(1974) 01 RAJ CK 0035

Rajasthan High Court

Case No: Civil Second Appeal No. 364 of 1972

Bhai Ishar Das		APPELLANT
	Vs	
Smt. Govindi and Others		RESPONDENT

Date of Decision: Jan. 30, 1974

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 63, 47
- Evidence Act, 1872 - Section 115
- Limitation Act, 1908 - Article 12, 142
- Transfer of Property Act, 1882 - Section 41, 52

Citation: AIR 1975 Raj 45 : (1974) RLW 220 : (1974) 7 WLN 123

Hon'ble Judges: C.M. Lodha, J

Bench: Single Bench

Advocate: N.M. Kashliwal, for the Appellant; Sagarmal, for the Respondent

Final Decision: Dismissed

Judgement

C.M. Lodha, J.

This is a defendant''s second appeal directed against the judgment, and decree passed by the Additional District Judge No. 1, Jaipur City, dated 31st May, 1972, by which the learned Judge set aside the decree passed by the trial Court and decreed the plaintiff-respondent''s suit declaring that the property in question, which is the outer chowk of a house situated at Chowkri Purani Basti in the City of Jaipur belongs to the plaintiff-respondent and the sale of the same in execution of the decree obtained by Ambalal against the judgment-debtor Ganganarayan, was ineffective against the plaintiff. He also issued a perpetual injunction against the defendants restraining them from interfering with the plaintiff''s possession over the suit property.

2. Briefly stated the facts are as follows:--

One Ambalal obtained a money decree against one Ganganarain on May 6, 1947. In execution of that decree the suit property was sold on October 8, 1956, and the defendant-respondent Smt. Dhapa purchased it. The sale was confirmed on December 18, 1956, and sale-certificate was granted on May 22, 1961. Thereafter she entered into an agreement for sale of this property with the appellant Bhai Ishardas on August 24, 1961. The sale-deed was got registered by Smt. Dhapa on October 16, 1961. This is how Ishardas has come into the picture. The plaintiff-respondent Bhaironlal was married to the sister of the judgment-debtor Ganga Narain. He died during the pendency of the first appeal and is now represented by his widow respondent No. 1 Smt. Govindi. The plaintiff''s case, as set out in the plaint, is that Bhaironlal was married to Ganganarain''s sister. On account of this relationship Ganganarain agreed to make a gift of the property in question on January 10, 1946 and actually, got the gift deed registered in Bhaironlal''s favour on September 9, 1946. The gift deed was not only with respect to the suit property, but in respect to other portions of the house also. In other words the outer chowk, which is the property in dispute, is only a part of the house, which bad been gifted to Bhaironlal by Ganganarain. It appears that sometime after the gift-deed had been executed and registered, there were some differences between Ganganarain and Bhaironlal as a result of which Ganganarain executed a sale-deed in respect of a part of the property already gifted to Bhaironlal in favour of defendant No. 2, Surajmal, who too has died during the pendency of this litigation. But his legal representatives have not been brought on record. When the suit property was attached in execution of the decree in favour of Ambalal against Ganganarain, Bhaironlal filed objection under Order 21. Rule 58, Civil Procedure Code, which was allowed. Consequently Ambalal filed a regular suit under Order 21, Rule 63. Civil Procedure Code. This suit was decreed by the trial Court on February 29, 1956, and it was held that the property belonged to Ganganarain and had rightly been sold in execution of the decree against him, Bhaironlal filed appeal, which was allowed on February 6, 1957, and it was held that the suit property was not liable to be attached and sold in execution of decree against Ganganarain. as, before the date of attachment the property already stood transferred to Bhaironlal. As regards the sale of the other part of the house in favour of Surajmal, Bhaironlal filed a suit alleging that the sale in favour of Suralmal was void inasmuch as before the date of the sale the property had been gifted to him. This suit was decreed on October 16, 1958, The plaintiff''s case, thus, is that having succeeded both against Ambalal and Su-rajmal he was recognized to be the undisputed owner of the whole of the house He has alleged that he had no knowledge about the auction of the suit property in course of execution of the decree of Ambalal nor had he knowledge about the subsequent sale made by the auction-purchaser Smt. Dhapa in favour of Bhai Ishardas and that he came to know of this fact when the defendant-appellant collected building material at the site and started digging foundation for raising construction. On these allegations the plaintiff brought the present suit on December 23. 1961.

