Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, and Mr. Justice Pontifex.

1879 *Feby. 5.*

UNNODA CHURN DASS BISWAS (PLAINTIFF) *v.* MOTHURA NATH DASS BISWAS AND OTHERS (DEFENDANTS).*

Suits to cancel Under-tenures—Limitation—Act IX of 1871, *sched. ii, arts.* 119, 120—*Avoidment of Under-tenures—Beng. Act VIII of* 1865, *s.* 16.

Under Beng. Act VIII of 1865, s. 16, under-tenures become void *ipso facto* by the sale, and are not merely voidable at the option of the purchaser.

The interpretation which should be put on the word "avoid" in sched. ii, arts. 119, 120 of Act IX of 1871, is, "to do something in exercise of the right of avoidance."

THIS was a suit brought to recover possession of certain property under the following circumstances:—In the year 1867, the rents of a patni taluk known as Raj Narain Bisonath Das having fallen into arrears, the zemindar brought a suit, obtained a decree, and in execution put the patni tenure up for sale, and purchased it himself on the 28th December 1869. Prior to and at the time of the sale there were certain persons (the defendants in this case) on the estate, who held tenures under the patnidar; the zemindar, however, took no steps to collect rent from these persons, nor did he attempt to oust them till the year 1875, when he proclaimed through the Court in which he had executed his decree, that he intended to take possession. Further than this he took no steps to dispossess them, and on the 31st May 1875 he granted a miras ijara of the zemindari to the plaintiff.

The plaintiff gave notice to the defendants that he intended to cancel their under-tenures, and on their refusing to give up possession, brought this suit against them to recover khas possession of the lands held by them, upon the ground that these under-tenures were avoided when the patni was sold. The defendant denied the right of the plaintiff to set aside these intermediate proprietary rights. The Munsif held that although the auction-purchaser, who was also the superior landlord, had alleged that his auction-

* Appeal, No. 3 of 1878, under s. 15 of the Letters Patent, against a judgment of Mr. Justice Markby and Mr. Justice Prinsep, dated the 24th of August 1878, made in Special Appeal No. 1569 of 1877.

purchased taluk lapsed into his zemindari, yet from the evidence it was clear that he never actually exercised his rights of putting a stop to the under-tenures existing on the lands at the time of his purchase, and, therefore, he never did obtain possession of the taluk free from all incumbrances. Therefore the lands in question could not be said to have been the khas of his zemindari at the time that he granted the miras ijara lease to the plaintiff, and inasmuch as the zemindar could not dispose of the lands as his khas, and the title of the talukdar, who alone could take khas possession, had become extinct before the miras ijara lease was created, that lease could not be so construed as conveying to the plaintiff the right of an auction-purchaser of the old taluk no longer in existence; he therefore dismissed the plaintiff's suit.

The plaintiff appealed to the District Judge, who held that the right to cancel under-tenures upon the sale of a patni for arrears of rent, was a right which could only belong to the person who at the auction-sale purchased the patni tenure, or to his assignee; whereas the plaintiff neither purchased at the execution-sale nor was he the assignee of that purchaser; and that the patni tenure never did pass to the plaintiff at all, but he was simply the holder of a new tenure, *viz.*, a miras ijara, and that, therefore, he had no power to cancel under-tenures.

The plaintiff appealed to the High Court, where it was contended that the plaintiff had not brought his suit in proper time, and that in order to avoid the under-tenure, it was necessary for the purchaser at the execution-sale, or the plaintiff who claimed under him, to have done some act to cancel the under-tenure.

The Court consisting of Mr. Justice Markby and Mr. Justice Prinsep were divided in opinion.

Mr. Justice Markby considered that, in order to enable the plaintiff to bring this suit, it was necessary that the zemindar, or the person claiming under him, should declare the under-tenure cancelled within a reasonable time.

Mr. Justice Prinsep, on the other hand, thought that, under art. 120 of sched. ii of Act IX of 1871, the legislature had prescribed the period of twelve years as being a reasonable time within which the zemindar or those claiming under him

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might bring a suit of this nature. The appeal was, however, dismissed in accordance with the decision of the Senior Judge.

The plaintiff appealed from the judgment of Mr. Justice Markby under s. 15 of the Letters Patent.

