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to anybody of anything. But if a registered document is so indexed that an enquirer anxious to ascertain whether there are documents relating to a property which he proposes, for instance, to buy, can find from the index documents relating to that property, then it will be held that he has notice of those documents; because if he made the enquiry, which as a prudent man he ought to make, then they would come to his notice. The particular document we are concerned with was not a transfer of any property, but an agreement. It is an agreement entered into by two persons, the vendor to the defendant and the plaintiff, and it relates to two properties, the property belonging to the defendants' vendor and the property belonging to the plaintiff. How it is indexed in fact we do not know. The matter has never been inquired into. It is quite possible it might be indexed in various ways. It might be indexed under the names of the contracting parties. That would not give notice for the purpose of this case. It might be indexed by a reference to the property belonging to the plaintiff and that again would not be notice for the purpose of this case. But if it is indexed in relation to the defendants' property, then no doubt it would be notice.

Issues sent down.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah. and Mr. Justice Hayward.

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April 6.

BHAICHAND KIRPARAM AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* RANCHHODDAS MANCHHARAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Civil Procedure Code (Act V of 1908), section 47, Order XXXIV, Rule 14—Mortgagor retaining possession of the mortgaged property under a rent-note executed to mortgagee—Arrears of rent—Non-payment of rent—Suit by

* Second Appeal No. 432 of 1919.

mortgagee to recover possession of property and arrears of rent—Decree—Execution of decree—Sale of equity of redemption in execution of decree for rent—Purchase of equity of redemption by a third party—Suit by mortgagor to set aside decree and sale—Decree as for a "claim arising under a mortgage"—Sale in execution is voidable only—Mortgagor's remedy to set aside decree and sale is application under section 47 and not a separate suit—Suit, if instituted, can be treated as an application—Limitation—Indian Limitation Act (IX of 1908), Article 166.

In 1910, the plaintiffs executed a possessory mortgage of their house to defendant No. 1; and at the same time passed a rent-note to defendant No. 1 and remained in possession of the house. The plaintiffs not having paid the rent, defendant No. 1 filed a suit and obtained a decree entitling him to recover possession of the house and arrears for rent. In execution of the decree for rent, the equity of redemption of plaintiffs was put up to sale and purchased by defendant No. 2 in January 1916, the sale having been confirmed in March 1916. In January 1917, the plaintiff sued to set aside the decree and the sale held in execution of it:—

Held, that the sale of the house in execution of the decree was in contravention of Rule 14, Order XXXIV of the Civil Procedure Code, because the claim for possession as well as rent arose under the mortgage.

Ibrahim walad Goolam v. *Nihalchand*[1], followed.

Held, further, that the sale held in contravention of Rule 14 was not void, but voidable at the instance of the mortgagor.

Sahadu Manaji v. *Devlya Jaba*[2], referred to.

Held, also, that the proper remedy to set aside the sale was not a suit, but an application under section 47 of the Civil Procedure Code, 1908.

Prosunno Coomar Sanyal v. *Kasi Das Sanyal*[3]; *Pita* v. *Chunilal*[4] and *Gokulsing Bhikaram* v. *Kisansingh*[5], relied on.

Held, moreover, that such a suit, if already instituted, might be treated as an application, provided it was brought within time under Article 166 of the Indian Limitation Act, 1908.

SECOND appeal from the decision of M. M. Bhatt, Assistant Judge of Surat, confirming the decree passed by J. N. Bhatt, Subordinate Judge at Surat.

Suit to set aside a sale and the decree under which the sale took place.

(1) (1919) 44 Bom. 366.
(2) (1911) 14 Bom. L. R. 254.
(3) (1892) L. R. 19 I. A. 166.
(4) (1906) 31 Bom. 207.
(5) (1910) 34 Bom. 546.

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In 1910, the plaintiffs mortgaged their house with possession to defendant No. 1 for Rs. 200. They executed on the same day a rent-note to defendant No. 1 and continued in possession of the house.

