

**APPELLATE CIVIL.***Before Justice Sir Cecil Brett and Mr. Justice Chapman.***AMRITA LAL BAGCHI***v.***JOGENDRA LAL CHOWDHURY.\***

1912

July 11

*Limitation—Suit by an auction-purchaser to recover the purchase-money from a person who attached money, in deposit in Court, as representing the surplus sale-proceeds belonging to the judgment-debtor—Limitation Act (XV of 1877), Sch. II, Art. 120.*

Limitation applicable to a suit brought by an auction-purchaser to recover a certain sum of money from one who had, after the sale and the deposit of money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is that provided by Art. 120, Sch. II of the Limitation Act (XV of 1877).

*Nilakanta v. Imam Sahib* (1) relied on.

*Hanuman Kamat v. Hanuman Mandur* (2) and *Rām Kumar Shaha v. Ram Gaur Shaha* (3) distinguished.

SECOND APPEAL by the defendant No. 1, Amrita Lal Bagchi.

One Amrita Lal Banerjee, in execution of a decree obtained in the First Munsiff's Court at Baruipore against defendant No. 3, put up  $\frac{3}{4}$  share of the Sunderbuns Lot No. 28 to sale, and on the 8th February 1899 the plaintiff purchased the property for Rs. 2,100.

The defendant No. 3 applied to set aside the sale under section 311 of the Code of Civil Procedure, and

\* Appeal from Appellate Decree, No. 1594 of 1909, against the decree of F. R. Roe, District Judge of 24-Parganas, dated June 1, 1909, modifying the decree of Aglure Chunder Hazra, Subordinate Judge of 24-Parganas, dated Feb. 15, 1909.

(1) (1892) I. L. R. 16 Mad. 361. (2) (1891) I. L. R. 19 Calc. 123.

(3) (1909) I. L. R. 37 Calc. 67.

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his application was rejected on the 20th September 1901. On appeal, the sale was set aside by the Additional Subordinate Judge of 24-Parganas on the 23rd May 1902. A second appeal to the High Court was dismissed on the 3rd August 1903. In the meantime defendant No. 1, in execution of a decree obtained against defendant No. 3, attached the money deposited by the plaintiff, as representing the surplus sale-proceeds belonging to the original judgment-debtor, and withdrew Rs. 1,600 on the 22nd August 1899. The plaintiff made an application under section 315 of the Code of Civil Procedure, which having been rejected, the present suit was brought by him on the 21st May 1908 for the refund of the purchase-money deposited in Court.

The defendant No. 1 pleaded, *inter alia*, that the plaintiff was the *benamidar* of Babu Giridhari Lal Roy, and that the suit was barred by limitation.

The Court of first instance held that Article 120, Schedule II of the Limitation Act, was applicable to the case, and that inasmuch as the suit was brought within 6 years from the date when the sale was set aside, it decreed the plaintiff's suit. On appeal, the learned District Judge of 24-Parganas affirmed the decision of the first Court. Against that decision the defendant No. 1 appealed to the High Court.

*Babu Ram Chunder Mazumdar (Babu Nogendra Nath Ghose and Babu Bejoy Kumar Bhattacharyya with him)*, for the appellant. The case is governed by either Article 62 or 97 of Schedule II of the Limitation Act. If the whole transaction is void from the beginning, then Article 62 would apply; if voidable, then Article 97 would apply: see *Hanuman Kamat v. Hanuman Mandur*(1). The learned Judge relied on the case of *Nilakanta v. Imam Sahib* (2), but in that case

(1) (1891) I. L. R. 19 Calc. 123; (2) (1892) I. L. R. 16 Mad. 361.  
 L. R. 18 I. A. 158.

Article 97 was not referred to at all. Article 97 would apply also in the case of an execution sale: see *Ram Kumar Shaha v. Ram Gour Shaha* (1). Article 62 applies in cases where Article 97 does not apply. That being so, Article 120 does not apply and the suit is barred by limitation. The plaintiff's application under s. 315 of the Civil Procedure Code having been rejected, no separate suit lies.

