under articles 137, 138 of the Limitation Act.

It has been contended before us that the Court ought to have applied article 144, and that as defendants Nos. 1 and 2 had not had adverse possession for twelve years before the suit, the suit was not barred. The question depends upon whether articles 136 and 137 apply only to suits brought against third persons in possession at the date of the sale and those claiming under them. In *Rám Prosád v. Lakhi Náráin Pradhán*⁽¹⁾ the Court would appear to have thought they were so limited, as it held that article 144 applied to a suit against the vendor who had subsequently obtained possession after the sale. In *Sheo Prosad v. Udai Singh*⁽²⁾, were the circumstances were similar, the Court had not to decide the question, as the suit was barred, whether article 136 or article 144 was applied.

Mr. Starling in his Commentaries on the Limitation Act, p. 189, expresses the opinion that articles 136 and 137 apply to suits brought by purchasers against third persons in possession of the land in whose favour limitation runs against the purchaser, in the same way as it would against the owner with whose rights the purchaser is clothed—and we think that this is the correct view of the clause. Here, however, article 144 is applicable having regard to the finding of the District Judge that No. 1 defendant's alleged title from Khandu was not proved. Had Khandu been out of possession for twelve years subsequent to his purchase before defendant No. 1 obtained possession, the latter

(1) I. L. R., 12 Calc., 197.

(2) I. L. R., 2 All., 718.

might probably have pleaded that Khandu's title was extinguished by section 28, and therefore, that plaintiff could acquire no title from Khandu. That was not, however, the case here, and we must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on the defendants here and in the lower appeal Court.

Decree reversed.

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APPELLATE CIVIL.

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

CHIMNIRA'M UMA'JI, DECEASED, HIS HEIR, HIS SON TELSIRA'M,
(ORIGINAL PLAINTIFF), APPELLANT, v. HANMANTA VALAD SATVA'JI,
(ORIGINAL DEFENDANT), RESPONDENT.*

1890.

September 22.

Act VII of 1889, Section 4, Sub-section 1, Clause (b)—Application of—Decrees passed prior to—Execution of decree after the passing of—Certificate under—Pending proceeding.

Section 4, sub-section 1, clause (b) of Act VII of 1889⁽¹⁾ is not confined to the execution of decrees passed subsequently to the coming into operation of the Act.

* Reference, No. 21 of 1889

(1) Section 4:—(1). No Court shall—

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under section 36 or section 37 of the Administrator General's Act (II of 1874), and having the debt mentioned therein, or

(iii) a certificate granted under this Act and having the debt specified therein, or

(iv) a certificate granted under Act XXVII of 1860 or an enactment repealed by that Act, or

(v) a certificate granted under the Regulation of the Bombay Code No. VIII of 1827 and, if granted after the commencement of this Act, having the debt specified therein.

(2). The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.