APPELLATE CIVIL.

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

1920.
February 9.

MAHADEV NARAYAN DATAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* SADASHIV KESHEV LIMAYE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS * AND MAHADEV NARAYAN DATAR AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* RAGHUNATH RAMCHANDRA AGARKAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS *.

Indian Limitation Act (IX of 1908), Schedule I, Art. 12A, sections 26 and 28 —Arrears of revenue—Sale by Revenue Courts—Judgment-debtor remaining in possession of property—Suit by purchaser for possession—Defence by judgment-debtor that the sale was invalid—Judgment-debtor not precluded from raising the defence—Revenue sales to be treated differently from sales by civil Courts—Purchaser's plea of want of notice of judgment-debtor's title not valid.

The defendants who owned plaint land in a *khoti* village brought a suit against the *khot* for a declaration that they held the land free of assessment. The suit was dismissed by the lower Courts but on appeal to the High Court it was held in 1905 that the defendants had the right to hold the land free of assessment. While the appeal proceedings were pending, the land was sold by the revenue Court under the provisions of the Land Revenue Code for arrears of assessment due from the defendants and it was purchased by the plaintiff's vendor. The sale was confirmed on the 6th August 1904. After the sale, the defendants continued to remain in possession of the property. In 1915, the plaintiff sued to recover possession of the property. The defendants resisted the claim on the ground that the sale was invalid. It was urged on plaintiff's behalf that as he was a purchaser at a revenue sale without notice of defendants' title, his title was good as against the defendants. The lower Courts decreed the plaintiff's claim, holding that as the defendants did not sue to set aside the sale within one year their right to impugn the sale was barred under Article 12A of the Limitation Act.

Held (reversing the decrees of the lower Courts), that the defendants could raise the defence that the sale was invalid, though a suit by them would have been barred by limitation under Article 12A of the Limitation Act.

Held, also, that the plaintiff as a purchaser at a revenue sale could not succeed on the ground that he was a purchaser without notice, inasmuch the

* Second Appeals Nos. 425 and 426 of 1918.

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sale held by the revenue Court for arrears of assessment while proceedings were pending in a civil Court became invalid when it was declared that the defendants were entitled to hold the land free of assessment.

Unless a suit falls under section 26 or section 28 of the Indian Limitation Act, 1908, there is no bar of limitation to a defence,

When a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings and he does not ask for a stay of execution, the purchaser at the execution sale acquires a good title although it may happen that eventually the decree against the defendant is set aside on appeal. But there is a great distinction between sales in execution of Civil Court decrees and sales by the Revenue Courts for arrears of assessment. If as a matter of fact the defendant in the revenue proceedings is entitled to hold the lands free of assessment, any sale which takes place on the footing that he is bound to pay assessment is invalid, and the purchaser at such a sale cannot acquire a good title except by adverse possession.

Venkatachalapathi Ayyar v. *Robert Fischer*[1], followed ; *Shivlal Bhagvan* v. *Shambhuprasad*[2], distinguished ; *Balkishen Das* v. *Simpson*[3], referred to.

SECOND appeals against the decision of P. J. Taleyarkhan, District Judge of Thana, confirming the decree passed by K. K. Thakor, Second Class Subordinate Judge at Pen.

Suit to recover possession.

One Mahadev Narayan Datar owned plaint land Survey No. 408, Pot No. 1, in a *khoti* village called Adharne of which one Sadashiv Keshav Limaye was the *khot*. Between 1895 and 1900 Sadashiv recovered assessment of the land from Mahadev by assistance decrees against him in Mamlatdar's Court.

In 1901, Mahadev filed a suit against Sadashiv for a declaration of his right to hold the plaint land free of assessment. The suit was dismissed by the trial Court as well by the First Court of Appeal but was

(1) (1907) 30 Mad. 444. (2) (1905) 29 Bom. 435.
(3) (1898) L.R. 25 I. A. 151.

decreed by the High Court in 1905. While the suit was pending, however, Sadashiv obtained assistance decrees from the Mamlatdar's Court in 1902 and 1903. and in execution of these decrees the plaint land (Survey No. 408, Pot No. 1) was put to auction and purchased by Shivram Dhondev on the 27th May 1904. The sale was confirmed on the 6th August 1904. The auction purchaser Shivram sold the land to Raghunath Ramchandra Agarkar who having failed to get possession from Mahadev filed a suit (No. 172 of 1915 out of which arose S. A. 426 of 1918) against him and his brothers for the recovery of possession together with Rs. 109 as damages and costs. In this suit, Mahadev contended *inter alia* that the decrees in the assistance suits and the revenue sale of 1904 were illegal.

