

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

BHIMAJI RAMCHANDRA WADWADGI (ORIGINAL PLAINTIFF), APPELLANT v. BHIMABAI KOM HIROJI SANAGAR (ORIGINAL DEFENDANT No. 1), RESPONDENT².

1920.

August 9.

Civil Procedure Code (Act XIV of 1882), section 335—Decree in terms of compromise—Execution of decree—Person in possession of property, a party to the suit but not a party to the decree—Purchaser in execution of decree trying to recover possession—Obstruction by the person in possession—Order for removal of obstruction in execution proceedings—Order not questioned by a suit—Finality of the order.

In a suit by a mortgagee against the mortgagor to recover the money due on the mortgage, defendant No. 2 who had purchased the equity of redemption from the mortgagor was made a party defendant. Ultimately the suit was compromised between the mortgagor and mortgagee and a decree passed in terms of the compromise. Neither to the compromise nor to the decree recording the compromise was defendant No. 2 a party. In execution of the decree, the mortgaged property was sold at a Court-sale and purchased by the plaintiff. When the plaintiff attempted to recover possession of the property, he was obstructed by defendant No. 2 who was in possession. On an application to remove the obstruction, the Court made an order for the removal of the obstruction in February 1908. The plaintiff recovered possession of the property in March 1908, but was dispossessed in June 1908. The plaintiff filed a suit in 1913 to recover possession of the property from defendant No. 2:—

Held, that the order for removal of obstruction was referable to section 335 and not section 334 of the Civil Procedure Code of 1882; that it was binding on defendant No. 2; and that as defendant No. 2 took no steps to have the same set aside within one year of its date it had become final.

THIS was an appeal under the Amended Letters Patent of the Bombay High Court, from the decision of Heaton J., who confirmed the decree passed by A. C. Wild, District Judge of Bijapur, reversing the decree passed by R. Baindur, Joint Subordinate Judge at Bagalkot.

² Letters Patent Appeal No. 39 of 1919.

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Suit to recover possession of property.

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In 1885, one Hanma sold the land in dispute to Nagappa, who mortgaged it to Mudiappa in 1888. The mortgage was, at a family partition, assigned to Basappa, nephew of Mudiappa.

In 1891, Nagappa sold the equity of redemption in the mortgage to Kalappa (defendant No. 2).

Basappa sued Nagappa and his two co-parceners in 1900 to recover money due on the mortgage. To this suit, Kalappa was joined as defendant No. 4. A compromise was arrived at between Basappa and Nagappa and his *bhaubandhs*, and a decree was passed in terms of the compromise on the 20th April 1901. Kalappa was not a party to the compromise or to the decree.

In execution of the decree, the land in dispute was sold at a Court sale in 1904 and purchased by the plaintiff. When the plaintiff sought to recover possession of the land he was obstructed by defendant No. 2.

The plaintiff thereupon applied to the Court to remove the obstruction. The defendant No. 2 appeared and claimed the land as his own. But he failed to adduce evidence in support of his claim and the Court ordered on the 15th February 1908 the removal of the obstruction.

On the 11th March 1908, the plaintiff was put in actual possession of the land. He, however, lost possession in June 1908.

In 1910, defendant No. 2 who was in possession of the land, sold it to the son of defendant No. 1.

In 1913, the plaintiff filed the present suit to recover possession of the land.

The suit was decreed by the Court of first instance.

On appeal, the District Judge was of opinion that as defendant No. 2 and his vendee were in possession of the land as owners since 1891, the plaintiff's suit must fail.

The plaintiff appealed to the High Court.