3. The suit was resisted by defendant No. 1 Smt. Dhapa (auction-purchaser) and defendant No. 4 Bhai Ishardas (appellant), who filed separate written statements, though the defences taken by them were identical. Other defendants also filed their written statements, but they are not vitally interested in the resuit of this litigation and it is, therefore, not necessary to mention about them any further. Smt. Dhapa and Ishardas have pleaded inter alia that both of them were bona fide purchasers for value without notice and had purchased the property in good faith. It was further pleaded that Bhaironlal by his acts, conduct and acquiescence was estopped from challenging the title of Smt. Dhapa and Ishardas and that in any view of the matter, the suit was barred by limitation under Article 12 of the Limitation Act, 1908, which was in vogue at the time the suit was instituted. The objection regarding insufficiency of Court fees was also taken.

4. After recording the evidence produced by the parties the trial Court dismissed the suit. Aggrieved by the judgment and decree of the trial Court, the plaintiff Bhaironlal filed appeal and, as already stated above, the appellate Court decreed his suit. Hence this appeal by the defendant Bhai Ishardas.

5. Learned Counsel for the appellant has argued the following points in support of his appeal:--

(1) that Smt. Dhapa was a bona fide purchaser for value in a court auction and had obtained possession of the suit property after the sale deed had been made in her favour and at any rate, so far as the appellant is concerned, he purchased the property from Smt. Dhapa, the ostensible owner, after taking all precautions and was, therefore, protected u/s 41 of the Transfer of Property Act;

(2) that by his act, conduct and acquiescence Bhaironlal is estopped from challenging the title of the appellant;

(3) that Bhaironlal is a representative of the judgment-debtor Ganganarain and the matter agitated in this suit pertains to execution, discharge or satisfaction of the decree, and, therefore, no suit is maintainable u/s 47, Civil Procedure Code:

(4) that the suit should have been brought within one year of the confirmation of the sale in favour of Smt. Dhapa under Article 12 of the Limitation Act, 1908, and is consequently barred by limitation. In this connection it has also been argued that even if Article 12 is held not to be applicable to the case the suit would nevertheless be governed by Article 142 and it was incumbent upon the plaintiff to show that he had been dispossessed within 12 years of the date of filing of the suit and since this has not been done, the suit must, in any case, be treated as time-barred.

6. Now so far as the question of purchase by Smt. Dhapa is concerned, it is not disputed before me that there is no warranty of title in an auction sale. The contention of the learned Counsel for the plaintiff-respondent is that the sale In favour of Smt. Dhapa is hit by the principle of lis pendens u/s 52 of the Transfer of

Property Act. There is high authority in support of the proposition that the doctrine of lis pendens applies to court-sale also. Reference in this connection may be made to Samarendra Nath Sinha and Another Vs. Krishna Kumar Nag, Kedarnath v. Sheonarain AIR 199O SC 1717 and Jayaram Mudaliar Vs. Ayyaswami and Others, It was observed by their Lordships in AIR 1967 SC 1440 (Supra) that it is true that Section 52, strictly speaking, does not apply to in voluntary alienations such as court-sales but it is well established that the principle of lis pendens applies to such alienations. This view was reiterated by their Lordships in the two subsequent decisions referred to above. In the present case the sale in favour of Smt. Dhapa took place on July 8, 1956, and was confirmed on December 18, 1956, This sale admittedly took place after the institution of the suit by Ambalal under Order 21, Rule 63, Civil Procedure Code, This suit was ultimately decreed by the appellate court on appeal by Bhaironlal on February 6, 1957. Consequently, there is no escape from the conclusion that the court- sale in favour of Smt. Dhapa is hit by the doctrine of lis pendens.