*Babu Harendra Narain Mitter* (*Babu Satis Chunder Bhattacharjea* with him), for the respondent. Article 120 applies. The case of *Nilakanta v. Imam Sahib* (2) supports my contention. The case of *Hanuman Kamat v. Hanuman Mandur* (3) was between two contracting parties. A suit does lie for the refund of the purchase-money, and remedy provided for in s. 315 of the Code of Civil Procedure is not the only remedy: *Hari Doyal Singh Roy v. Sheikh Samsuddin* (4).

*Babu Ram Chunder Mazumdar*, in reply.

BRETT AND CHAPMAN JJ. The only question which has been raised in support of this appeal is whether the District Judge was correct in the view which he took that the limitation applicable to the present suit was that provided by Article 120 of the second Schedule of the old Limitation Act, that is to say, six years. The suit was brought by the auction-purchaser to recover the sum of Rs. 1,600 from the defendant No. 1 who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree

(1) (1909) I. L. R. 37 Calc. 67 ;  
13 C. W. N. 1080.

(2) (1892) I. L. R. 16 Mad. 361.

(3) (1891) I. L. R. 19 Calc. 123 ;  
L. R. 18 I. A. 158.

(4) (1900) 5. C. W. N. 240.

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obtained against the debtor by the decree-holder. There can, in our opinion, be no doubt that the present plaintiff would be entitled to recover the money from the present appellant, who was the defendant No. 1 in the lower Courts, either by an application made under Order XXI, rule 93, Civil Procedure Code, or as he has done in the present case by a suit. For the purposes of the suit it would be necessary for him to make parties to it the judgment-debtor and the decree-holder.

In support of the present appeal, it has been argued that the proper Article of Limitation applicable to the present suit is Article 97 of Sch. II of the old Limitation Act. In support of this view the decision of the Privy Council in the case of *Hanuman Kamat v. Hanuman Mandur* (1) has been relied on, as also the case of *Ram Kumar Shaha v. Ram Gour Shaha* (2). Both of these cases are, in our opinion, distinguishable from the present case. The former is a case in which a member of a joint family attempted to sell certain properties, and his other co-sharers objected. The purchasers then sued for the return of the purchase-money, and their Lordships of the Privy Council held that the case must fall either under Art. 62 or Article 97 of Schedule II of the Limitation Act. That, however, was a suit between the original contracting parties to the sale, whereas in the present case it is impossible to contend that the person whose property was sold was in fact a willing party to the transaction, or that the present suit is one between the two original contracting parties. In fact the sale was brought about at the instance of the decree-holder, and the property sold was the property of the judgment-debtor, and the present suit is brought against a

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third person who attached some of the sale-proceeds as being the property of the judgment-debtor. This certainly cannot be regarded as a suit between the two contracting parties to the sale. In the same way in the case of *Ram Kumar Shaha v. Ram Gour Shaha* (1) the decree-holder had sold as the property of his debtor property which belonged to a third person, and, in that case, it was held that a suit would lie by the purchaser against the original decree-holder, and that the limitation applicable would be that provided by Article 62 of the second Schedule of the Limitation Act. In our opinion both these two Articles contemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale, which owing to the default on the part of the vendor has become infructuous. The present case is not, however, of the same nature at all: and we think that the District Judge was quite right in holding that it did not fall within the provisions of either Article 62 or Article 97 of Schedule II of the Limitation Act. The learned Judge has relied on a case of the Madras High Court: *Nilakanta v. Imam Sahib* (2). That decision appears to be applicable to the facts of the present case, and, agreeing with it, we hold that the only limitation applicable to the present suit must be that provided by Article 120 of Schedule II of the old Limitation Act. As the present suit was instituted within six years from the date when the sale was declared by this Court to be invalid, we think that the learned Judge was quite right in holding that the suit was not barred by limitation. No other points have been taken in support of the appeal. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1909) I. L. R. 37 Calc. 67;      (2) (1893) I. L. R. 16. Mad. 361.

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