

(1881) 04 CAL CK 0009

Calcutta High Court

Case No: None

Mahomed Hossein

APPELLANT

Vs

Kokil Singh and
Others

RESPONDENT

Date of Decision: April 13, 1881

Acts Referred:

- Limitation Act, 1963 - Article 165

Citation: (1881) ILR (Cal) 91

Hon'ble Judges: Richard Garth, C.J; McDonell, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

This is a rule obtained by Mahomed Hossein, who is the purchaser of certain land at an execution-sale, to discharge an order made by the Subordinate Judge of Patna on the 13th of September 1880, which order set aside the sale made to the plaintiff, directed the purchase-money to be refunded and also directed the judgment-debtor to be restored to possession.

2. The rule was obtained on the ground that the Subordinate Judge had no jurisdiction, after the sale had become absolute and had been confirmed by the Court, to make any such order.

3. The facts were these. In a suit which was brought by Gridari Mahton against Bissessi Dutt Singh, the defendant obtained a decree dismissing the plaintiff's suit with costs.

4. On the 18th November 1878, an auction-sale was held in execution of that decree, at which the present applicant purchased the right, title, and interest of one of the judgment-debtors in certain property, and by a certificate duly granted and dated the 23rd of May 1879, the sale was afterwards confirmed.

5. Meanwhile, an application had been made by the judgment-debtor to set aside the sale for irregularity, under the provisions of Section 314 of Act X of 1877, but this was refused by the Subordinate Judge on the 17th May 1879, and on appeal to the District Judge, this decision was confirmed, it being admitted by the appellant that he could not support his case upon the ground of irregularity.

6. It appears, however, that, on the 18th of November 1878, before the sale took place, another application had been made to the Subordinate Judge to stay the sale, on the ground that the right to apply for execution had been barred by limitation; but the Subordinate Judge decided against this application also, and consequently the sale proceeded. This order of the Subordinate Judge was also appealed to the District Judge, who reversed the decision of the Subordinate Judge on the 5th July 1879, holding that the right to apply for execution was barred and the High Court, to whom a second appeal was made, confirmed that decision.

7. It appears that these last mentioned proceedings were in some way or other brought to the notice of Mr. Beveridge, the District Judge, on the hearing of the appeal in the other case on the 24th March 1880; but he very properly considered that, for the purposes of that appeal, he ought not to go into them.

8. At the same time he threw out a suggestion in his judgment, that possibly the last words of Section 316, as amended by Act XII of 1879, might help the judgment-debtor, or might operate to make the certificate already granted a nullity, and that a substantive application might perhaps have the effect of cancelling the certificate.

9. Upon this the judgment-debtor appears to have made an application to the Subordinate Judge to have the sale set aside, and the purchase-money refunded to the auction-purchaser; and the Subordinate Judge made an order to that effect, upon the ground that the decree under which the execution took place was not subsisting at the time of the sale, because the right to execute the decree had been barred by limitation.

10. The present application was then made to us to set aside this order of the Subordinate Judge, as having been made without jurisdiction, and the question which we have to decide now is undoubtedly one of great importance to auction-purchasers.

11. The plaintiff purchased this property in November 1878. His purchase was confirmed by the Court, and he obtained a certificate on the 23rd day of May 1879, from which time he has been in possession. No application appears to have been made by the judgment-debtor during the pendency of either of the appeals from the Subordinate Judge to stay the confirmation of the sale, until those appeals had been decided. The purchaser was no party to the proceedings in which the question of limitation was raised, nor is he shown even to have been cognizant of these proceedings. He purchased, apparently, in perfect good faith; and the question now

is, whether, after the lapse of nearly two years from the date of the sale, and one and-a-half year from the date of its confirmation, the auction-purchase is to be set aside, and the plaintiff turned out of possession, upon a summary application made in the execution-proceedings to the Subordinate Judge.

12. The ground upon which the Subordinate Judge bases his judgment seems obviously erroneous. He seems to suppose that because the right to take out execution upon a decree is barred by limitation, the decree itself has ceased to subsist; whereas, of course, the decree remains, and will ever remain, in full force, as an adjudication of the rights of the parties, whether execution can be taken out upon it or not. A decree subsists for ever, unless it is set aside or reversed by some competent authority.

13. The words upon which the Subordinate Judge relies at the close of Section 316 as amended have been probably added to the section in consequence of what fell from the Bombay High Court in the case of *Basappa bin Malappa Aki v. Dundaya bin Shivlingaya* (I. L. R. 2 Bom. 540); but whether they were or no, the words "subsisting decree" evidently mean a decree unreversed and in full force, and not merely one upon which execution cannot be issued.

14. We think that, after the sale had been confirmed, and no attempt made by the execution-debtor to stay its confirmation, the Subordinate Judge had no power to set aside the sale by a summary order; and we think moreover, that under sched. ii, article 165 of the Limitation Act, the Application which was made to him ought not to have been entertained.

15. We say nothing as to the right of the Judgment-debtor to raise the question in a substantive suit; though we give him no encouragement to bring such a suit.

16. The rule must be made absolute with costs.