7. Learned Counsel for the appellant has, however, urged that a transfer lis pendens is not a nullity and is not void ab initio. In support of his contention he has cited Tatya Lagamanna Desai and Others Vs. Yogabai, ; Kartik Das Vs. Ganeswar Acharya and Others, and Indu Bhushan Mitra Vs. Sudhakar Choudhury and Others,

8. In Tatya Lagamanna Desai and Others Vs. Yogabai, it was held that a sale cannot be regarded to be a nullity because of a bar of lis pendens, whether the sale is voluntary or involuntary.

9. In Kartik Das Vs. Ganeswar Acharya and Others, it was held that an alienation pendente lite is not void ab initio. It is a voidable transaction. The effect of the doctrine of lis pendens is that such an alienation is subject to the result of the suit. In Indu Bhushan Mitra Vs. Sudhakar Choudhury and Others, the learned Judge held that the doctrine of lis pendens as embodied in Section 52, Transfer of Property Act, does not mean that a transfer pendente lite is either illegal or void. What it does mean is that it is only voidable to the extent that it affects the rights of the party who obtains the decree or an order in the pending litigation and that too at the instance of that party only and not of any other party. It is good otherwise and cannot be questioned by a third party or even by the successful party in the pending litigation if his right in the property in question is left unaffected by the transfer.

10. Learned Counsel for the appellant has tried to derive support from the above quoted cases to fortify his argument that the sale in favour of Smb. Dhapa was not void ab initio even if it is hit by the doctrine of lis pendens. At best, it was voidable at the option of the plaintiff and it was, therefore, the duty of the plaintiff: to have got the sale set aside within the limitation prescribed by law. I will leave this argument at that and deal with it in greater detail when I come to the question of limitation. For the present it is sufficient to observe that as against the plaintiff, who was not, a party to the execution proceedings the court-sale in favour of Smt. Dhapa is not

binding upon him.

11. Of course there is nothing on the record to show that Smt. Dhapa was aware of the gift of the suit property in favour of Bhaironlal, at the time of purchasing it in court-sale. There is also no denying the fact that she purchased the property in question in court-sale for valuable consideration. Learned Counsel for the respondent has, however, contended that she cannot be said to have acted in good faith inasmuch as she had made no inquiry into the title of the judgment-debtor which she could have very well done by inspecting the execution record, which contained an objection by Bhaironlal under Order 21, Rule 58, Civil Procedure Code. However, there is nothing on the record to show that there was anv reasonable ground for Smt. Dhapa to have suspected in any way the title of the judgment-debtor Ganganarain to the property in question. I am, therefore, not inclined to agree with the learned Counsel that the transaction lacked an element of good faith on the part of Smt Dhapa.

12. At this stage it may be proper to deal with the question whether Smt. Dhapa had come into possession of the suit property after the court-sale in her favour. It may be pointed out that the subject-matter in dispute is the outer-chowk of the house and by its very nature it cannot be put under lock and key, There was no enclosure on the outer-chowk and it was open to all and sundry so as to be accessible at least to every inmate of the house. Learned Counsel for the appellant has invited my attention to rent-note Ex. D. W. 4/5 alleged to have been executed by Dhalumal and submits that Dbalumal had taken it on rent from Smt, Dhapa. It has been further stressed that Dhalumal used to keep his push-cart in the outer-chowk. This may be so. The plaintiff Bhaironlal has also admitted in his statement that he had come to know that Dhalumal had taken on rent the outer-chowk from Smt. Dhapa for putting his ''Thelas''. But this has not been brought out in his cross-examination as to when he came to know of it for the first time. This fact is of considerable importance from the point of view of judging the question of implied consent of Bhaironlal to the sale of the property in question. Apart from this there is nothing on the record to show that Bhaironlal had by any act or conduct induced Smt. Dhapa to believe that the judgment-debtor was the owner of the property in dispute. It has been strenuously argued by the learned Counsel for the appellant that Bhaironlal had come to know in the course of litigation between him and Ambalal that the property was being sold in execution of the decree against his predecessor-in-title Ganganarain and yet he deliberately kept silent and did nothing so as to inform the executing court that the judgment-debtor''s title to the property in. question was sub judice in the suit filed by Ambalal. It has been, therefore, argued that in the facts and circumstances of case implied consent on the part of Bhaironlal to the sale of the property in execution of the decree against Ganganarain must be inferred, A number of cases have been cited on behalf of both the parties as to what facts and circumstances are sufficient to raise an inference of implied consent u/s 41 of the Transfer of Property Act. However, I do not consider it necessary to refer to those

