

(1934) 07 CAL CK 0001

Calcutta High Court

Case No: None

Jateendra Chandra
Bandopadhyay and Others

APPELLANT

Vs

Rebateemohan Das and Others

RESPONDENT

Date of Decision: July 10, 1934

Acts Referred:

- Limitation Act, 1963 - Section 14, 15, 9

Citation: AIR 1935 Cal 333 : 158 Ind. Cas. 191

Judgement

1. The facts, which give rise to the present appeal, are as follows: One Rajchandra was the owner of certain properties. He executed a will on 18th September 1888, by which he bequeathed his properties to his grandsons, i.e., son's sons, Rajendra and Jogendra. Rajchandra died on 28th November 1899, leaving Girish as his only son. On 29th October 1911 Girish mortgaged the properties, which are the subject matter of the present litigation, to the respondents. The respondents obtained a mortgage decree on the basis of the said mortgage against Girish on 3rd December 1917. On 2nd December 1924, Chandrakala, the wife of Girish, who was appointed executrix by the will of Rajchandra, obtained probate in common form. Subsequently, the probate proceedings were contested and the probate was ultimately issued to Chandrakala on 25th May 1927. On 2nd January 1925 Chandrakala instituted a suit for a declaration that the mortgaged properties were not liable to be sold on the allegation that the mortgagor had no title to the property, that the property vested in her by virtue of the will and that she was in possession thereof as executrix to the estate of Rajchandra.

2. The said suit was numbered and registered as suit No. 1 of 1925 of the first Court of the Subordinate Judge at Dacca. A temporary injunction was issued by the Subordinate Judge, restraining the decree-holder from selling the mortgaged properties during the pendency of the suit. The said injunction however was ultimately dissolved on the 1st December 1925. The mortgaged properties were

sold On 7th April 1926, and purchased by the decree-holders. On 10th May 1926, the sale was confirmed. On 23rd August 1926, the decree-holder purchasers applied for delivery of possession. The auction-purchasers could not however get possession on account of the resistance offered by Chandrakala at the time, when the nazir of the Court went to deliver possession. The application was thereafter dismissed for default on 13th November 1926. The suit instituted by Chandrakala was decreed on 14th May 1928, and it was declared that Girish had no right to mortgage the properties in question and that the mortgage by Girish was infructuous and inoperative against those properties and the execution sale in execution of the decree was not binding against the properties. It was also declared that the plaintiff as executrix had a right to the properties. An appeal was thereupon taken by the decree-holder, auction-purchasers, to this Court which was registered as First Appeal No. 352 of 1928. On 15th July 1931, this Court allowed the appeal and dismissed Chandrakala's suit. On 8th October 1931, the-auction-purchasers applied to the Court for delivery of possession. Thereupon the judgment-debtors took the objection that the application was barred by limitation. The learned Subordinate Judge overruled the objection of the judgment-debtors and ordered delivery of possession. Hence the present appeal by the judgment-debtors.

3. The only point for decision in this appeal is whether the application for delivery of possession is barred by limitation. u/s 3, Lim. Act, subject to the provisions contained in Sections 4 to 25 of the said Act, an application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been pleaded. Under Article 180, Schedule 1, Lim. Act, an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession is to be made within 3 years from the time when the sale becomes absolute. The present application by the auction-purchaser was admittedly made beyond three years from 10th May 1926, when the sale was confirmed. It was however contended by the learned advocate for the respondents that u/s 15, Lim. Act, in view of the decree of the Subordinate Judge on 14th May 1928, in the suit of Chandrakala, the auction-purchasers were entitled to deduct the period from 14th May 1928 to 15th July 1931 in computing the period of limitation prescribed by Article 180. Section 15, Lim. Act. however refers to a suit or, an application for the execution of a decree. The application for delivery of possession by the auction-purchasers may be treated as an application in an execution proceeding but it cannot be treated as an application for execution. Section 15, Lim. Act, therefore does not help the auction-purchasers in this case. Section 14, Lim, Act, also is not attracted in this case, inasmuch as the auction-purchasers were not in the plaintiffs in the suit before the Subordinate Judge, which was instituted on 2nd January 1925, but were resisting the claim of Chandrakala in the suit as defendants. It was however contended by Dr. Basak on the authority of the observations of the Judicial Committee in *Nrityamoni Dassi v. Lakhon Chandra Sen* 1916 PC 96. on the principle analogous to the provisions of Section 14, Lim. Act, limitation would remain in

suspense at least from 14th May 1928 to 15th July 1931, as the auction-purchasers were bona fide litigating their rights in a Court of Justice. In view of the provisions of Section 3, Lim. Act, it is not permissible to claim any exemption apart from what is contained in the Limitation Act.