The rent agreed upon was not paid. To recover the arrears of rent, defendant No. 1 filed Suit No. 255 of 1914 and obtained a decree for the rent as also for recovering possession of the house.

In execution of the decree, defendant No. 1 recovered possession of the house, and attached plaintiffs' equity of redemption in the house and also in certain lands, which the plaintiffs had mortgaged with a third party (defendant No. 3).

On the 17th January 1916, the equity of redemption was sold at a Court sale to defendant No. 2. The sale was confirmed by the Court on the 1st March 1916.

The plaintiff sued on the 17th January 1917 to set aside the decree and the sale held in execution of it.

Defendant No. 2 contended, *inter alia*, that the suit was not maintainable; that the plaintiffs' remedy if any was by appeal against the order of confirmation of the sale, and that the claim was time-barred.

The Subordinate Judge held that the suit was not barred by reason of section 47 or Order XXI, Rule 92 of the Civil Procedure Code; that the claim was within time; but that the plaint did not disclose a cause of action. The suit was dismissed.

This decree was on appeal confirmed by the Assistant Judge.

The plaintiff appealed to the High Court.

G. N. Thakor, for the appellants :—The sale contravened the provisions of Order XXXIV, Rule 14 and ought to have been set aside as absolutely illegal and void. Rule 14 is peremptory in its terms. The rulings

alluded to by the lower Courts, viz., *Sahadu Manaji* v. *Devlya Jaba*[1]; *Khiarajmal* v. *Daim*[2]; *Ashutosh Sikdar* v. *Behari Lal Kirtania*[3]; *Lal Bahadur Singh* v. *Abharan Singh*[4], are not applicable here, as they were cases in which the mortgagee himself was the purchaser. The case of *Sahadu Manaji* v. *Devlya Jaba*[1] is in my favour, as it was remarked there that with regard to the property purchased by a third person, a suit could be brought within a year, the period of limitation. Here the suit was filed within a year from the date of confirmation, the period prescribed by Article 12 of the Indian Limitation Act, and consequently the objection under Order XXXIV, Rule 14 was not too late as erroneously supposed by the lower Court.

[HAYWARD, J.:—Would Order XXI, Rules 90 and 92 apply?]

I submit not, as there is no question here of any irregularity or fraud *in publishing* or *conducting the sale*. As against an auction-purchaser, a suit is the only remedy as the auction-purchaser is neither a representative of the decree-holder nor of the judgment-debtor: *Narsinhbhat* v. *Bando Krishna*[5].

K. N. Koyajee, for respondents Nos. 1 and 2:—I do not say that Order XXI, Rules 90 and 92 apply. I submit that the plaintiff's remedy was under section 47 of the Code to have objected before the sale was confirmed: *Ashutosh Sikdar* v. *Behari Lal Kirtania*[3]; *Lal Bahadur Singh* v. *Abharan Singh*[4]; *Nannuvien* v. *Mathusami Dikshadar*[6]; and *Dharanikota Venkayya* v. *Budharazu Surayya Garu*[7]. A sale in

(1) (1911) 14 Bom. L. R. 254.
(2) (1904) 32 Cal. 296.
(3) (1907) 35 Cal. 61.
(4) (1915) 37 All. 165.
(5) (1918) 42 Bom. 411.
(6) (1905) 29 Mad. 421.
(7) (1907) 30 Mad. 362.

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contravention of Order XXXIV, Rule 14 is only voidable, not void: *Khiarajmal* v. *Daim*[1] and *Sahadu Manaji* v. *Devlya Jaba*[2].

Although the auction-purchaser is a third party, the judgment-debtor cannot get the sale set aside without proceeding against the decree-holder, which he can only do under section 47 of the Code.

[SHAH, J. referred to *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[3] and *Pita* v. *Chunilal*[4] and *Gokulsing Bhikaram* v. *Kisansingh*[5] and to Article 166 of the Indian Limitation Act.]

