1919.

RAJASAHEB RASULSAHEB, *In re*.

and that the correct view of the matter was taken by the learned Sessions Judge. It would appear that there is no provision requiring that the divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her under Mahomedan law, and these views find support in the recent decision of *Sarabai* v. *Rabiabai*[1] in this Court, which was approved by the Calcutta High Court in the case of *Ful Chand* v. *Nazab Ali Chowdhry*[2], and by the Madras High Court in the case of *Asha Bibi* v. *Kadir Ibrahim Rowther*[3].

The rule, therefore, should in my opinion be discharged.

Rule discharged.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919.
July 25.

TIPANGAVDA BIN SANDYAWANGAVDA GAVDAR (ORIGINAL OPPONENT No. 2), APPELLANT, *v.* RAMANGAVDA BIN VENKANGAVDA GAVDAR AND ANOTHER (ORIGINAL APPLICANT AND OPPONENT No. 1), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Auction sale—Application made to the Mamlatdar to set aside sale—Mamlatdar not a Court within the meaning of Order XXI, Rule 89—Application must be made to Civil Court—Limitation Act (IX of 1908), Schedule I, Article 166.

An application by a judgment-debtor to have an auction sale held by the Mamlatdar set aside under Order XXI, Rule 89, Civil Procedure Code, 1908, must be made to the Civil Court. A Collector or other Revenue Officer cannot be considered as a Court within the meaning of Order XXI, Rule 89, and, therefore, the judgment-debtor who presents his application to the Collector cannot stop limitation running against him.

(1) (1905) 30 Bom. 537. (2) (1908) 36 Cal. 184,
(3) (1909) 33 Mad. 22.

*Second Appeal No. 416 of 1913.

1919.

TIPAN-GAVDA v. RAMAN-GAVDA.

SECOND appeal against the decision of E. Clements, District Judge of Dharwar, reversing the decree passed by V. V. Bapat, Subordinate Judge of Haveri.

Application to set aside sale.

In execution of a decree obtained by the plaintiff in 1910, the opponent No. 2 purchased the property at the auction sale for Rs. 151 on the 23rd March 1915.

On the 15th April 1915, the applicant-judgment-debtor deposited Rs. 154-12-0 in the Mamlatdar's Office and applied to the Mamlatdar to have the sale set aside. The application was rejected and the applicant was referred to the Civil Court. The Court was closed for Summer vacation. It re-opened on the 19th May and the period of limitation expired on that date.

On the 13th July 1915 that is more than three months after the auction sale, the judgment-debtor presented an application to the Subordinate Judge to set aside the sale.

Opponent No. 2, the auction-purchaser, replied that the application to the Mamlatdar was not according to law, that the application ought to have been made to the Civil Court and that it was barred by limitation.

The Subordinate Judge disallowed the application as time-barred on the ground that it was necessary to make the application to the Civil Court under Order XXI, Rule 89, Civil Procedure Code, 1908, and the period of limitation governing such an application was thirty days from the date of the sale under Article 166 of the Limitation Act, 1908.

On appeal, the District Judge reversed the order holding that the application and deposit of 15th April 1915 should be regarded as made in Court. He relied on *Mathuji* v. *Kondaji*[1].

[1] (1905) 7 Bom. L. R. 263.

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Opponent No. 2 appealed to the High Court.

S. Y. Abhyankar, for the appellant :—I submit that the application being made after thirty days from the date of the sale is barred by limitation : see section 3 and Article 166 of the Limitation Act, 1908.

The reasoning of the lower Court that the deleting of the period of limitation from the Civil Procedure Code and incorporating it in the Limitation Act makes no change in the law, is not correct. When a period of limitation is prescribed by the schedule, it comes within the operation of section 3 of the Limitation Act, and the Court has no option but to dismiss the application made after the period of limitation, while it would not be so if the period be in the Civil Procedure Code.

Secondly, the rules made under section 320, Civil Procedure Code, 1882, do not create an impression, as observed by the lower Court, that the application and the deposit may be made before the Collector. This contention of the lower Court was negatived in *Pita* v. *Chunilal*[1]. Apart from the fact that the rule was made before section 310 A came into force, it cannot be implied that the rule gave power to the Collector to set aside sale. In fact the terms of the rule preclude such a contention.

