

## APPELLATE CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.*

1876  
Aug. 3.

ABUL MUNSOOR (ONE OF THE DEFENDANTS) *v.* ABDOOL HAMID  
*alias* SABHAN MIAH (PLAINTIFF).\*

*Limitation—Act IX of 1871, sch. II., cl. 14—Suit to set aside a Sale—Purchase of Decree by Joint-debtor.*

*M* sold to *S* her rights under a decree for mesne profits which she had obtained against *A* and two other persons, and *S* thereupon proceeded to execute the decree against *A*'s property, and that property was sold in execution of the decree obtained by *S*, and was purchased by *B*: but in a suit brought by *A* for a declaration that *S* was not the real purchaser, the Court found that *S* had in fact purchased the decree benami for *A*'s two joint-debtors, and that consequently he had no right to execute it against the property of *A*. In a suit brought by *A* against *B* in 1874 for the purpose of recovering the property, *Held*, that the purchase of the benefit of the decree by *A*'s joint-debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable, and the sale under it binding on *A*. The suit, therefore, was in effect a suit to set aside a sale under a decree within the meaning of cl. 14 of sch. II. of Act IX of 1871, and inasmuch as it was not brought within one year from the date of the sale, was barred.

THE facts of this case were as follows:—

A certain Mrs. Munro obtained a decree for mesne profits against three persons, the present plaintiff Abdool Hamid, and two Hindus, Guru Gobind and Bykunt Nāth. In the year 1268 (1861), Mrs. Munro sold her rights under this decree to one Shitul Chunder, and Shitul Chunder then took proceedings to execute the decree against the estate of Abdool Hamid. Abdool Hamid objected to this, on the ground that Shitul Chunder had purchased the decree, not for himself, but *benami* for his (Abdool Hamid's) two other joint-debtors, and he then brought a suit for the purpose of obtaining a declaration to the effect that his co-debtors were the real purchasers of the decree, and conse-

\* Regular Appeal, No. 152 of 1875, against a decree of the Judge of Zilla Dacca, dated the 12th of February 1875.

quently that according to a well established rule of law the judgment-debt was thus satisfied. In that suit he obtained a decree on the 16th March 1872. It was found by the Court, that Shitul Chunder had in fact purchased the decree for the two other joint-debtors, and consequently that Shitul Chunder had no right to execute the decree against Abdool Hamid's property.

Previously, however, to the institution of that suit, an order for execution under the decree had been obtained from the Court by Shitul Chunder against Abdool Hamid's property; and under that execution, the property, which is the subject of the present suit, was sold, and Abul Munsoor (defendant No. 2) became the purchaser. This sale took place on the 19th of September 1870. On the 12th May 1874, Abdool Hamid, alleging that the sale having been held in execution of a decree which was at the time of sale inoperative, was null and void, brought this suit against Abul Munsoor and others for the purpose of recovering possession of the property thus sold.

The only defendant who appeared was Abul Munsoor, the appellant. His main contentions were, that as the property had come into his possession by a sale in due course of law, and no objection had been taken by the plaintiff under s. 257, Act VIII of 1859, the sale was final, and the suit not maintainable; that the suit was one to set aside a sale, and, not having been brought within one year from the date of the sale, was barred by the law of limitation, and that the suit was moreover barred by s. 7, Act VIII of 1859. The Judge held that the suit was not one to set aside the sale, which would have been unnecessary, and therefore the limitation of one year was not applicable, and that the suit was not barred by s. 7. He therefore gave a decree in favour of the plaintiff, from which the defendant appealed to the High Court.

Mr. *M. Ghose* (Mr. *L. Ghose* with him) contended that under the provisions of s. 11, Act XXIII of 1861, the suit would not lie; that the bringing of the suit amounted to a splitting of the cause of action within s. 7, Act VIII of 1859; and that the property having passed to the defendant by operation of law, the suit was not maintainable, and cited

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*Mariott v. Hampton* (1), *Nojabut Ali Chowdhry v. Busseeroollah Chowdhry* (2), *Radhagobind Shaha v. Brojender Coomar Roy Chowdhry* (3) and *Chunder Kant Surma v. Bissessur Surma* (4). Even if such a suit does lie, in this case the plaintiff's suit is clearly barred by limitation. Act IX of 1871, sched. II, art. 14, provides that a suit to set aside a sale in execution of a decree must be brought within a year of the sale. Though the plaintiff chooses to call the suit one for recovery of possession, it is in effect a suit to set aside the sale, and should have been brought within a year from the date thereof—*Ram Kant Chowdhry v. Kalee Mohun Mookerjee* (5). The following cases were also cited: *Krishnaji Vishvanath Josi v. Mukund Chivanshet* (6). A party bound by proceedings must, in order to set them aside, bring a suit within one year—*Brijo Kishore Nag v. Ram Dyal Bhadra* (7).

The learned Counsel was stopped by the Court who called upon the pleader for the respondents on the point of limitation.

Babu *Sreenath Doss* for the respondents.—The only remedy the plaintiff has is to sue in a regular suit. The purchase of a decree by one of the debtors operates as a satisfaction of the decree, which cannot, after such satisfaction, be legally executed—*In the matter of Digamburee Dabee* (8). If in fact there was no live decree which could be executed anything done under it would be void *ab initio*. [GARTH, C.J.—But a decree does not lose any of its virtues, because it has been paid, and a sale in execution of such decree will be void.] [GARTH, C.J.—Not void, but only voidable]. If the sale had been made under a decree in existence at the time, then only would the principle laid down in *Jan Ali v. Jan Ali Chowdhry* (9) apply. If from a time previous to sale there was not a decree, the one year's limitation would not apply—*Badree*

(1) 2 Smith's L. C., 405.