I further submit that Order XXXIV, Rule 14 cannot apply as the sale was not in execution of a money-decree on a claim *arising under* the mortgage: *Haribans Rai* v. *Sri Niwas Naik*[6] and *Bhyramshet* v. *Subraya*[7].

Thakor, in reply:—The fact that the auction-purchaser was a party to the proceedings is the reason for bringing a suit. The case of *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[3] and the other cases do not lay down that a suit cannot be filed within the short period provided by the Limitation Act. Assuming that the proper remedy was by an application under section 47 of the Code, the suit can be treated as such an application. I submit that Article 166 will not apply, as it can only apply to cases arising under Rules 89, 90 and 91 of Order XXI. The present Article 166 of the Act of 1908 has been substituted for Articles 166 and 172 of the Act of 1877 bringing all the cases under those two articles within one article. But an application under Order XXXIV, Rule 14 could not

(1) (1904) 32 Cal. 296.
(2) (1911) 14 Bom. L. R. 254.
(3) (1892) L. R. 19 I. A. 166.
(4) (1906) 31 Bom. 207.
(5) (1910) 34 Bom. 546.
(6) (1913) 35 All. 518.
(7) (1915) S. A. 351 of 1915. (Unrep.)

have been contemplated by the Legislature to fall under Article 166 of the Act of 1908.

Koyajee :—Article 166 of the present Limitation Act is a consolidating article, and there is no reason to suppose that the Legislature did not contemplate all cases of setting aside a sale as coming within the scope of the article. The words of the article are wide enough to cover a case like the present.

SHAH, J. :—The plaintiffs in this case mortgaged the house in suit to defendant No. 1 in 1910 with possession. They continued in possession under a rent-note passed at the same time to the mortgagee. In 1914 the defendant No. 1 sued the plaintiffs to recover possession of the house and the rent due on the rent-note, and obtained a decree against them. In execution he obtained possession of the house and attached the equity of redemption in the house and one land owned by the mortgagors.

This land was mortgaged to one Bai Mankore who assigned her rights to defendant No. 3. Defendant No. 2 purchased the house and the land in January 1916: and both the sales were confirmed in March 1916. The present suit was filed by the plaintiffs in January 1917 to set aside the decree and the sales held in execution thereof. For the purpose of this second appeal it is needless to state the allegations upon which he sought to set aside the decree and both the sales. It is enough to state that the trial Court dismissed the plaintiffs' suit. In appeal the decree of the trial Court was confirmed: but for the first time the point relating to Order XXXIV, Rule 14 was considered with reference to the sale of the house.

In the appeal to this Court the relief claimed is limited in argument to the setting aside of both the sales: and it may be mentioned at once that there is

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no error of law shown with regard to the conclusion reached by both the lower Courts as to the sale of the land. It is clear that the appeal so far as it relates to the sale of the land must fail. It was mortgaged to a third person and it was quite open to the defendant No. 1 as decree-holder to bring the equity of redemption in the land belonging to his judgment-debtors to sale.

As regards the sale of the house, however, it is urged that it is contrary to the provisions of Order XXXIV, Rule 14, and that on that ground it ought to be set aside. Thus we have to consider the plaintiffs' suit so far as it relates to the setting aside of the sale of the house. From the facts stated above it will be clear that the defendant No. 1, who was the mortgagee, obtained a decree in respect of the rent of the mortgaged property and brought the property to sale in execution of that decree. It is important to note that the purchaser at the Court sale was not the mortgagee, but a third person, original defendant No. 2. The questions that arise with reference to the sale are first whether it contravenes the provisions of Order XXXIV, Rule 14, secondly, whether the sale is liable to be set aside on that ground alone, and, thirdly, whether the proper remedy to set aside the sale is by way of suit.