4. It is contended by Mr. Basu appearing on behalf of the appellants that limitation began to run from 10th May 1926, when the sale was confirmed and that the subsequent inability of the auction-purchasers to get possession, in view of the decree of the Subordinate Judge on 14th May 1928, could not stop it. In support of this contention reliance was placed upon Section 9, Lim. Act. The effect of the decree of the learned Subordinate Judge however was that it was declared by a competent Court that the decree-holders had acquired no right on the basis of their auction-purchase in execution of the mortgage decree and consequently had no right to get possession. This decree was binding on the auction-purchasers until it was set aside by the Court of appeal. Consequently, the position is that there was a cancellation of the cause of action for delivery of possession by the decree of the Subordinate Judge on 14th May 1928 operating to suspend the rights of the auction-purchasers. Consequently they are entitled, on removal of the cancellation by the Court of appeal, to avail of a fresh cause of action, which arose by reason thereof: see the observation of Mukerji, J., in *Sarat Kamini Dasi v. Nagendra Nath Pal* 1926 Cal 65. As already stated the net result of the decree, passed by the Subordinate Judge on 14th May 1928, was that there was no actual sale which would give the purchaser a title to enter into possession or to enjoy the fruits of the sale.

5. In other words there was no real sale, to the benefit of which the purchaser was entitled: see *Baijnath Sahai v. Ramgut Singh* (1896) 23 Cal 775. Assuming that the words "to sue" in Section 9, Lim. Act, include an application for delivery of possession, in our judgment the section contemplates cases, where the cause of action continues to exist. It cannot apply to cases where the cause of action is cancelled by reason of subsequent events.

The language of Col. 3, Schedule 1, Lim. Act, should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party: see the case of *Muthu Korakkai Chetty v. Madar Ammal* 1920 Mad 1.

6. If the auction-purchasers applied for delivery of possession during the period between 14th May 1928 and 15th July 1931, they would have been successfully met with the plea that they had no right to get possession in view of the decree passed on 14th May 1928. Mr. Basu however contended that the auction-purchasers should have made a formal application for possession and, if their application failed, they could have filed an appeal against the order rejecting their application and thereby could have kept their application for delivery of possession pending till the question of title was finally decided by the appellate Court. In other words, the contention of Mr. Basu is that it was the duty of the auction-purchasers to apply for possession

even though it was not possible for them to get possession till the question of title was finally decided. But the utmost benefit that the auction purchasers could have got by such a proceeding would have been to have it suspended till the question of title was finally decided by the Court of appeal.

It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not: see the case of *Bassu Kuar v. Dhum Singh* (1889) 11 All 47.

7. We are therefore unable to give effect to the contention of Mr. Basu. This view is not inconsistent with the decision of the Judicial Committee in *Chandramani Shaha v. Anarjan Bibi* 1934 PC 134. In that case the sale was confirmed by the Subordinate Judge and the appeal by the judgment-debtor was dismissed. In that case there was no question of suspension of any cause of action. Again the delivery of possession to the auction-purchasers in 1926 was interrupted and was rendered infructuous by the resistance occasioned by the executrix, who was claiming in good faith to be in possession of the property on her own account. In fact, as stated above, she had instituted a suit long before the sale for a declaration that the property belonged to her on the distinct assertion that she was in possession of the property as executrix. It is therefore clear that delivery of possession to the auction-purchasers was rendered infructuous not by any fault or laches on the part of the auction-purchasers, but by an obstacle, which could not be removed even in a proceeding under Order 21, Rule 97, Civil P.C. The position then was that the obstruction could not be removed until the suit terminated in favour of the auction-purchaser. In these circumstances, we are of opinion that the real effect of the order dated 13th November 1926, dismissing the application for delivery of possession for default, is that the application for delivery of possession was not finally disposed of but remained pending in the eye of the law. The present application for delivery of possession should therefore be treated as one for continuance or revival of the former one. We are accordingly of opinion that the learned Subordinate Judge was right in holding that the application for delivery of possession is not barred by limitation. The appeal is, accordingly, dismissed, but there will be no order for costs.