

*Before Sir Francis W. Maclean K.C.I.E., Chief Justice, Mr. Justice Ghose
and Mr. Justice Brett.*

1902
May 8.

CHOWDHRY KESRI SAHAY

v.

GIANI ROY.*

Civil Procedure Code (Act XIV of 1882) ss. 310A, 551—Sale—Sale set aside on deposit of debt within 30 days—'Date of sale'—Limitation—Limitation Act (XV of 1877) s. 14, Sch. II, Art. 12—Appellate Court, order of—Second appeal—Exclusion of time during which a second appeal was pending.

A property was sold in execution of a decree against the judgment-debtor on the 22nd May 1900. The sale was set aside by the first Court on the 25th May following, but was declared valid by the Appellate Court on the 2nd August 1900. The judgment-debtor preferred a second appeal to the High Court on the 15th August 1900, which appeal was dismissed on the 5th September following. On the 12th September the judgment-debtor applied under s. 310A of the Civil Procedure Code to have the sale set aside on deposit of the requisite sum.

Held, that the application was barred by limitation, not having been made within 30 days from the date of sale; and that, although in computing the period of limitation, the time between the 25th May and the 2nd August may be excluded, the time between the 15th August and the 5th September, spent in prosecuting the second appeal, cannot be excluded.

THE judgment-debtor, Chowdhry Kesri Sahay Singh, appealed to the High Court.

A property belonging to the judgment-debtor was sold on the 22nd May 1900, in execution of a decree against him, in the Court of the Munsif of Shahabad, and was purchased by the decree-holder. On the 25th May following, the sale was set aside by the Munsiff on the ground that the Nazir who conducted the sale had no authority to accept the bid and close the sale without his sanction. Thereupon on some date between the 26th and 29th May, the judgment-debtor deposited in Court the full decretal amount with costs. The order of the Munsiff of the 25th May was, however, set aside on appeal by the District Judge on the 2nd August 1900, and the sale was declared to be a good and valid one. Against this order of the District

* Appeal from Order No. 148 of 1901, against the order of H. R. H. Coxe, Esq., District Judge of Shahabad, dated the 29th of January 1901, affirming the order of Babu D. Bose, Munsiff of Shahabad, dated the 22nd of December 1900.

Judge, the judgment-debtor preferred a second appeal to the High Court on the 15th August 1900, which appeal was summarily dismissed on the 5th September following.

1902

 CHOWDHRY
 KESRI
 SAHAY
 v.
 GIANI ROY.

Then on the 12th September 1900 the judgment-debtor deposited five per centum of the purchase-money as required by s. 310A of the Civil Procedure Code, and applied under that section to have the sale set aside. The Munsiff refused the application on the ground that it was barred by limitation, as the deposit was not made within 30 days from the date of sale, and that the only period which the judgment-debtor was entitled to get over and above the 30 days, was the period from the 25th May 1900, when the sale was set aside, and the 2nd August 1900, when the order setting aside the sale was set aside and the sale confirmed, but that he was not entitled to get the time spent in prosecuting his unsuccessful appeal to the High Court. There was an appeal to the District Judge, who upheld the order of the Munsiff and dismissed the appeal summarily. Then the judgment-debtor appealed to the High Court.

The appeal was originally heard by a Divisional Bench consisting of GHOSE and BRETT JJ., who differed in opinion, and the appeal then came on before MACLEAN C. J. under the provisions of s. 575 of the Civil Procedure Code.

Mr. J. T. Woodroffe (Advocate-General) and Babu Umakali Mukerjee for the appellant.

Dr. Rashbehary Ghose and Baboo Saligram Singh for the respondent.

MACLEAN C. J. This case comes before me under s. 575 of the Code of Civil Procedure by reason of a difference of opinion between Mr. Justice Ghose and Mr. Justice Brett. The facts are not in dispute, and the point is really a very short one. Certain property in certain execution proceedings was put up for sale on the 22nd May 1900 and purchased, as I understand, by the decree-holder. On the 25th May the Munsiff held that there was no sale by reason of certain irregularities, and on the 26th May the judgment-debtor deposited in Court the

1902
 CHOWDHRY
 KESRI
 SAHAY
 v.
 GIANI ROY.

decretal amount with costs. On the 29th May the execution case was struck off. The decree-holder, the purchaser, appealed, and on the 2nd August 1900 the order of the Munsiff setting aside the sale was reversed and the sale was held to be a good one. The judgment-debtor filed a second appeal against that decision on the 15th August 1900. On the 5th September 1900 that appeal was dismissed under s. 551 of the Code. On the 12th September an application was made by the judgment-debtor to set aside the sale under s. 310A on his depositing the five per cent. on the purchase-money necessary under that section. That application was rejected by the Munsiff, upon the ground that the money was not tendered within 30 days from the date of sale. That order was affirmed on the 29th of January by the District Judge. The judgment-debtor appealed to the High Court, and on the 16th of April 1902 the present difference of opinion arose between the learned Judges I have named, and the matter now comes before me.