The appeal was heard by Heaton J. on the 24th June 1919. The following is the judgment :—

HEATON, J.:—Only one point has been raised in this appeal, and I shall only deal with that briefly. Otherwise the judgment of the first appellate Court cannot be assailed. The point which I must deal with is this. It appears that in the year 1908 there was a dispute between the same parties in execution proceedings, and an order was made by the Court in favour of the present plaintiff, and against the present defendant, Kalappa, who is the principal party amongst the respondents. If that was an order made under section 335 of the old Code, it would bind the respondent Kalappa, who then would be unable to resist the plaintiff's suit. But if it was an order under section 334, it would not have that effect. Having referred to the order itself, I hold that it was an order under section 334, because there was a purchaser of immovable property sold in execution of the decree; there was an obstructor, and that obstructor, Kalappa, was held by the Court to be a party to the decree and to be bound by the decree. In other words, the order was made on the assumption, right or wrong, that the obstructor was the judgment-debtor. It follows then that his point is not made good by the appellant, and that the appeal must be dismissed with costs.

The plaintiff appealed from this decision under the Amended Letters Patent of the Bombay High Court.

The appeal was heard by a bench consisting of Shah and Crump JJ.

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*Coyaji with G. S. Mulgaokar, for the appellant.**B. K. Dhurandhar with V. R. Sirur, for the respondent.*

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SHAH, J. :—The facts which have given rise to this appeal under the Letters Patent are these : One Hanma was the original owner of the land (Survey No. 142) now in dispute. He sold it to Nagappa in 1885. Nagappa mortgaged it along with other properties to Mudiappa in 1888. It was a simple mortgage. The mortgage was assigned to Basappa, the nephew of Mudiappa at a family partition. Basappa filed Suit No. 574 of 1900 to enforce the mortgage against Nagappa and two other coparceners. Kalappa was joined as defendant No. 4, as it was asserted by Nagappa that he had sold to him the equity of redemption in the land now in dispute. Kalappa did not appear to contest the plaintiff's claim in that suit. Finally, on the 20th April 1901, a compromise was arrived at between the plaintiff and defendants Nos. 1, 2 and 3 in that suit. It is not necessary to detail the terms of the compromise : it is enough to state that a part of the property in that suit was conveyed to the then plaintiff that a certain amount was made payable to him in instalments and he was allowed the right to recover the amount, in case of default, by the sale of certain properties including the land now in dispute. Kalappa was not a party to this compromise. A decree in terms of the compromise was passed on the same day. The decree was silent as to the defendants other than defendants Nos. 1 to 3. Subsequently the property referred to in the decree was sold through the Court and the present plaintiff purchased it in 1904. In attempting to recover possession he was obstructed by Kalappa, who had been joined as a party to the suit, but who had not joined in the compromise and had not appeared to defend the suit. The plaintiff made an

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application to the Court to have the obstruction removed. Kalappa was served with a notice under section 335 of the Code of Civil Procedure of 1882. He filed a statement and claimed to be the owner of Survey No. 142. But he did not appear afterwards and did not adduce any evidence. An order was made against him by the Court on the 15th February 1908 removing the obstruction, and directing possession to be given to the present plaintiff. In pursuance of that order the possession was given to the present plaintiff on 11th March 1908. The plaintiff filed the present suit to recover possession in 1913 alleging subsequent dispossession in June 1908. In 1910 Kalappa sold his rights to the land to the son of defendant No. 1. The real contest in the suit lay between the plaintiff and the defendant No. 1. The trial Court allowed the plaintiff's claim with costs. The defendant No. 1 appealed to the District Court which held that Kalappa had purchased the equity of redemption from Nagappa in the year 1891 and had been in possession of the property since then and accordingly dismissed the plaintiff's suit. The plaintiff preferred an appeal to this Court in which the question as to the effect of the order made in February 1908 against Kalappa was raised. Mr. Justice Heaton who heard the appeal held that the order was made under section 334 and that it had no finality such as an order under section 335, if not challenged by a suit, would have. The plaintiff has now preferred the appeal under the Letters Patent, and the same question is raised before us. In view of the arguments which we have heard I have stated the facts with a view to make clear the position of the plaintiff and Kalappa with reference to the land in suit and to the litigation preceding the present suit.