authorities. In my opinion it depends upon the facts and circumstances of each case whether there was implied consent of the person interested in immovable property. The utmost that can be said in favour of the appellant is that Bhaironlal was inactive and not alert. It is true that if Bhaironlal had approached the executing court so as to find out whether the property was being sold, all these complications would not have arisen. However, nothing has been brought out in his statement that he had any knowledge about the sale proceedings having been commenced after Amba-lal''s suit had been decreed by the trial court and appeal had been filed by him and he very well could have been under the impression that so long as the appeal filed by him was not decided, no proceedings for sale of the disputed property would take place.

13. Learned Counsel for the appellant has placed strong reliance on Sheikh Hussain v. Phoolchand Harichand AIR 1952 Nag 64 in this connection and has argued that the silence and inaction on the part of Bhaironlal so as to allow the property to be sold in execution proceedings must be construed against him. In AIR 1952 Nag 64 (Supra) it was observed that Section 41, T. P. Act, applies to voluntary sales. However, the principle of natural equity on which that provision as well as the one in Section 115, Evidence Act, are based would apply even to a Court-sale. The principle enunciated in that case admits of no doubt. There is ample authority in support of the proposition that Section 41, T. P. Act, in terms has no application to court-sale and if authority is needed on the point reference may be made to, Vaman Pandu Patel Vs. Tikaram Dagdu, ; Mangat Lal Vs. Ghasi Khan and Others, and Dwarika Halwai Vs. Sitla Prasad and Others, However, the equitable principle incorporated in Section 41, T. P. Act, is essentially one of estoppel.

14. In Shamsher Chand v. Bakshi Mehr Chand AIR 1947 Lah 147 while observing that the principle underlying Section 41. T. P. Act, applies even to the places where the Transfer of Property Act is not applicable, it was held that the mere fact that a person after attaining majority took no step whatever to have his name recorded as an owner in the revenue record and thus made it possible for his uncle to transfer the land which really belonged to him would not debar him from claiming the property within the prescribed period of limitation. In the facts and circumstances of the present case I have come to the conclusion that mere inaction on the part of Bhairon-lal in not approaching the executing court at the time when his appeal against Ambalal was pending in the appellate court, cannot debar him from urging hid claim against auction-purchaser.

15. Learned Counsel for the appellant has, however, urged that, so far as his client Ishardas, appellant is concerned, both by virtue of Section 41, T. P. Act, as well as Section 115, Evidence Act, the plaintiff is debarred from asserting his claim and on this aspect of the case the learned Counsel laid considerable emphasis. He urged that Smt. Dhapa was an auction-purchaser, who had obtained the sale certificate in her favour as far back as on May 22, 1961. Ishardas had first entered into an

agreement for sale with Smt. Dhapa on 24-8-1961. and thereafter before getting the sale deed registered he gave a public notice of the intended sale in the daily paper ''Lokwani'' on August 29, 1961'', vide Ex. D. W. 4/2 and, ''therefore at any rate the appellant is protected as a bona fide purchaser for value from an ostensible owner in good faith with the implied consent of the plaintiff. It is urged that the plaintiff allowed Smt. Dhapa to hold herself out as the owner of the property. On the other hand learned Counsel for the respondent has urged that as soon as Bhaironlal came to know of the sale in favour of Smt. Dhapa and the subsequent transfer by Smt. Dhapa to Bhai Ishardas, he brought the suit. He has further urged that the judgment-debtor had no saleable interest in the suit property at the time it was sold by court auction to Smt. Dhapa and, therefore, Smt. Dhapa acquired no title to it and she could not have passed better title to Bhai Ishardas than what she herself had. In this connection he placed reliance on Moti Lal v. Karrab-Ul-Din (1897) 24 Ind App 170 and Ramrao Jankiram Kadam Vs. State of Bombay,

