

APPELLATE CIVIL.

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

SARAT CHANDRA BISU

v.

TARINI PRASAD PAL CHOWDHRY.*

.1907
Jan. 4.

Limitation—Resistance to Execution—Investigation into the matters of resistance—Dismissal for default—Limitation Act (XV of 1877), Sch. II, Art. 11—Civil Procedure Code (Act XIV of 1882) s. 335.

An application under section 335 of the Code of Civil Procedure was dismissed for default on the petitioner applying to withdraw his petition for want of evidence, the opposite party being present.

In a suit by the petitioner for possession of the property, the subject of the above application, the defendants pleaded limitation under Art. 11 of Schedule II to the Limitation Act :—

Held, that there was no enquiry within the meaning of section 335 and that consequently the order made was not conclusive, and the suit was not barred by the special limitation of one year.

It is a condition precedent to passing an order under section 335, so as to make it conclusive unless a suit is brought within one year, that the Court shall enquire into the matters of resistance, etc.

SECOND APPEAL by the defendants, Sarat Chandra Bisu and others.

The plaintiff Tarini Prasad Pal Chowdhry brought the suit out of which the second appeal arose for possession of certain immovable properties with mesne profits. The allegations in the plaint, so far as they are material to the purposes of this report were that the plaintiff had purchased the properties in dispute at a sale in execution of a decree obtained by certain third parties against the estate of one Koylash Chandra Pal deceased; that when he went to take possession of the properties, the defendants Nos. 1 to 4 who were the widow and sons of Koylash resisted the

* Appeal from Appellate Decree, No. 1569 of 1905, against the decree of F. MacBlaine District Judge of Nadia, dated June 21, 1905, reversing the decree of Hem Chandra Mukerjee, Offg. Subdt. Judge of that district, dated Feb. 11, 1905.

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officer of the Court in the name of the defendant No. 5 and the writ of delivery of possession was returned unserved on the 1st of July 1899; that he then presented a petition under section 335 of the Code of Civil Procedure but subsequently withdrew the application and that the Court without trying the case dismissed it. The sale to the plaintiff was confirmed on the 29th of April 1899.

The suit was defended by the defendants Nos. 5, 6 and 7 who pleaded, *inter alia*, that the application under section 335 of the Code having been dismissed on the 19th of April 1899, the suit which was brought long after one year from that date was barred by limitation.

The Subordinate Judge who tried the suit overruled the plea of limitation, but finding that the plaintiff had failed to prove his case dismissed the suit.

On appeal, the District Judge held that the plaintiff had made out a good title, and agreeing with the Subordinate Judge on the question of limitation made a decree in favour of the plaintiff.

The defendants Nos. 5, 6 and 7 appealed to the High Court.

Babu Lal Mohan Dass and *Babu Jnanendra Nath Bose*, for the appellants.

Babu Mohendra Nath Roy and *Babu Kshetra Mohan Sen*, for the respondents.

MACLEAN C.J. The only question which arises on this appeal is whether the suit is barred under the special limitation to be found in section 335 of the Code of Civil Procedure, having regard to Article 11 of the second schedule to the Limitation Act. The whole question turns upon whether or not the Court inquired into the matter referred to in that section, so as to make the order which it passed under that section conclusive as against the present plaintiff unless he brought a suit within a year from the date of that order. What then we have to look at are the circumstances under which that order was made, and to ascertain whether or not any enquiry was held within the meaning of that section. It is a condition precedent, in my opinion, to

passing an order under that section, so as to make it conclusive unless a suit is brought within a year, that the Court shall enquire into the matters of resistance, etc., and it is imperative under the language of the section that the Court should do so. Now, what happened on the present occasion was this. When the application came on for hearing, the petitioner applied to withdraw the petition for want of evidence; the opposite party was present but whether they objected or not we do not know; perhaps they objected. But the Court directed the application to be dismissed for default of prosecution, and made an order as to costs. The precise terms of the order are these:—"The petitioner applies to withdraw this petition for his want of evidence. The opposite party is present. Hence I direct that the application shall be dismissed for default of prosecution; and that the applicant shall be charged with costs of the opposite party; and its vakil fees Rs. 8 in all." Upon the face of this order and the facts which are not challenged, it is clear to my mind, that there was no enquiry within the meaning of section 335 and, if there were no such enquiry then, in my judgment, the order made was not conclusive, and the plaintiff has the ordinary period within which to bring his suit.

It is urged, however, that the case is concluded by two or three decisions of this Court. We are referred to a case, *Bibi Aliman v. Dhakeshwar Pershad*(1) to the judgment of which I was a party. But that case has no immediate bearing upon the present; for in that case the Court found that an investigation was held by the Subordinate Judge as was evident from the order sheet of the orders passed by him; as pointed out in that case, the Judicial Committee had remarked in the case of *Sardhari Lal v. Ambika Pershad*(2) that the Code does not prescribe the extent to which an investigation should go. There was an investigation in that case and therefore we held that the order was conclusive. The same view was taken in an earlier case: *Kallar Singh v. Toril Mahton*(3). Then comes the case of *Rahim Bux v. Abdul Kader*(4). But there again the Court held that the facts were such as to warrant it in saying that there had been an

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(1) (1904) 1 C. L. J. 296.

(3) (1895) 1 W. N. 24.

(2) (1838) I. L. R. 15 Calc. 521.

(4) (1904) I. L. R. 32 Calc. 537.

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investigation and, that being so, the Court was right in saying that the order was conclusive, unless a suit was brought within a year from the date of the order. It is unnecessary to express any opinion as to whether the facts in that case were such as to justify the finding of the Court that there had been an investigation, because the facts in the present case are different.

For these reasons, I think that the view taken by both the lower Courts is correct, that the present suit is not barred by the special limitation of one year, and consequently this appeal must be dismissed with costs.

GEIDT J. I agree.

Appeal dismissed.

S. GIL. B.