G. S. Mulgaonkar, for respondent No. 1 :—We submit that an application made to the Collector is an application made to a Court. Rule 17 of the Rules was made before section 310 A of the Civil Procedure Code, 1882, came into force. That rule gives power to the Collector not only to receive the deposit but also the application and is still in force. See *Mathuji* v. *Kondaji*.[2]

Secondly, the application is not barred as the provision of limitation is equally authoritative whether

(1) (1906) 31 Bom. 207. (2) (1905) 7 Bom. L. R. 263.

appearing in the Limitation Act or in the Civil Procedure Code. The change in the law would not affect the result.

MACLEOD, C. J. :—This was an application by the judgment-debtor to have an auction sale held by the Mamlatdar of Hangal set aside under Order XXI, Rule 89 on the ground that he had deposited in the Mamlatdar's office Rs. 154-12-10, including 5 per cent. of the purchase money, and had applied to the Mamlatdar to set aside the sale that was held on the 15th April 1915, but was referred to the Civil Court. As the Court was closed and reopened on the 19th May, the period of limitation expired on the 19th May, but the application was not made until the 13th July. It was then argued that the application to set aside the sale made to the Mamlatdar was an application to the Court, and that therefore it was within time. The trial Judge disallowed the application, and this order was reversed on appeal mainly on the authority of *Muthuji* v. *Kondaji*[1], where it was held by the Court that the application and deposit to a Revenue Officer should be looked to on the question of limitation. That decision was under section 310A of the Civil Procedure Code of 1882, and the learned Judges thought that having regard to the words of that section the essential fact upon which the action of the Court was to depend was the deposit within 30 days, and not the fact that the application was to have been made within that period. But now the period of limitation for an application to set aside a sale is transferred from the Civil Procedure Code to the Limitation Act, and it is expressly provided that such an application must be made within 30 days from the date of the sale. It has been argued that the Collector or the Mamlatdar or the Revenue

[1] (1905) 7 Bom. L. R. 263.

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Officer executing a decree comes within the definition of the word "Court," so that this application was made within time. Now it is obvious that the Revenue Officer under the rules passed under section 320 of the old Code, which are still in force, has no power to consider an application to set aside a sale. If the application be made to the Collector or other officer within the time limited by law, then he should refer the applicant to the Civil Court. That, as I read Rule 17 of the Rules, means that the Collecter or other officer cannot be considered as a Court within the meaning of Order XXI, Rule 89, or the corresponding section 310A of the old Code, and therefore the judgment-debtor who presents his application to the Collector cannot stop limitation running against him unless, after having been referred to the Civil Court, he presents his application there within 30 days. He is not protected by section 14 of the Limitation Act which only excludes time during which a party has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against his opponent. But I see no hardship in this. It is quite clear that the application to set aside the sale must be made to the Court. The party desiring to make that application has 30 days within which to make it. If he makes it to a Collector or a Revenue Officer so shortly before the period of limitation expires that he has no time to go to Court then that is his own fault. Here in this case there is no hardship whatever. The judgment-debtor had over a month in which to present his application to the Court after he had been referred to the Court by the Mamlatdar, and he did not choose to present his application until July. In my opinion, therefore, the order of the lower appellate Court was wrong. We allow the appeal, set aside the decree of the lower

appellate Court and restore that of the trial Court with costs.

HEATON, J.:—I agree. Primarily an application under Order XXI, Rule 89 of the Civil Procedure Code must be made to the Court. The application in this matter was undoubtedly made to the wrong person in the first instance, and not made to the Court until long after the time allowed; unless the Collector or the Mamlatdar can be regarded as authorized to receive such applications on behalf of the Court. We are asked to infer such authorization from Rule 17 of the Rules. It seems to me this Rule can best be read as meaning that the Collector should not receive applications, but should return them to any one presenting them to him with an intimation that the persons presenting them must go to the Civil Court. On that interpretation of Rule 17 it follows that this appeal must succeed, and I agree with the order proposed.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton

1919.
July 30.

JAGANNATH AND TWO OTHERS, SONS AND HEIRS OF THE DECEASED KASHIRAM MANIRAM TAMBOLI, MINORS, BY THEIR GUARDIAN THEIR MOTHER HIRABAI (HEIRS OF ORIGINAL PLAINTIFF), APPELLANTS, *v.* SHANKAR VALAD GANPAT SHIMPI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS. *

Indian Evidence Act (I of 1872), section 92, proviso 4—Contract of mortgage —Oral evidence led to prove discharge of mortgage debt by payment of a smaller sum of money than actually due—Inadmissibility of such evidence.

* Appeal No. 29 of 1915 under the Letters Patent.