Mahadev and his brothers, also filed a suit (No. 81 of 1916 out of which arose S. A. 425 of 1918) for setting aside revenue sale of 1904.

In Suit No. 172 of 1915, the Subordinate Judge held that the provisions of Article 12 of the Limitation Act did not debar the defendants who were in actual possession of the suit property from impugning the validity of the sale of 1904 on the authority of *Minalal Shadiram* v. *Kharsetji*[a]. He, however, decreed the plaintiff's claim on the ground that the defendants had failed to substantiate their allegation about illegality of the revenue sale.

On appeal, the District Judge confirmed the decree. The defendants, Mahadev and his brothers, thereupon, preferred a second appeal No. 426 of 1918.

In Suit No. 81 of 1916 filed by Mahadev and his brothers, the Subordinate Judge held that the revenue sale was legally and honestly held and the plaintiff's suit having been instituted a year after the date of the

[a] (1906) 30 Bom. 395.

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confirmation of the sale was barred under Article 12 of the Limitation Act: *Bajaji Krishna* v. *Pirchand Budharam*[1], *Mahomed Hossein* v. *Purundur Mahto*[2], *Venkatapathi* v. *Subramanya*[3].

On appeal, the District Judge confirmed the decree.

Plaintiffs, Mahadeo and his brothers, preferred a second appeal No. 425 of 1918.

G. N. Thakor for T. P. Khare, for the appellants :— The sale which is the basis of plaintiff's title was invalid. The sale was for assumed arrears of assessment. As a fact, the land is not and was not at the time of the sale liable to pay assessment. So it has been held in a contested civil litigation. Hence the sale was invalid and could convey no title : see *Balkishen Das* v. *Simpson*[4]. It was not necessary to bring a suit within one year from the date of the sale, as it was void and it was not necessary to sue to set it aside. Moreover, the defence pleading the invalidity of the sale was open to be taken, as the Limitation Act applied to suits, applications and appeals, but not to a case, where a plea was raised in defence. *Venkatachalapathi Ayyar* v. *Robert Fischer*[5].

P. B. Shingne, for respondent No. 1 :—At the date of the sale, there was an order of a competent officer that there were arrears. The order was passed by the Mamlatdar under a special enactment, which empowered him to pass it. The proceeding leading to the order should be regarded as a judicial proceeding. The order should not be regarded as a mere departmental one. Otherwise, revenue sales stand the risk of being upset. Whether rightly or wrongly passed the order

(1) (1888) 13 Bom. 221.
(2) (1885) 11 Cal. 287.
(3) (1886) 9 Mad. 457.
(4) (1898) L. R. 25 I. A. 151.
(5) (1907) 30 Mad. 444.

was binding and the sale in pursuance to it must prevail, unless it was set aside by a proper procedure. If the sale is thus maintained, title has passed to the auction purchaser, whose *bona fides* are unquestionable and the defence as made out should not be accepted.

Second Appeal No. 426 of 1918.

MACLEOD, C. J. :—In this case the plaintiffs sued to recover possession of the suit property together with Rs. 109-9-6 as damages and costs. In the trial Court the plaintiffs succeeded. An appeal by the defendants to the District Judge was dismissed.

The plaintiffs claimed title through their vendors, who were the purchasers at a revenue sale on the 27th of May 1904, which was confirmed on the 6th of August 1904. The defendants remained in possession. They resisted the plaintiff's claim to possession on the ground that the sale was invalid.

The first question is, whether the defendants can raise this defence, since they did not file a suit to set aside the sale within one year under Article 12A of the Limitation Act. That question was decided in favour of the defendant in *Venkatachalapathi Ayyar* v. *Robert Fischer*[1]. The reasoning appears to be that the Limitation Act applies only to the limitation of suits, and it is only when a suit comes within section 26 or 28 of the Act that a defence is barred, otherwise the defendant, who would be barred if he was raising the same question as a plaintiff, is not barred from raising that question when he is a defendant. It seems well-recognized that unless the suit falls within section 26 or 28 of the Limitation Act, there is no bar of limitation to a defence. The plaintiff suing for possession has to prove his title. He sets up as his

[1] (1907) 30 Mad. 444.