The question appears to me to be shortly this: What is meant by the words "date of sale" in s. 310A. of the Code? I need not read that section, the terms of which are familiar to most of us. It enables a person, whose property has been sold, to apply at any time within thirty days from the date of sale to have it set aside on complying with certain conditions. I think the date of sale was the 22nd of May 1900, when the property was put up for sale and knocked down to the highest bidder, and both the learned Judges seem to take that view. It has been suggested that the date of sale means the date when the sale was confirmed, and reference was made to the case of *Baijnath Sahai v. Ramgut Singh* (1). I do not think that that case has any bearing upon that now before me. That decision turned upon the question what was the date of the confirmation of the sale within the meaning of Article 12 of the Indian Limitation Act. It is difficult to say, if the 22nd of May was not the date of the sale, what the date of the sale really was. I am unable to accept the suggestion that the date of the sale was either the 2nd of August 1900, when the order of the District Judge was made, or the 5th of September 1900, when the appeal from that decision was dismissed under

(1) (1896) I. L. R. 23 Calc. 775; I. L. R. 23 I. A. 45.

s. 551. I think it must be the date when the property was actually sold. If it were the 2nd August, it would not assist the present appellant, for the application under s. 310A was not made within 30 days from that date.

1902

 CROWDHRV
 KESRI
 SAHAY
 v.
 GIANI ROY.

It is said that the judgment-debtor could not have applied under s. 310A to set aside the sale within 30 days, because the Munsiff had held that there was no sale. It is true that the Munsiff held that the sale was bad, but that order was liable to reversal on appeal. Under these circumstances the judgment-debtor would have been prudent, if he had made his application under s. 310A within 30 days from the 22nd May, in which event he would have been insured, so to say, against a reversal of the Munsiff's order. If the Court had then refused to accept the money by reason of its own mistake, different considerations might have arisen. But this did not happen. If the judgment-debtor could not have made the application by reason of there having been no sale, then the case is outside the section-altogether, but unfortunately for him there was a sale, and he did not make his application within 30 days of its date.

There is one other argument I have to deal with. Some reference has been made to certain observations of my own in the Full Bench case of *Chundi Charan Mandal v. Banke Behary Lal Mandal* (1), in which I said: "There may be circumstances in a particular case, which would render such a rule quite inequitable." I was alluding there to possible cases in which the decree-holder had by his conduct misled the judgment-debtor, and so prevented him paying in the money within the specified period and cases of that description, and I said there might be circumstances which would render the rule inequitable. There is no such element in the present case, and it is unnecessary to discuss how far my observation was well founded, having regard to the language of s. 310A.

The case may or may not be a hard one: into that I am unable to enter. I think that the view of Mr. Justice Ghose is right, and this appeal must be dismissed with costs.

(1) (1899) I. L. R. 26 Calc. 449.

1902

CHOWDHRY
KESRI
SAHAY
vs.
GIANI ROY.

GROSE J. This is rather a hard case, but the question is whether we are at liberty to give the appellant the relief that he asks for.

In execution of a certain decree against the appellant, the judgment-debtor, certain property belonging to him was sold in the Munsiff's Court on the 22nd May 1900, and it was purchased by the decree-holder. The sale, however, was set aside by the Munsiff on the 25th May, on the ground that the Nazir, who conducted the sale, had no authority to knock down the property without the permission of the Court. After the sale was thus set aside, *vis.*, on the 26th or 29th May (the exact date does not appear), the judgment-debtor deposited in Court the amount of the money due to the decree-holder. On appeal, however, to the District Judge by the decree-holder purchaser against the order of the Munsiff of the 25th May, that officer held that the sale was a perfectly good one, and accordingly, on the 2nd August 1900, set aside the order of the Munsiff, the result being that the sale was restored.

Against this order of the Judge, the judgment-debtor preferred a second appeal to this Court on the 15th August 1900, but it was dismissed under s. 551 of the Code on the 5th September of the same year. On the 12th September following, the judgment-debtor applied, under s. 310A of the Code, for setting aside the sale in question, depositing the five per centum on the purchase-money due to the purchaser. But the Munsiff held that the application was barred by limitation, it not having been presented within 30 days (as prescribed by s. 310A) from the date when under the order of the District Judge the sale was confirmed. The learned Judge of the Appellate Court has taken the same view and dismissed the appeal that was preferred to him.

