

The 6th January, 1853.

PRESENT: J. DUNBAR, ESQ., *Judge*, AND A.J.M. MILLS AND  
R.H. MYTTON, ESQRS., *Officiating Judges*.

CASE NO. 123 OF 1852.

Special Appeal from the decision of Mr. W. St. Quintin, Additional Judge of Tirhoot, dated 24th July 1851, reversing a decree of Moulvee Niamut Alee Khan, Principal Sudder Ameen of that district, dated 17th January, 1850.

BABOO SHEOSUHYE (*Plaintiff*), *Appellant* v. BABOO BUNEAD SINGH  
AND OTHERS (*Defendants*), *Respondents*.

[*Limitation—Adverse possession—Running of time not interrupted by miscellaneous order referring plaintiff to regular suit—Fresh cause of action not accruing on such order*]

Cause of action does not arise from a miscellaneous order of court, which cannot control existing legal disabilities; adverse possession for more than twelve years being proved, suit barred under the law of limitation.

*Vakeel of Appellant*—Bahoo Ramapersaud Roy.

*Vakeels of Respondents*—Mr. J.G. Waller and Moonshoe Ameer Alee.

THIS case was admitted to special appeal on the 2nd March, 1852, under the following certificate recorded by Messrs. A.J.M. Mills and R. H. Mytton :

(The particulars of this case will be found at page 326 of the zillah Tirhoot Decisions for July, 1851.)

“The suit was instituted to obtain possession, as proprietor by purchase, of a third share in 8 annas of mouza Gopal Ram Kishen, [22] with mesne profits from 1244 up to 1256, and to set aside an auction-purchase.

“The principal defendants pleaded that the suit was barred by the law of limitation, as more than twelve years had elapsed from the date of the auction-sale, which was made in 1833; and they foreclosed the rights and interests of the then possessors of the property in suit, *viz.*, those of Talla Singh and Bojjoo Lal Singh.

“The principal sudder ameen decreed the claim, on the grounds that the plaintiff obtained a decree for possession in 1836, in virtue of a deed of sale executed in his favor by Sarebjeet; that Sarebjeet was in possession at the time of the auction; and that the suit was not barred by lapse of time, as the cause of action arose on the miscellaneous order passed by the Court on the 20th of September, 1836.

“The Judge reversed the decree of the principal sudder ameen, on the point of limitation. He held that as the auction took place in 1833, an action to reverse it *must* be preferred within twelve years from the date it was made.

“It appears that the plaintiff obtained a decree for possession of the property in suit in 1836, and in suing out execution of his decree he was opposed by the defendants, on the plea that they were in possession of the same, and the Court, on the 20th of September 1836, referred him to a regular suit against the possessors, who were not a party to the decree for the establishment of his right.

“We admit the special appeal, to try whether the cause of action arose in this case from date of the auction-purchase, as laid down by the judge, or from the date of the miscellaneous order passed by the civil court, on the 20th of September 1836, as ruled by the principal sudder ameen.”

*Baboo Ramapersaud Roy*, for appellant.—The simple point in this case is, from what date limitation is to be calculated. The law is clear; the Courts are prohibited from trying any suit if the cause of action shall have arisen twelve

years before any suit shall have been commenced. In this case the pleadings show that Sarebjeet was the vendor of the plaintiff; that the property belonged to one Honooman Dutt, who sold it conditionally as the plaintiff says, and absolutely as the defendants say, to Talla Singh; that after the redemption of the mortgage, Honooman, the mortgagor to Talla Singh, sold it absolutely to Sarebjeet; and that plaintiff did not acquire an absolute right in the property until he obtained his decree of foreclosure and possession in 1836. The auction-purchasers acquired the rights and interests of Talla Singh only; and they do not profess to have purchased the right or title of either Honooman or Sarebjeet, from the latter of whom plaintiff purchased the property. There is, therefore, no sort of privity of title between plaintiff and Talla Singh, the vendor of [23] the defendant, and the defendant himself. The cause of action of plaintiff arises therefore from the time when he was endamaged, *viz.*, in 1836.