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title a sale of 1904. The defendants reply "The sale was invalid. It is true that if we file a suit now to set aside that sale, it would be time-barred. But there is nothing in the Limitation Act which prevents us from raising that defence in a suit by a plaintiff for possession of the property which was sold, when the question arises whether the sale in 1904 was a good sale as against the defendants". There was a sale by the Revenue Court under the provisions of the Land Revenue Code for arrears of revenue. At that time proceedings were pending in the suit brought by the defendants against their landlord for a declaration that the lands they held were held by them free of assessment. They had lost in the lower Courts and an appeal was pending in the High Court. After the date of the sale but before the sale was confirmed the High Court set aside the decree of the lower Courts and remanded the case for further inquiry, and eventually in 1905 passed a decree in favour of the defendants. The result was that it was held that the defendants held the lands free of assessment and it would follow that they would be entitled to recover any arrears of assessment which the plaintiff had recovered in the revenue suit. In my opinion it follows that the sale to recover arrears of assessment, when as a matter of fact the land was free of assessment, would be invalid as against the judgment-debtor in those proceedings.

But it has been argued in favour of the plaintiffs that they are purchasers without notice, and therefore their title is good as against the judgment-debtor. That argument is sought to be supported on the analogy of a sale in execution of a decree in a civil Court. No doubt when a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings and he does not ask for a stay of

execution, the purchaser at the execution sale acquires a good title although it may happen that eventually the decree against the defendant is set aside on appeal. It appears to me that there is a very great distinction between sales in execution of civil Court decrees and sales by the revenue Courts for arrears of assessment. I think that if it were found, as it has been found in this case, that as a matter of fact the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and that the purchaser in such a sale would not acquire a good title except by adverse possession. In this case the purchaser did not even get possession. The judgment-debtor remained in possession of the property, and ten years after the sale the vendor who had bought the property for Rs. 8, subject to various mortgages, sold to the present plaintiffs. In my opinion the defendants were entitled to raise the question whether or not the sale in 1904 was valid, and on the facts of this case I think that they succeeded in showing that the sale was invalid.

The result must be that the appeal succeeds, the decree of the lower appellate Court must be reversed and the plaintiff's suit dismissed with costs throughout.

Second Appeal No. 425 of 1918.

In this case the plaintiffs sue for cancellation of the sale of the same property. But in my opinion Article 12A of the Limitation Act applied, and they ought to have filed the suit to set aside the sale within one year. This appeal, therefore, must be dismissed with costs.

HEATON, J.:—I concur in the decision in both matters. As regards pleading in defence an allegation

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which could not be urged were the defendant a plaintiff, it seems to me that the law as set out in the Limitation Act is fairly clear. The Limitation Act deals with the bar of time in the case of suits and applications. In general it does not profess anywhere either in the Act itself or in the Schedule to deal with defences. Therefore I do not think that our law of limitation puts a bar of time to any defence in any case whatever except where it appears from the express words of the Act that such a thing is intended. Such an intention is apparent in the words of sections 26 and 28. The case we are dealing with is not however of the class covered by these two sections. So the law of limitation does not in any way deprive the defendant of his right to put the plaintiff to prove that the sale was a valid sale ; provided of course that the defendant establishes facts which appear to show that the sale was invalid.

That the sale would have been set aside had a suit been brought for the purpose within 12 months I cannot myself doubt. The owner of the property, who is the plaintiff in one suit and defendant in the other, had brought a suit for the purpose of having it declared that he was not liable to pay *dhara*, and that suit had been heard in the first Court and in the Court of first appeal when the land now in suit was sold. That sale was authorised by a decision of the Revenue Court that *dhara* was in arrears. But when the second appeal was decided it was held that no *dhara* was payable, so there would not have been any arrears. To explain a little more fully : the owner was sued for *dhara* in the Mamlatdar's Court and an order for payment was made and on his failure to pay his property was sold. That is to say, it was held that *dhara* was payable. But this was in an order which assumed as determined a question which as a matter of fact had

not been determined. At least it remained to be finally determined by this Court in second appeal.