16. In (1897) 24 Ind App 170 (supra) where the defendant in an ejectment action had bought the village in question at a sale in execution of a decree obtained by the mortgagee against the mortgagors thereof, it appeared that prior to his purchase the plaintiff''s vendor had sued to establish against the parties to that decree his title to the village, and had subsequently obtained a decree in his favour, it was held that the defendant bought pendente lite, and was bound by the decree so obtained, and that that result could not be avoided by showing that the mortgagee decree-holder had attached the village prior to the suit by the plaintiff''s vendor. It may be observed that the suit in that case was founded on the fact that prior to the Court sale a valid sale of the same Interest had been made to Masih, and that the appellant Moti took nothing because nothing was left to pass to him. It was observed by their Lordships that attachment only prevents alienation. It does not confer title and even if it did the interest sO acquired would be that of the judgment-debtor with the result that the judgment-debtor and all persons claiming under him by subsequent transfer would be bound.

17. In Ramrao v. State of Bombay (supra) it was observed.--

"It was then suggested that the plaintiff was disentitled to anv relief by reason of an estoppel raised by Section 41 of the Transfer of Property Act. The basis for this argument was that some time after the sale the second defendant had purchased the plot bearing Survey No. 80 for Rs. 2,000/- from the Government while the fifth defendant similarly purchased plots bearing Survey Nos. 35 and 40 for Rs. 1,750/- and that the inaction of the plaintiff without taking proceedings to set aside the sale constituted a representation to the world that the Government were properly the owners of the property which they had purchased for nominal bids and this was the reasoning by which Section 41 of the Transfer of Property Act was sought to be invoked. The respondent did not rely on any representation or any act or conduct on the part of the appellant but their belief that Government had acquired title by

reason of their purchase at the revenue sale. If the Government had no title to convey. it is manifest the respondents cannot acquire any. They would clearly be trespassers, In the circumstances we consider there is no scope for invoking the rule as to estoppel contained in Section 41 of the Transfer of Property Act."

18. Again it is well settled that the doctrine of caveat emptor applies to the purchaser at auction sale (See: The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussenbhai, What is sold in such sale is nothing, but right, title and interest of the judgment-debtor: if he has none, the purchaser sets nothing. All that is granted is that the purchaser gets the rights and interest, whatever they may be, of the judgment-debtor and that the judgment-debtor shall not recover back the property sold.

19. Thus, the position, is crystal clear that there being no saleable interest of the judgment-debtor at the time of the Court sale in favour of Smt. Dhapa, he did not become lawful owner of the property by virtue of the Court sale in her favour. Learned counsel for the appellant has however, urged that this position did not take the case out of the purview of Section 41, T. P. Act and in this connection he argued that even in (1897) 24 Ind APP 170 (supra) their Lordships were invited to examine the applicability of Section 41 of the Transfer of Property Act. The argument is plausible and the question of applicability of Section 41 of the Transfer of Property Act, in fact. arises when the transfer is made not by the real owner, but by the ostensible owner. It has, therefore, to be adjudged whether there was any implied consent of Bhaironlal to the transfer of the suit property in favour of appellant Ishardas. In this connection learned counsel has relied on the conduct of Bhaironlal prior to the sale in favour of Smt. Dhapa. as well as subsequent to it. I have already dealt with, above, the alleged conduct of Bhaironlal before the sale in favour of Smt. Dhapa and have come to the conclusion that the inaction on the part of Bhaironlal or, to be more precise, lack of yigilance on his part in not aporoaching the executing Court to stay its hands for sale of the property does not amount to implied consent or estoppel against him. As regards Bhaironlal''s conduct after the sale in favour of Smt. Dhapa, it is urged by learned counsel for the appellant, that Bhaironlal knew that Dhalumal was inducted as a tenant by Smt Dhapa and that the sale certificate had also been granted to Dhapa and further that in spite of a public notice having been issued by the appellant Ishardas in a daily paper inviting objections to the intended sale of the suit property by Smt. Dhapa, the plaintiff remained silent. Bhaironlal has pleaded ignorance about all these facts. The appellant obviously does not rely on any representation or overt act on the part of Bhaironlal which may have led Ishardas to believe that Bhaironlal had no obiection to Smt. Dhapa being treated as the owner of the property. The plaintiff''s case is that as soon as he saw building material collected at the site he happened to know that Dhaluram was asserting his right to the suit property as tenant inducted by Smt Dhapa. he brought the present suit. It has not been brought out in the statement of Bhaironlal as to when he came to know that Dhalumal had been admitted as tenant by Smt. Dhapa. In these