As regards the first question it is urged on behalf of defendants Nos. 1 and 2, who are really the only respondents interested in this sale, that the provisions of Rule 14 would not apply, as the decretal claim did not arise under the mortgage. It is clear, in my opinion, that the claim for possession and rent arose under the mortgage. No doubt the claim for rent as also for possession was based upon the rent-note; but the rent-note itself was the result of the mortgage and the claim based thereon must be taken to arise under the mortgage. The contention of the

defendants is based upon too narrow a construction of the expression "claim arising under the mortgage". Such a narrow construction would unduly restrict the legitimate scope of this rule. It is true that the old section 99 of the Transfer of Property Act has been reproduced in a modified and restricted form in this rule; but even then I do not see how a claim arising under a rent-note passed by the mortgagor to the mortgagee could be said to arise otherwise than under the mortgage. In the present case there is the additional fact that the rent reserved happens to be equal to the interest due on the mortgage amount. The arrangement, such as we have in the present case, is very common at least in this Presidency; and substantially the claim made by the mortgagee on the rent note is a claim arising under the mortgage within the meaning of the rule. This view is supported by the recent judgment of the learned Chief Justice in *Ibrahim walad Goolam* v. *Nihalchand*[1]. The meaning of the expression "claim arising under a mortgage" has been discussed in *Kadma Pasin* v. *Muhammad Ali*[2]. The facts in that case were different. But generally speaking the view taken by both the learne Judges in that csse as to the meaning of the expres supports the conclusion that the claim made in t present case by the mortga in his suit against mortgagors on the rent no is one arisin under mortgage. Mr. Koyajee referred to *Bhyram Subraya*[3]. There is written judgment case: the decree of th lower appellate C simply confirmed by th Court. It is true out by him that a claim respect of a lease ed as not arising ur a mortgage b Courts in that case. in the absenc

(1) (1919) 44 Bom. 366.
(2) (1919) 41 All. 399.
(3) (1915) S on 23rd

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judgment of this Court, it is difficult to know whether the point was argued at the hearing and decided by the Court. I may add that the decision in *Haribans Rai* v. *Sri Niwas Naik*[1] which was referred to in the lower Courts in this unreported case, has been considered by the Allahabad High Court in the later case to which I have already referred. I agree with the lower appellate Court that the sale of the house was held in contravention of the provisions of the rule.

The second question is whether on that ground alone it is liable to be set aside. The rule provides that the mortgagee shall not be entitled to bring the property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. I think it is clear on general grounds as well as on the decided cases that a sale held in contravention of the provisions of the rule is not void but voidable at the instance of the mortgagor, and that in order to avoid it it is sufficient for the mortgagor to show that the sale contravenes the provisions of Rule 14. Apart from the question relating to the remedy which the mortgagor has to adopt in order to set aside the sale, this point has not been seriously contested before us. The decision of this Court in *Sahadu Manaji* v. *Devlya Jaba*[2], the judgments in *Ashutosh Sirkar* v. *Behari Lal Kirtania*[3] and *Lal Bahadur Singh* v. *Abharan Sing*[4] and the observations in *Khiaraimal* v. *Daim*[5] support this conclusion.

This brings me to the third question as to which we have heard further arguments, and which presents difficulty. The question is whether a suit by the mortgagor to set aside the sale is competent or whether relief can be had by way of an application under section 47 of the Civil Procedure Code to secure that result.

(1) (1904) 32 Cal. 254.
(3) (1907) 35 Cal. 61.
(4) (1915) 37 All. 165.

In connection with this point it must be remembered that in this case defendant No. 2, the purchaser at the Court sale, is a third person and not the mortgagee himself, and that the suit, if otherwise competent, is within the period prescribed under Article 12 of the Indian Limitation Act. It is also important to note that in the present case the sale was held apparently after the usual notice of the Darkhast by the decree-holder to the judgment-debtors; but they did not appear at any stage of the execution proceedings to object to the sale. At the same time there was no adjudication during the execution proceedings that the sale was not contrary to the provisions of Rule 14. Thus for the purpose of this appeal it may be taken that though the plaintiffs were aware of the execution proceedings they did not raise any objection to the sale before the confirmation thereof and that there was no adjudication in the execution proceedings as to the application and effect of Rule 14.