It has been contended on behalf of the judgment-debtor that the sale did not become final until this Court dismissed his appeal on the 5th September 1900, and that the application having been made within 30 days from that date, it is within time. In support of this contention the case of *Bairjnath Sahai v. Ramgut Singh* (1) has been relied upon. It has been further

(1) (1898) I. L. R. 23 Calc. 775 ; I. R. 23 I. A. 45.

argued that, following the equitable principle underlying the provisions of s. 14 of the Indian Limitation Act, the appellant is entitled to deduction of the period between the 15th August, when the second appeal was presented to this Court, and the 5th September, when it was dismissed, that if such period be deducted, he is not barred, and that the rule of 30 days' limitation as prescribed by s. 310A is not inflexible.

S. 310A is very specific and clear. It provides that—
 “Any person whose immoveable property has been sold under this chapter, may at any time within 30 days from the date of sale apply to have the sale set aside on his depositing in Court—

- (a) for payment to the purchaser, a sum equal to five per centum of the purchase-money, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

“If such deposit is made within thirty days, the Court shall pass an order setting aside the sale.”

The section says “may within 30 days from the day, of sale apply,” etc., etc.—“on his depositing in Court,” etc., etc. It does not say “day of confirmation of sale” or “the day when the sale becomes final.” The “day of sale,” I take it to be the day when the sale is held; and in the present case it was on the 22nd May. The day when the High Court dismissed the appeal of the judgment-debtor could in no sense be taken to be the day of sale. As to the case of *Bajjnath Sahai* relied upon by the learned Counsel, it has, I think, no application to the circumstances of this case. In that case, the Collector had refused to confirm the sale, but his order was set aside by the Commissioner on the 25th January 1884. The order of the Commissioner was, however, discharged by the Board of Revenue on the 12th August 1884, but subsequently on the 21st August 1886 they discharged their own order, and revived that of the Commissioner, and it was held, with reference to the question of limitation raised in the

1902

CHOWDHRY
 KESRI
 SAHAY
 v.
 GIANI ROY.

1902
 CHOWDHRY
 KESRI
 SAHAY
 v.
 GIANI ROY.

case under Art. 12 of the 2nd Schedule of the Indian Limitation Act, that there was no final or definite confirmation of the sale until that date, *i.e.*, the date of the Revenue Board's order last mentioned. It will be observed that the words of Art. 12 of the Act are "when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought"—words substantially different from those which occur in s. 310A of the Code.

I am therefore unable to accept the contention of the learned Counsel as to "the day of sale" as mentioned in s. 310A. And I am of opinion that the limitation prescribed by that section runs from the 22nd May 1900. But then the sale was set aside by the Munsiff on the 25th May. It was not therefore in legal existence between that date and the 2nd August 1900, when the Judge restored it, and therefore the period of limitation as prescribed by the section, which began to run from the 22nd May, was in suspense between the 25th May and the 2nd August 1900, but it would continue to run from the latter date until the period of 30 days was completed.

Turning then to the next point urged by Mr. Bonnerjee, it has been conceded that the provisions of s. 14 of the Indian Limitation Act (1877) do not apply to an application under s. 310A of the Code, which was promulgated some years after the passing of the Limitation Act, and in respect of which a special limitation is provided in the section itself, but what has been contended for is that the equitable principle which it embodies should apply, and that the time during which the appeal was pending before the High Court should be deducted in favour of the judgment-debtor. The learned Counsel has further argued, with reference to certain observations made by the Judges in the Full Bench case of *Chundi Charan Mandal v. Banke Behary Lal Mandal* (1), that s. 310A does not lay down a hard-and-fast rule that, unless the full amount as enjoined by that section be paid within 30 days from the date of sale, the Court had no power to set aside the sale, and that, as observed by the learned Chief Justice in the case of *Chundi Charan*, "there may be circumstances in a particular case which would render such a rule quite inequitable." The

(1) (1899) I. L. R. 26 Cal. 449.