circumstances mere delay on the part of Bhaironlal in bringing the suit cannot amount to such conduct or acquiescence on his part which may give rise to estoppel against him. If Smt. Dhapa had no title to convey, it is manifest that Bhai Ishardas cannot acquire any right and in the circumstances of the case I have come to the conclusion that no sufficient material has been placed on the record for invoking the rule as to estoppel contained in Section 41 of the Transfer of Property Act and Section 115 of the Act against Bhaironlal.

20. This brings me to another contention raised on behalf of the appellant that Bhairon Lal''s suit is hit by Section 47 of the Civil Procedure Code, It is urged that being a donee from Ganganarain, Bhaironlal should be considered as representative of the judgment-debtor Ganganarain and the question whether the suit property was liable to be sold in execution of the decree, is a question pertaining to execution, discharge or satisfaction of the decree and could have been decided by the executing Court alone and consequently the present suit is not maintainable. This argument was not advanced in any of the Courts below, but being a pure question of law I permitted the learned counsel for the appellant to canvass it. Learned counsel, however, candidly conceded that he could not lay his hands on any decided case on the point, but it has been submitted that on a Plain reading of the section. Section 47 was clearly attracted in the present case. The argument on the face of it is attractive. But the question is whether Bhaironlal is claiming the property through the judgment-debtor or is claiming it in his own right ? Obviously he is not claiming it as an heir or a legatee. He is claiming it in his own right on the basis of the gift made in his favour much prior to the date of attachment. Therefore, he is not bound by the decree obtained against Ganganarain.

21. In Ajodhya Roy v. Hardwar Roy (1909) 1 Ind Cas 213 the Calcutta High Court observed as follows:

"To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are, first, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by act of Parties or by operation of law, vested in the person who is sought to be treated as representative, and secondly, if there has been any devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree."

This view was followed in Abdul Aziz v. Alliance Bank AIR 1933 Lah 352 and Satyanarayan Banerji and Another Vs. Kalyani Prosad Singh Deo Bahadur and Others,

22. It is true that it is not necessary that the transfer of interest should be after decree; it may be before the decree, in which case the circumstances must be such that the transferee is bound by the decree. In the present case, there are no such

circumstances on account of which Bhaironlal may be held to be bound by the decree passed against Ganganarain.

23. Learned counsel for. the respondent has relied on Hamidgani Ammal (one of the L.Rs. of the deceased first respondent) Vs. Ammasahib Ammal (died) and Others, wherein it was held that if a person was a party to the suit or had been dismissed from the suit, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose. It was further observed that Section 47, Civil Procedure Code, only requires to be decided in execution proceedings those questions which arise between parties to the suit in which the decree has been passed or their representatives and which relate to the execution, discharge or satisfaction of the decree. As already observed Bhaironlal was neither a party to the suit nor is a representative of the judgment-debtor Ganganarain. and when as a stranger to the suit he claims as his. the immovable property which has been the subject-matter of execution, that claim cannot in law be regarded as being a question relating to the execution discharge or satisfaction of the decree. In this view of the matter I am unable to hold that the suit is barred under S. 47, Civil P. C.

24. The only point which now remains to be dealt with is regarding limitation. Learned counsel for the appellant has urged that the relief claimed by the plaintiff sauarely falls within the four corners of Article 12 of the Limitation Act, 1908. which reads as below:

"12. To set aside any of the following sales:--

(a) Sale in exe cution of a decree of a Civil Court;	One Year	When the sale is confirmed, or would other wise have be come conclusiva had no suit been brought".