The question is whether the order of the 15th February 1908 was made under section 334 or 335 of the

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Code of Civil Procedure then in force. It is urged on behalf of the appellant that Kalappa was not a judgment-debtor that he claimed to be entitled to retain possession of the land in suit on the ground that he was the owner, and that the order cannot be referred to section 334 as the obstruction was not offered by Kalappa on behalf of Nagappa, but on his own account. On the other hand it is urged that the order is based upon the ground that Kalappa was a party to the suit and bound by the decree against Nagappa and others and that though in fact not a judgment-debtor he was treated as such by the Court making the order and that the order should, therefore, be referred to section 334. It is further urged for the respondent that as Kalappa was not a party to the decree the decree and the subsequent proceedings, so far as they relate to the land in suit, are nullities, that Kalappa is in no way bound thereby and that he was entitled to ignore the order under section 335 as a nullity, even if the order be treated as having been made under that section. Mr. Sirur has relied upon *Malkarjun v. Narhari*⁽¹⁾ and *Khiarajmal v. Daim*⁽²⁾ in support of his argument that the order under section 335 could be treated by Kalappa as a nullity.

On a consideration of these arguments and the admitted facts in the case, I am of opinion that the compromise decree was not binding upon Kalappa, as he was not a party to the compromise, that he was not a judgment-debtor as there was no decree against him, and that the application by the auction-purchaser for the removal of the obstruction caused by Kalappa was clearly covered by section 335. It could not be referred to section 334 as the obstruction was not by a judgment-debtor or any person claiming on his behalf.

(1) (1900) L. R. 27 I. A. 216.

(2) (1904) L. R. 32 I. A. 23.

Whether Kalappa then claimed as a purchaser from Hanma, the original owner, or merely as a purchaser of the equity of redemption from Nagappa, he claimed to be entitled to possession in his own right. The mortgage on which the consent decree was based was a simple mortgage and there was no question of possession as between the decree-holder and the judgment-debtors. It arose for the first time between the auction-purchaser and Kalappa. The notice was issued to Kalappa under section 335 and though the reason given by the Court making the order that Kalappa was a party to the suit and was therefore bound by the decree was wrong, I do not see how the order could be referred to section 334 on the admitted facts of the case. Kalappa did not appear to oppose the application nor did he adduce any evidence in support of his allegation as to the ownership of the land in suit. The order for the removal of the obstruction and for possession made by the Court was almost inevitable under the circumstances and could have been properly made only under section 335. The Court did not refer to any section of the Code under which it purported to make the order, and I think we ought to treat it as having been made under the section under which alone it could have been made under the circumstances. The fact that the auction-purchaser applying to have the obstruction removed and the Court making an order were under a misapprehension as to the effect of the decree on Kalappa's position is not a sufficient ground, under the circumstances to treat the order as having been made under section 334. On the other hand we have the fact that the notice was issued under section 335 and that Kalappa claimed as owner in his own right. No suit having been filed by Kalappa to challenge the order, it would become final under section 335, and would be a complete answer to defendant No. 1, who claims under Kalappa.

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I am unable to accept Mr. Sirur's contention that Kalappa was entitled to ignore it as he would be entitled to ignore the sale held in execution of a decree to which he was not a party. The cases relied upon by Mr. Sirur do not help him in any way. It is not suggested before us that the auction-sale is binding upon Kalappa. It is common ground that Kalappa was entitled to ignore the Court sale, so far as the land in suit was concerned. But the question arising in this appeal did not arise in these cases and there is nothing in the judgments to show that a person claiming to be in possession of the property and offering obstruction to an auction-purchaser is not bound by an order under section 335 passed after notice to him, just as he is not bound by the decree and the sale held under the decree. The difference between the two proceedings is obvious. One is a proceeding taken against him and he is a party to it; the other is a proceeding to which he is not a party at all. The contention derives no support from the cases cited and is opposed to the words of the section.