question raised in that case was whether the shortness of deposit that was made by the judgment-debtor was due to a mistake of the Court in calculating the amount to be paid, and whether by reason of such shortness of deposit the judgment-debtor was debarred from obtaining relief under s. 310A, and the observations that were made had reference to that question. Now, are there any circumstances in this case which would render the application to this case of the rule laid down by s. 310A quite inequitable? It will be observed that there was no question between the parties that the amount specified in the proclamation of sale was due to the decree-holder, and accordingly the judgment-debtor, so soon as the sale was set aside by the Munsiff, deposited the amount in Court to the credit of the decree-holder, and when, on the 2nd August 1900, the sale was declared to be a good sale by the District Judge, it was incumbent upon him to deposit (if he desired to avail himself of the remedy allowed by s. 310A) the amount (and it was a very small amount) that was required to be paid, viz., the five per centum upon the purchase-money (Rs. 386-5-6), and to put in his application under that section. He neglected to do so, and chose to take up the matter to the High Court, contesting the propriety of the order of the District Judge. I do not think that in the circumstances of this case, it would be inequitable to apply the rule as embodied in s. 310A, and that the judgment-debtor is entitled to say that the period during which his appeal was pending in the High Court should be deducted in his favour in calculating the 30 days from the date of sale.

It has, however, been said that the sale having not been accepted as valid by the Court executing the decree, but by the Court of appeal, the judgment-debtor had the right to test the question of the validity of the sale by a second appeal to this Court, and that therefore, even if he is not entitled to calculate the period of limitation from the date of the dismissal of the appeal, he is entitled to a deduction of the time during which the appeal was pending before the High Court. I regret I am unable to adopt this view. I do not think that any distinction in principle can be drawn between the case where the sale is affirmed by the Court holding the sale, and where it is affirmed by the

1902

CHOWDHRY
KESRI
SAHAY
v.
GIANI ROY.

1902

CHOWDHRY
KESRI
SAHAY
".
GIANI ROY.

Appellate Court, and the law does not evidently contemplate that the propriety of an order like this might be tested by an appeal to the High Court before the period of limitation as prescribed by s. 310A should begin to run. Granting that the judgment-debtor had a right of second appeal, the question would still arise, what was the date of sale as contemplated by s. 310A? As already stated, the section does not speak of the date when the sale becomes final or conclusive, and it seems to me that, if the opposite view be accepted, the result would be that in every case where a sale is confirmed by the Appellate Court and not by the Court of first instance, the judgment-debtor would have a right to test the correctness of the order of the Appellate Court by a second appeal, and would have the right to calculate the period of 30 days from the date of the final judgment, or to claim a deduction of the period during which the case might be pending before the High Court—a state of things which, I am inclined to think, is not contemplated by s. 310A.

It seems to me that the necessity for making an application under s. 310A arose in this case when the Appellate Court held that the sale was a good sale, if the judgment-debtor was desirous of availing himself of the remedy which that section gives. Putting the most liberal construction upon s. 310A, and taking even the date of the order of the Appellate Court as the day of sale, as held by the Courts below in this case, the application presented by the judgment-debtor was beyond time. As observed by the learned Chief Justice in his referring order in the case of *Chundi Charan Mandal*, s. 310A affords "a special indulgence to the judgment-debtor; it gives him, if I may say so, yet one more chance of saving his property. But he can only avail himself of that special indulgence if, as a condition precedent, he make the deposit within the 30 days." In this case the judgment-debtor failed to do so so far as the 5 per centum was concerned, and I am unable to hold that he is entitled to have the sale set aside.

I should therefore dismiss the appeal. As my learned colleague, however, takes a different view, the case will be placed before the learned Chief Justice with a view that it may be referred to a third Judge.

Brett J. The only point for determination in this appeal is the question of limitation. Both of the lower Courts have held that the application made by the present appellant under s. 310A, Civil Procedure Code, is barred by limitation, and he has appealed to this Court.

1902
 CHOWDHRY
 KESRI
 SAHAY
 v.
 GIANI ROY.

The facts are simple. In execution of a decree which the opposite party had obtained against the petitioner (appellant) he brought certain immoveable property of the petitioner to sale in the Court of the Munsiff of Arrah. The sale was held on the 22nd May 1900 by the Nazir of the Court, and the property was knocked down to the opposite party (the decree-holder). On the 25th May 1900, however, the Munsiff, when the matter was brought before him, refused to accept the sale as valid or to declare the decree-holder to be the purchaser, holding that the Nazir had no authority to accept the bid of the decree-holder and close the sale without his sanction.

The petitioner (the judgment-debtor) thereupon between the dates of the 26th and 29th May deposited in Court the full decretal amount with costs.

The decree-holder then appealed to the District Judge against the Munsiff's order of the 25th May, and that officer set aside the order of the Munsiff on the 2nd August 1900, and declared the sale to be valid and the decree-holder to be the purchaser.