Learned counsel for the appellants submits that the Court sale in favour of Smt. Dhapa and subsequently by Smt. Dhapa in favour of the appellant is not a nullity. At best it was voidable at the option of the true owner. It is urged that one of the reliefs claimed in the plaint is for setting aside the sale and since the suit has been filed admittedly after more than one year after the confirmation of the sale, it is argued, that the suit must be dismissed as barred by limitation. It is true that sale pendente lite is not a nullity, but the question is whether the plaintiff was bound to get the sale set aside. No direct authority on the point has been placed before me in support of has contention by learned Counsel for the appellant.

25. In (1897) 24 Ind APP170 (supra) a similar argument based on Article 12 was raised before their Lordships of the Privy Council, but it was refuted on the ground that the suit was founded on the fact that prior to the Court sale, a valid sale of the same interests had been made and the purchaser at the subsequent sale took nothing because nothing was left to pass to him. A distinction has been drawn between setting aside a sale and holding that the plaintiff''s rights are not affected by it. It further appears that this article applies only to those cases in which the sale will be binding on the plaintiff, if not set aside.

26. In Vishnukeshav v. Ramachandra Bhaskar, ILR (1887) 11 Bom 130 a creditor of the plaintiff''s father brought a suit against the plaintiff, and obtained a money decree against him when the plaintiff was a minor and his estate was administered by the Collector. At the sale held in 1871, in execution of the decree, the property in question was purchased by the defendant, who obtained possession in 1876. In 1879 the plaintiff attained majority, and in 1882 he brought the present suit to recover the property from the defendant. In these circumstances it was held that Article 12 of the Limitatior Act did not apply, and that the suit was not barred. It was further observed that Article 12 applies only to the cases in which the plaintiff would be bound by the sale if he did not succeed in getting it set aside. It was held that the plaintiff was not bound by the proceedings in suit, as he had not been properly represented.

27. Again in Pasumarti Payidanna v. Ganti Lakshminarasamma ILR (1915) Mad 1076 : AIR 1916 Mad 33 it was observed that the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, the sale was not binding on the plaintiff and did not require to be set aside and the suit which was instituted within three years of the plaintiff''s attainment of majority was not barred by limitation.

28. Thus the crux of the matter is whether the sale would be binding on the plaintiff if he did not succeed in getting it set aside ? As already held above, since the plaintiff was neither a party to the suit nor a representative of any party to the suit, the sale would not be binding upon him and consequently the plaintiff was not bound to set the sale set aside. In this view of the matter the suit cannot be dismissed as barred under Article 12.

29. The other branch of argument advanced by the learned counsel for the appellant with respect to limitation is that the suit is barred under Article 142 of the Limitation Act, 1908, as the plaintiff has not succeeded in showing that he has been dispossessed within 12 years of the filing of the suit. It may be stated, here, that no such ground was taken in any of the Courts below. The point canvassed is a mixed question of fact and law and. therefore, it would not be just to allow the appellant to raise this point for the first time in this Court. But apart from that, it may be pertinent to point out that the subject-matter of the suit is an open outer-Chowk and according to the plaintiff there was no overt act of possession exercised by any of the defendants even though the chowk had been purchased by Smt. Dhapa in Court sale and subsequently by the appellant from Smt. Dhapa. It has been asserted by him that he came to know of the interference in his possession by the defendants when the building material was collected at the site and the foundations were dug to raise construction on the Chowk. This act is said to have been committed only a few days before filing of the suit. The stray act of parking push-carts, as is alleged to have been done by Dhalumal as tenant of Smt. Dhapa and/or of Ishardas, cannot be said to an open act of dispossessing the plaintiff. I do not find force in this

contention either.

30. The result of the foregoing discussion is that I do not find force in this appeal and hereby dismiss it. But in the circumstances pf the case I leave the parties to bear their own costs.

31. Learned counsel for the appellant prays for grant of leave to appeal u/s 18 of the Rajasthan High Court Ordinance. However. I do not consider it a fit case to grant leave. The request is rejected.