Mr. J. G. Waller, for respondents.—There was no order passed by the principal sudder ameen on the 20th of September, 1836. When the plaintiff got his decree in 1836, and attempted to execute it, he was met by the defendant in possession on the ground that he was in possession in virtue of a purchase at a public sale in 1833; no opposition was made to the sale, and no opposition to the defendants' taking possession. Talla Singh was at the time the registered proprietor. The principal sudder ameen recorded a reference to the judge on the 20th of September 1836, for instructions how to act, staying, in the meantime, the execution of the decree obtained by the plaintiff. On the 5th of November, 1836, the principal sudder ameen recorded an order that it was unnecessary for the present to make any reference. It was then open to the plaintiff to appeal against the order, but he took no further steps for the execution of his decree. The cause of action cannot have arisen from the 20th of September 1836, because no order of court can create a cause of action; if so, the remedy would be against the court. The cause of action must be independent of any such order. The real issue to be tried in this case is, was there ever a deed of sale in favor of Sarebjeet, the vendor of plaintiff's inheritance, and did he obtain possession under it? The plaintiff alleges that the deed of sale was in 1825, and the present suit is instituted in 1847. The judge has erred in narrowing the time of limitation; it should run from 1825, in which the real cause of action arose. It is also to be remarked that the plaintiff did not make the cause of action the 20th of September 1836, in his plaint, but stated that he was dispossessed after obtaining a decree and was opposed by defendant.

The pleader refers to the decision of the full bench of the 30th of December 1848, and Construction No. 1036, to show that the Court has applied the law of limitation under analogous circumstances.

*Moonshee Ameer Alee* followed on the same side.

*Baboo Ramapersaud Roy, contra.*—The respondents' pleader has gone into the merits of the case, which is foreign to the certificate. If the judge has gone into the merits of the case, and determined that no right of property was vested in Sarebjeet, and that the sale to Talla Singh had been an absolute possession, then there would have been no ground for special appeal. The judge merely rules that the cause of action arose from the date of the sale, and upon this point the appeal has been certified. The judge merely notices, against the principal sudder ameen's finding, that at the time of the auction Sarebjeet was in possession.

#### [24] JUDGMENT.

Mr. J. DUNBAR.—The Judge finds the possession of the defendants to be proved from the date of auction purchase, in 1833. They were not parties

in the suit in which the plaintiff sued for foreclosure, and were therefore in no way affected by the decree. Having been in undisturbed possession for fourteen years, no suit will lie against them under the general law of limitation. I consider the ruling of the Judge to be correct, and would dismiss the appeal.

Mr. A. J. M. MILLS.—The point to be tried in this case is, whether the cause of action arose from the date of the auction purchase, as laid down by the judge, or from the date of the miscellaneous order passed by the civil court, on the 20th of September 1836, as ruled by the principal sudder ameen. I am of opinion that the miscellaneous order cannot be taken as the date of the cause of action in this case. Such an order cannot control existing legal disabilities." The auction sale occurred in 1833, and from this fact, as well as from the plaintiff's own showing that the defendants were in possession when he sued out execution of his decree, the judge comes to the conclusion that Sarebjeet, the vendor of the plaintiff, was not in possession of the property in suit when it was bought by the plaintiff. From that date more than twelve years had elapsed before this suit was commenced, during which period possession adverse to the plaintiff was held. I am of opinion, therefore, that the judge has rightly applied the law of limitation, and would reject the appeal.

I may add, that when the period of limitation had begun to run as against the vendor, the vendee is of course subject to its operation.

Mr. R. H. MYTTON.—The principle upon which the question of what date should be taken as that from which limitation should be calculated, is laid down correctly, in my opinion, by Macpherson, at page 57, as follows:—

"When a man is wrongfully excluded from the enjoyment of that which he has not possessed, the cause of action arises at the time when he first becomes entitled to demand such enjoyment."

At the time of the auction sale, in 1833, the plaintiff only held a mortgage, and could not have claimed possession. I am therefore of opinion that the cause of action ought not to be taken as respects his claim from that date; neither does it necessarily date from the miscellaneous order.

The primary question for the Court to have determined should have been the date up to which Sarebjeet, the vendor to plaintiff, was in possession, and then to have calculated the period of limitation from that date. I would reverse the decision, and remand the case.

[25] *The 6th January, 1853.*

PRESENT: J. DUNBAR, ESQ., *Judge*, A.J.M. MILLS, ESQ. AND  
R. H. MYTTON, ESQ., *Officiating Judges.*

CASE NO. 215 OF 1851.

Regular Appeal from the decision of Mr. H. V. Hathorn, Judge of Sarun,  
dated 17th February, 1851.

KHAJEH TALIB ALEE KHAN (*Plaintiff*), *Appellant* v. RAJA SAHIB  
PERHLAD SEIN (*Defendant*), *Respondent.*

[*Consideration—Suit on bond—Proof of payment of consideration essential—Contract under seal—Proof of consideration not dispensed with on that account.*]

In a suit upon a bond, held that full inquiry as to the payment of the consideration money is an essential point; a contract made under seal not considered as of itself importing that there was a sufficient consideration for the agreement.

*Vakeels of Appellant*—Mr. J. G. Waller, Baboo Sumbhoonath Pundit and Moonshee Abbas Alee.

*Vakeels of Respondent*—Baboos Ramapersaud Roy, Kishen Kishore Ghose and Moonshee Ameer Alee.