It is not suggested before us that the order is not final as the section was repealed by Act V of 1908 and substituted by a new rule which is different in its scope before the period of one year prescribed by the Indian Limitation Act expired. The new rule cannot affect the validity of the order made under section 335 when the section was in force. The period allowed for challenging its correctness by a suit was the same under the Limitation Act of 1877 as under the Limitation Act of 1908.

I would, therefore, reverse the decree under appeal and restore the decree of the trial Court with costs of both the appeals in this Court and of the appeal in the District Court on the defendant No. 1.

CRUMP, J. :—The question in this case is whether the order of February 15, 1908, became final as against Kalappa on the expiry of one year from that date, and if so, what is the result. If the order is to be referred to section 335 of the Civil Procedure Code of 1882 then it could only be contested by a suit. It was an order in execution proceedings, and in the suit in which the decree was made Kalappa was a party, but he was not a party to the decree which was made in his absence on a compromise between other parties to the suit. He was not bound by that decree and was therefore not a judgment-debtor as defined in section 2 of the Code. *Prima facie*, therefore, when he obstructed the delivery of possession to the auction-purchaser section 334 could not apply to the case. And as a matter of fact the Court cited section 335 in directing notice to issue to him. The order which was made does not cite any section of the Code of 1882. Apart from the grounds on which it is based it is an order which could be made either under section 335 or under section 329 which latter section is applicable to cases falling under section 334. The operative portion of the order is merely a direction that the obstruction be removed. In giving brief reasons for this order the Court has wrongly treated Kalappa as a judgment-debtor, but this does not confer on the Court power to act under section 334, nor does it render the order a nullity so long as it was one which the Court had power to make. It cannot, in my opinion, be contended that an order, otherwise good, is vitiated because it is based on a wrong view of the facts. The order should, therefore, be referred to section 335. There can be no question that the grounds now suggested would have been held inadequate had Kalappa at the time sought to set the order aside. The auction-purchaser obtained possession in 1908 in pursuance of that order and it must

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be held to have conclusively determined the right to possession at that date. As it was made less than twelve years before the filing of the suit plaintiff who claims through the auction-purchaser is entitled to succeed.

On these grounds I agree with the orders proposed.

Decree reversed.

R. R.

APPELLATE CIVIL.

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

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August 11.

MARTAND MAHADEV DUNAKHE (ORIGINAL DEFENDANT), APPELLANT
v. DHONDO MORESHWAR DUNAKHE AND ANOTHER (ORIGINAL
PLAINTIFFS), RESPONDENTS*.

Indian Limitation Act (IX of 1908), Schedule I, Article 96—Mistake—Discovery of mistake when first Court's decree was passed—Appeal—Dismissal of appeal—Time begins to run from the date of the first Court's decree.

In 1903, plaintiff No. 2 obtained a decree for partition against the defendant, his father and plaintiff No. 1. In execution of that decree a compromise was effected between the parties and certain properties, including a mortgage-debt due to the family, were allotted to plaintiffs Nos. 1 and 2. The plaintiffs sued the mortgagors in 1910 to recover the mortgage amount but the suit was dismissed as it was held that the consideration for the mortgage had been paid off. The decree of the trial Court was passed in 1912. The plaintiffs appealed but the appeal was dismissed on the 11th July 1914. On the 28th June 1917, the plaintiffs sued to recover from the defendant their share of the loss. The Subordinate Judge found that it was a case of mutual mistake under which all the parties considered that the mortgage was a perfectly good asset and therefore held the defendant liable to contribute to the loss. On appeal to the High Court, it was contended that the suit was barred by limitation,

Held, that the suit was barred under Article 96 of the Limitation Act as the discovery of the mistake, dated not later than the first Court's decree which was passed in 1912 and time began to run against the plaintiff from that date

* First Appeal No. 266 of 1918.