(2) 11 B. L. R., 42.

(3) 7 W. R., 372.

(4) 7 W. R., 312.

(5) 22 W. R., 84.

(6) 2 Bom. H. C. Rep., 18.

(7) 21 W. R., 133.

(8) B. L. R., Sup. Vol., 938.

(9) 1 B. L. R., A. C., 56.

v. *Lokeman* (1). Limitation of one year applies only to set aside sales on account of irregularity and not on account of fraud—*Kishen Bullub Mahatab v. Roghoo Nundun Thakoor* (2).

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Mr. *M. Ghose* in reply.

*Cur. adv. vult.*

The judgment of the Court was delivered by

GARTH, C.J.—In this appeal it is only necessary for us to decide one of the points which have been taken by the defendants, the appellants, and that point is upon the plea of limitation.

(After stating the facts as above, the learned Chief Justice proceeded as follows):—

The plaintiff relies upon the same ground as that taken in his former suit, *viz.*, that Shitul Chunder's purchase was made on behalf of his (the plaintiff's) co-debtors; and that the judgment-debt was consequently extinguished. He contends, therefore, that the subsequent sale was void as against the plaintiff.

One objection to this suit, which was made in the Court below, and is now made by the defendant, the appellant, is, that it is brought to set aside a sale in execution of a decree of a Civil Court within the meaning of cl. 14 of the 2nd schedule of the present Limitation Act, and this point was argued before us yesterday.

There are other questions in the case, and many circumstances which we should have had to take into consideration, if it had been necessary to decide the suit upon its merits. But the facts already mentioned are sufficient to raise the question of limitation, and that question we think ought to be decided in favour of the appellant.

It has been argued by the plaintiff's pleader, that this is not a suit for the purpose of setting aside the sale by which the property passed to defendant No. 2, but a suit to recover possession of that property, and that, assuming the purchase of the decree by Shitul Chunder to have been made for the plaintiff's co-debtors, the decree itself is no longer in force, and

(1) 4 Agra H. C. Rep., 89.

(2) 6 W. R., 305.

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the sale which took place under it was absolutely null and void. It is obvious, however, that this is not a correct view of the law. The purchase of the benefit of the decree by the plaintiff's joint-debtor could not affect the decree itself, although it had the legal effect of satisfying the judgment-debt which the decree created. There is no suggestion that the decree was not in itself a just one; and the order made by the Court in the execution of that decree and the sale which took place under that order were both binding upon the plaintiff until proper steps were taken to reverse them, and the title of the defendant who purchased under that sale was also a perfectly good title, until the sale was set aside in due course of law. The mistake into which the learned Judge has fallen in the Court below is this, that he supposes the sale which took place under a valid order of the Court and under a decree which is at this moment effectual and undisputed, is *ipso facto* void by reason of the judgment-debt having been satisfied. The sale was not void, but only voidable, and whatever may be the frame or language of the plaint in the present suit, its real object and purpose is to avoid or set aside the sale; because that is the only means by which the defendant's title can be defeated, and the plaintiff restored to his right of possession.

We have been referred by the plaintiff's pleader to a case, *Kishen Bullub Mahatab v. Rughoo Nundun Thakoor* (1), but that is a totally different case from the present, and will be found not to support the defendant's contention. The plaintiff there had obtained a decree against Pearee Lall Mahta for certain sums of money. Pearee Lall Mahta (the judgment-debtor) then died, and after his death, his wife, for the purpose of preventing her husband's property being taken in execution, made a sham sale of it in the first instance to a third person, and a collusive suit followed, in which a decree was fraudulently obtained, and the property sold under that decree to another party. In this state of things, the plaintiff (the execution-creditor) brought a suit to set aside the collusive sale and subsequent proceedings, upon the ground that they were all one

(1) 6 W. R., 305.

entire fraud, concocted for the purpose of defeating his judgment. It is obvious that this was not a suit to set aside a sale under a decree within the meaning of cl. 14 of the Act.

Another case in the Agra High Court Reports, decided by Morgan, C.J., and Ross, J., was also referred to, in which the point as to the one year's limitation seems also to have been taken and overruled. That case is very imperfectly reported, and the ground of the decision seems rather to have been that the one year's limitation did not apply, because the defendant had been guilty of some fraud which prevented the rule of limitation from applying. Whatever may be the correct solution of that case, we certainly do not consider it an authority by which we ought to be influenced in our present judgment.

The case cited by Mr. Ghose—of *Ram Kant Chowdhry v. Kalee Mohun Mookerjee* (1) decided by Kemp and Birch, JJ., is a distinct authority in this Court in favour of the view we take of this question.

The appeal will consequently be allowed with costs. The decree of the lower Court will be reversed, and the plaintiff's suit will be dismissed with costs of the Court below.

*Appeal allowed.*

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## ORIGINAL CIVIL.

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*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.*

IN THE MATTER OF THE LAND ACQUISITION ACT (X OF 1870.)  
PREMCHAND BURRAL AND ANOTHER *v.* THE COLLECTOR OF  
CALCUTTA.

*Land Acquisition Act (X of 1870)—Principle on which Compensation is to be given.*

Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood without any special reference to the uses to which it may be

(1) 22 W. R., 84.

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