It has been urged that the question as to the application and effect of the Rule 14, Order XXXIV as regards the sale must be taken to have been decided against the appellants, as no objection on that point was taken by them in the course of the execution proceedings. But the point was not raised by the appellants in the execution proceedings; and apparently it was not noticed by the Court. The sale was effected in execution of the decree without any adjudication as to whether it was contrary to the terms of that rule. The argument is that a point which might have and ought to have been raised must be taken to have been raised and decided. The section relating to *res judicata* has no direct application to the execution proceedings. The principle upon which the orders made in execution proceedings are held binding upon the parties is pointed out in the case of *Ram Kinal*

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Shukul v. *Mussumat Rup Kuari*[1]. Their Lordships observe at page 41 of the report that the matter decided in execution proceedings is "as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon section 13, Act X of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation." These observations show that it applies to the matter actually decided; and I do not think that on the facts of this case the point could be treated as having been decided on the analogy of the rule contained in section 11 of the Civil Procedure Code. It is open, therefore, to the appellants to raise the question as to the validity of the sale on the ground that it is contrary to the provisions of Rule 14, Order XXXIV in the present proceedings.

As regards the remedy, in the argument it was suggested that a suit would be barred by Rule 92 of Order XXI. It was ultimately conceded, and quite properly conceded, by Mr. Koyaji, that a suit to set aside the sale on the ground that it was held contrary to the provisions of Rule 14 of Order XXXIV would not fall within the scope of the bar created by Rule 92 (3).

The question is whether the remedy by way of a suit or an application to set aside the sale under section 47 of the Code of Civil Procedure is appropriate. With reference to this point it has been urged on behalf of the appellant that in this Presidency it has been held that an auction-purchaser is certainly not the representative of the decree-holder and that he is not the

[1] (1883) L. R. 11 I. A. 37 at p. 41; I. L. R. 9 All. 269 at p. 274.

representative even of the judgment-debtor. The decision in *Narsinhbhat* v. *Bando Krishna*[1] has been referred to in suport of this contention. I think it must be taken that the auction-purchaser is neither the representative of the decree-holder nor of the judgment-debtor. It is further argued that if that be so, section 47 would have no application to any proceeding to which the auction-purchaser is a necessary party. It is quite true that section 47 applies in terms to all questions arising between the parties to the suit in which the decree was passed or their representatives. It is contended that as the auction-purchaser is not the representative of any of the parties to the suit in which the decree was passed, section 47 cannot apply. In *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[2] it was held that the mere fact of the auction-purchaser not being a party to the suit was not fatal to the application of section 244 of the Code of Civil Procedure of 1882. The following observations in the judgment are pertinent: "Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit is interested in the result has never been held a bar to the application of the section." In *Pita* v. *Chunilal*[3] and *Gokulsing Bhikaram* v. *Ksansingh*[4] these observations have been applied to cases in which the ction-purchaser was a party; and the fact that he was not a representative of the parties to the suit was not held to be any bar to the application of section 2[illegible] of the Code of 1882. Section 47 of the present Co[illegible]

(1) (1918) 42 Bom. 411.
(2) (1892) L. R. 19 I. A. 56 at p. 169.
(3) 1906) 31 Bom. 207.
(4) (1910) 34 Bom. 54[illegible]

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which corresponds to section 244 of the Code of 1882, must be construed in the same way. In my opinion the observations of their Lordships of the Privy Council in *Prosunno's case*(a) afford a complete answer to the appellants' contention that section 47 has no application to the present case, because the auction-purchaser is a party to the suit. It follows that the proper remedy is not a suit but an application under section 47 to set aside the sale.