It may be that in those circumstances the Collector had no authority whatever to sell the property except subject to the condition that the sale would not hold good if the decision of this Court was to the effect, as ultimately it was, that *dhara* was not payable. Or it may be that though the sale might be held, it could only properly have been confirmed subject to such a condition. However it was held and it was confirmed quite regardless of the possibility that the whole foundation, the whole justification of the sale might afterwards be removed by an order of this Court, and such order was in fact eventually made. It seems to me that if sales of this kind are ever to be set aside, we have here overwhelming reason why this particular sale should be held to have been a bad and not a binding sale; or rather one that would not have been upheld had a suit been brought in time to set it aside. I find it difficult myself to imagine stronger reasons for setting aside a sale than are here disclosed. That the sale on its merits therefore was bad and not good seems to me to be beyond question. In the case of *Balkishen Das* v. *Simpson*[1] their Lordships of the Privy Council dealt with a sale which had been made by a Collector on the supposition that arrears of revenue were due when in fact they were not. They unhesitatingly set aside the sale in those circumstances, which do not seem to me to be really appreciably stronger than those which exist in the present case. The appropriate result would appear to be the same in both cases, namely, that the Collector had really no right to sell the property although he thought he had.

But it has been urged that although the sale was bad, yet as the land was sold to a stranger who paid

[1] (1898) L. R. 25 I. A. 151.

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the auction price for it and had no notice of any defect of title, therefore the property cannot be taken away from such purchaser however bad the sale may have been. If the sale had been a civil Court sale, it appears on the strength of the case of *Shivlal Bhagvan* v. *Shambhuprasad*[1] that it would be so. But sales held by civil Courts made after enquiry and after the fulfilment of all the required formalities are in a very different position from sales by Revenue authorities. In the former case you have a Court of Justice at work with its impartiality and its care. In the other you have fiscal authorities at work, and experience and common knowledge tell us that you certainly cannot expect and do not get the same qualities of impartiality and so forth in fiscal authorities as you are entitled to expect and ordinarily do obtain from the civil Courts. So to apply to sales by fiscal authorities precisely the same law which it is proper to apply to sales by civil Courts would seem to me to be a very gross legal extravagance.

I feel no doubt whatever that this principle of a purchaser for value without notice cannot apply to the facts of this case. That principle to begin with is based on this idea that circumstances occasionally arise in which a stranger who has paid money for property has a better right to that property in equity than has the true owner. This of course is rather a startling proposition to any one who is disposed to regard the true owner of property as the person undoubtedly entitled to it. The underlying idea is that the true owner loses his rights, not by parting with them but owing to some carelessness or negligence on his part or on the part of those acting for him. In this particular case we have the true owner fighting vigorously, assiduously

[1] (1905) 29 Bom. 435.

and consistently for what he deems to be his right. There is nothing in the nature of negligence or carelessness on his part, and to deprive him of his property by the application of a principle (or a rule as I prefer to call it) relating to a purchaser for value without notice would to my mind be a very great injustice.

That is all I wish to say for myself in this case. I concur in the orders proposed.

Decree accordingly.

J. G. R.

APPELLATE CIVIL.

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

DALUCHAND BALARAM MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* APPI KOM KHEMA SASTE AND ANOTHER*.

1920. *March 2.*

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Dekkhan Agriculturists' Relief Act (XVII of 1879), Sections 12 and 13—Cause of action—Splitting up of—Two mortgages—Suit on one mortgage—Sale in execution of decree free from any incumbrance—Sale proceeds applied in paying off the mortgage in suit—Balance of sale proceeds—Second suit on another mortgage—Attachment of balance of sale proceeds.

The defendant executed three mortgages as part of the same transaction over the same property. The mortgagee sued to recover money due on one of the mortgages only, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. He obtained a decree in execution of which the mortgaged property was sold free from any incumbrances. The sale proceeds were applied in paying off the decretal amount and there remained a balance. The mortgagee brought a second suit on the remaining two mortgages and prayed for a decree against the balance :—

Held, that the mortgagee having omitted to sue on the remaining two mortgages when he sued on the first mortgage bond, he was barred, by Order II, Rule 2, of the Civil Procedure Code coupled with the provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, 1879, from asking the Court to pass a decree on the two mortgage bonds so as to be

* Second Appeal No. 281 of 1919.