Baboo *Doorga Mohun Dass* for the appellant.—Mr. Justice Markby has held that a suit to avoid an under-tenure must be brought within "a reasonable time," whilst Mr. Justice Prinsep has held that to import the condition "of reasonable time" interferes and adds to the law of limitation already in force in this country. Now the Limitation Act, by arts. 119 and 120 of sched. ii, Act IX of 1871, lays down a specific time, *viz.*, twelve years, within which a plaintiff may bring his suit to avoid under-tenures, and, therefore, no question of "reasonable time" within which a suit may be brought can arise. [JACKSON, J.—The difference between the two Judges seem to be this, that Markby, J., held that the mere intention of the auction-purchaser to avoid an under-tenure makes such tenures void; whilst Prinsep, J., on the other hand, seems to hold that such under-tenures cannot be avoided except by a suit. Nor does the expression of an intention of the auction-purchaser to avoid his under-tenure render the holder thereof a trespasser.] Laches to enforce a legal right cannot determine the right; and where the right has expressly been given by the legislature, as in this case by Act IX of 1871, no Court of law is justified in diminishing the period in which the right may be exercised on the ground of the laches of any person to enforce that right—*Juggernath Sahoo* v. *Syud Shah Mahomed Hossein* (1). The principles of justice, equity, and good conscience cannot be applied to this case; they are only to be invoked in cases "in which no specific rules may exist"—*Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2); but in this case we have a specific law prescribing the period within which we may bring our suit. No silence on our part can be taken as a waiver to our right of suit if we are within time prescribed by law—*Taruck Chunder Bhuttacharjee* v. *Huro Sunkur Sandyal* (3); *Peddamuthalaty* v. *N. Timna Reddy* (4).

(1) L. R., 2 I. A., 54.
(2) L. R., 4 I. A., 50.
(3) 22 W. R., 267.
(4) 2 Mad. H. C., 270.

Baboo *Srinath Dass* for the respondent.—From the words of the 16th section of Act VIII of 1865, it is apparent that the tenures are not void, but simply voidable at the time of sale. [PONTIFEX, J.—Assuming that is so, why should a period of limitation be introduced?] I rely on the case of *Koylash Chunder Dutt* v. *Jubur Ali* (1), which decides that a right to cancel an under-tenure may be transferred, but that right must be exercised within a reasonable time.

Judgments of the Court were:—

GARTH, C. J. (PONTIFEX, J., concurring).—(who, after stating the facts, continued):—Mr. Justice Markby's view appears to have been founded on the supposition, that the sale of the patni did not of itself avoid the under-tenure, unless it was followed by an intimation by the purchaser or those claiming under him, that he or they intended to exercise their right to cancel it, or in other words, that the under-tenures were only voidable at the option of the purchaser or his assigns, and that this option must be exercised within a reasonable time.

Now the language of Beng. Act VIII of 1865 is, that "purchasers of tenures sold under that Act acquire them free from all incumbrances which may have accrued thereon by any act of any holders of those tenures, their representatives, or assigns."

I think that must mean, that at the time when the purchaser acquires the tenure, all under-tenures created by the former holder of the tenure are *ipso facto* avoided by the sale; and that he and those claiming under him are by art. 120 of the Limitation Act entitled to bring their suit for the purpose of realizing the subject-matter of those under-tenures within twelve years from the time of the auction-sale.

I confess, it seems to me, that the words of art. 120, "to avoid incumbrances of under-tenures in a patni taluk, &c.," are hardly appropriate; because the sale itself in the view which I take, avoids the under-tenures; and the suit to which

(1) 22 W. R., 29.

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art. 120 is intended to apply, must be, I think, a suit like the present to recover possession of the subject of the under-tenure.

As my learned brothers agree with me, the decision of the Division Bench, which was in accordance with Mr. Justice Markby's opinion, will be reversed, and also the decisions of the lower Courts; and the plaintiff will be entitled to recover what he claims in this suit with costs in all the Courts.

JACKSON, J.—I am of the same opinion. I think the only interpretation to be put on the word "avoid" in arts. 119 and 120 of Act IX of 1871, sched. ii, is, "to do something in exercise of the right of avoidance." The words of s. 16 of Beng. Act VIII of 1865 are quite unambiguous, and do not enable the purchaser, at his option or discretion, to avoid under-tenures, but declare that he acquires the under-tenure which is sold under the Act free from all incumbrances.

But even if the case had been otherwise, I confess I see no ground for refusing the plaintiff his remedy in this case, because we understand that the zemindar, who was himself the purchaser of the patni taluk, not only refused to receive rent from the holder of the *ousut* taluk, but proceeded to create entirely other relations, by creating the lands comprised in the taluks, or some of them, into a miras ijara; that is to say, he parted with his rights and with the rights of the zemindar, absolutely, to a new holder, reserving only a certain ijara rent for himself, and in that way, I should say, he gave, in the plainest manner, notice of his intention to avoid, it may be called, or to act upon the privilege which the law confers of acquiring this tenure free of all incumbrances created by the previous patnidar. To import the condition that the intention of the purchaser must be declared within a reasonable time, would be placing a limitation upon the plain words of the legislature, which is quite beyond the power of the Court.

Appeal allowed.