The petitioner appealed against the appellate order of the District Judge to this Court on the 15th August 1900, but the appeal was summarily dismissed on the 5th September.

On the 12th September the petitioner deposited the 5 per cent. on the purchase-money as required by s. 310A, Civil Procedure Code, and applied under that section to have the sale set aside. The Munsiff held that the application was barred because it had not been made within 30 days from the 2nd August 1900, the date on which the District Judge declared the sale to be valid, and he therefore dismissed it. The petitioner appealed to the District Judge, but his appeal was dismissed. He has accordingly preferred the present second appeal to this Court.

The only point which has been argued before us is whether the petitioner is entitled to deduct for the purposes of limitation the period between the 15th August and the 5th September,

1902
 CHOWDHRY
 KESRI
 SAHAY
 v.
 GIANI ROY.

during which his appeal against the appellate order of the District Judge confirming the sale was pending before this Court. If he is so entitled, his application was in time.

I do not think that the ruling relied on by the learned Counsel in the case of *Baij Nath Sahai v. Ramgout Singh* (1) can be taken to directly apply to the present case, as the provisions of s. 310 A of the Civil Procedure Code differ materially from Art. 12 of the 2nd schedule of the Limitation Act, which was under consideration in that case.

But at the same time the present case seems to me to be quite exceptional. This is not a case in which the sale having been accepted as valid by the Court in which execution was taken out, the judgment-debtor applied to have the sale set aside. The sale was not accepted as valid by the Court in which execution of the decree was in progress, but that Court refused to so accept it. It was the decree-holder who appealed, and it was the Appellate Court which declared the sale to be valid.

It cannot therefore be said that the proviso to s. 310A, Civil Procedure Code, directly applies to this case. The judgment-debtor did not elect to seek a remedy other than that provided in the section. The matter was taken before the Appellate Court by the other party. The judgment-debtor under the circumstances did all he could, when he paid in the full decretal amount with costs before the sale was accepted as valid. The order of the Appellate Court accepting the sale as valid is not open to question in this appeal, but as the decretal debt had been discharged before the order of the Appellate Court was passed, it is impossible, having regard to the latter portion of s. 291, Civil Procedure Code, to take the date of the order of the Appellate Court, viz., the 2nd August 1900, as "the date of the sale" for the purpose of calculating the period of limitation provided in s. 310A, Civil Procedure Code. The date when the Nazir held the sale, viz., the 22nd May 1900, must be taken to be the date of the sale. At the same time limitation cannot be held to have run for the period during which the order of the Munsiff refusing to confirm the sale was under appeal to the District Judge, as otherwise the application under s. 310A

(1) (1896) I. L. R. 23 Calc. 775; L. R. 23 I. A. 45.

Civil Procedure Code, would have been barred before it could possibly have been made.

The question then arises whether, when the sale had been declared to be valid by the Appellate Court, the judgment-debtor was placed as regards his right to make an application under s. 310A of the Civil Procedure Code in the same position as if the sale had been accepted as valid by the Court executing the decree. It appears to me that it would be highly inequitable to hold that he was in the same position. If an appeal lay against the order of the Appellate Court declaring the sale to be valid (as to which it is perhaps hardly necessary to express an opinion in this case), then under the circumstances of this case, and having regard to the fact that the order declaring the sale to be valid was passed by the Court of first appeal, it seems only equitable to hold that the judgment-debtor had the same right to test by a second appeal the correctness of the order of the Court of first appeal as the decree-holder had to test the correctness of the order of the executing Court refusing to accept the sale as valid by an appeal to the District Judge, and the question of the validity of the sale can only be held to have been finally determined by the decision of the Court of second appeal. And under these circumstances the judgment-debtor, appellant, is, in my opinion, entitled to allowance for the period during which the matter was under appeal to the High Court, if indeed he was not entitled (as has also been argued) to commence to calculate the period of limitation from the date of the decision of this Court, and accordingly his application was not barred by limitation.

It is not, and could not be, suggested in this case that the judgment-debtor was guilty of any *laches* in pursuing his remedies to avoid the sale of his property, and it would therefore be highly inequitable to construe the provisions of s. 310A, Civil Procedure Code, so strictly as to hold in this case that the judgment-debtor sacrificed his remedy under that section by following the course which was his natural remedy against the action taken by the decree-holder.

I would therefore decree the appeal with costs.

M. N. B.

Appeal dismissed.

1932

CHOWDHURY
KESBI
SARKAR
v.
GIANT ROY.