Section 47, however, provides that the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding. Under this provision it is permissible to us to treat the present suit to set aside the sale as an application to set aside a sale under section 47 subject to any objection as to limitation or jurisdiction. In the present case there is no objection as to jurisdiction: but there is an objection as to limitation which must be considered. If the present suit is treated as a proceeding under section 47, i. e., as an application to set aside a sale, it seems to me that it clearly falls under Article 166 of the Limitation Act of 1908. Mr. Thakor has argued that Article 166 really applies to an application under the Code of Civil Procedure of 1908 to set aside a sale in execution of a decree, which is expressly contemplated by the Code, as for instance an application under Rules 89, 90 or 91 of Order XXI. He has also referred to Articles 166 and 172 of the Limitation Act of 1877 as supporting his contention that the application of the present Article 166 is limited to those cases which were expressly provided in the old Article 166. It is urged that there is no provision in the Code referring to an application to set aside a sale on the ground that

(a) (1892) L. R. 19 I. A. 16 at p. 169.

it is contrary to the provisions of Rule 14 of Order XXXIV. We have, however, to read the Article as it stands and to construe the words in their plain and natural sense. It provides for applications under the Code of Civil Procedure of 1908 to set aside sales in execution of decrees. The present suit, which must be treated as an application under section 47 of the Code of Civil Procedure to set aside the sale, is an application under the Code of Civil Procedure to set aside a sale in execution of a decree; and it is difficult without unduly restricting the plain meaning of the words to hold that an application of that character is outside the scope of Article 166. It may be that the change in the wording of the present Article 166 is due to the circumstance that it is intended to include within its scope the old Article 172 in the Limitation Act of 1877, which is omitted in the present Limitation Act; and it may be that an application to set aside a sale on the ground that it is contrary to the provisions of Rule 14, Order XXXIV was not expressly contemplated by the Legislature. But the words of the Article are wide enough to cover such an application; and in my opinion it would not be right to curtail the scope of these words by reference to the previous history of this Article, which is relied upon by Mr. Thakor in support of the restricted interpretation. I am therefore of opinion that the present suit must be treated as an application under section 47 to set aside a sale and that it is barred under Article 166, because it has not been made within 30 days from the date of the sale.

On these grounds I am of opinion that the plaintiff's claim to set aside the sale must fail.

The result is that this appeal fails, and must be dismissed. The decree of the lower appellate Court is affirmed with costs.

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HAYWARD, J. :—I agree that the claim for possession and rent of the house did arise under the mortgage and that the sale of the house was voidable as contrary to Order XXXIV, Rule 14 of the Schedule to the Civil Procedure Code. I also agree that the suit brought by the mortgagors to set aside the sale by the mortgagees was, notwithstanding the fact that the suit affected the interests of the auction-purchasers, a matter between the parties to be decided under section 47 of the Code of Civil Procedure in view of the decision of the Privy Council in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[1]. It seems to me further impossible in view of that finding to hold that the suit did not fall within, and was not barred by, the wide words of Article 166 of the Schedule to the Limitation Act.

Decree affirmed.

R. R.

[1] (1892) L. R. 19 I. A. 166.

CRIMINAL REVISION.

Before Mr. Justice Shah and Mr. Justice Kajiji.

1920.

April 22.

EMPEROR *v.* RAM GOPAL RUPJI.*

Bombay Rent (War Restrictions No. 2) Act (Bombay Act VII of 1918) section 7 (1) †—Standard rent—Additional charge for supplying light—Recovery of rent in excess of standard rent.

* Criminal Application for Revision No. 39 of 1920.

† The section runs as follows :—

"Whoever knowingly receives whether directly or indirectly on account of the rent of any small premises of which the standard rent has been fixed any sum in excess of such standard rent shall on conviction by a Magistrate be punishable, in the case of a first offence, with fine which may extend to one thousand rupees or, in the case of a second or subsequent offence in regard to the same or any other small premises of which the standard rent has been fixed, with fine which may extend to two thousand rupees.