

(1867) 03 CAL CK 0004

Calcutta High Court

Case No: Special Appeal No. 1137 of 1866

Protab Chunder
Chowdhry and Others

APPELLANT

Vs

Brojololl Shaha and
Others

RESPONDENT

Date of Decision: March 12, 1867

Judgement

Sir Barnes Peacock, Kt., C.J.

In this case a decree for the payment of money was obtained against Shamdyall in the Court of the Sudder Moonsiff of Moorshedabad. The decree was sent to the Moonsiff of Beerbhoom for the purpose of being executed, and it appears that, in executing that decree, the proclamation, which was issued under s. 249, Act VIII of 1859, declared that the right, title, and interest of Shamdyall in certain property specified therein would be sold. The property was put up to sale under that proclamation, and the defendant became the purchaser. At the time when he made the purchase, and when he fixed the amount which it would be worth his while to give for that which was about to be sold, he knew that he was purchasing only the right, title, and interest of Shamdyall. Proceedings went on until it came to the granting of a certificate of sale under s. 259, and then, by some error (whether intentional or not, it is unnecessary to decide), it was recited in the certificate of sale that the plaintiffs' ancestor Kristodyall, as well as Shamdyall, was a defendant in the suit, and that the interests of the defendants in that suit had been sold; so that, in fact, instead of declaring that only Shamdyall's interests in the property had been sold, it was declared that the interests of the plaintiffs' ancestor, as well as Shamdyall's interests, had been sold under the decree. In carrying out the execution under s. 264 of the Procedure Code, the property being in the possession of ryots, a copy of the certificate of sale would have to be affixed, and a notice given to the occupants of the land that the right, title, and interest of the defendants had been transferred to the purchaser, coupling the notice with the copy of the certificate of sale. It would appear that notice was given to the occupants of the property that the interests of the persons who were described in the certificate of sale as the defendants had been sold. By putting the auction-purchaser into

possession in that manner, according to s. 264, it may be said that the plaintiffs, or their ancestor, were dispossessed of their interest in the property under the execution of the decree, and they might, if they had pleased, have applied within one month from the date of such dispossession to the Court by which the decree was executed, and complained of their having been so dispossessed, and the Court, under s. 269 of Act VIII of 1859, would have inquired into the matter and passed such order as it considered proper. If the Moonsiff, upon their making such application, had decided that their interest had been properly sold, or that that of which they had been dispossessed actually belonged to Shamdyall, they could not have appealed against the order, but might, within one year from the date of that order, have brought a regular suit for the purpose of establishing their right.

2. This suit is now brought by the plaintiffs for confirmation of their title, and to recover possession of the property of which they were dispossessed, and the question referred to us is whether the plaintiffs are barred by cl. 3, s. 1, Act XIV of 1859. That clause fixes the period of limitation to suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Courts not established by Royal Charter, when such suit is maintainable, at one year from the date at which such sale was confirmed, or would otherwise have become filial and conclusive, if no such suit had been brought. But this suit is not brought to set aside the sale of the property. It is brought merely to confirm the plaintiffs' title, and to restore them to possession. It is contended on the part of the defendants that the suit, although it has not been brought to set aside the sale, is substantially a suit to set aside the sale of the plaintiffs' interest, because the plaintiffs cannot be put into possession until that sale has been set aside. It appears to us that the clause referred to does not apply to a suit for setting aside certificates of sale but only to a suit for setting aside sales. The sale took place under the proclamation and was completed, and the certificate ought to have been a true certificate of the sale which actually took place. There was no necessity to set aside the sale because Shamdyall's interests alone had been sold, although the certificate stated that the plaintiffs' ancestor's interest had also been sold; and in a regular suit for confirmation of title, and for restoration of possession, it was competent to the plaintiffs to show what the sale really was, and that the certificate was wrong. The period of limitation for the suit, and for confirmation of title, and for restoration of property, is twelve years under cl. 12, s. 1, Act XIV of 1859 therefore, so far as Act XIV of 1859 goes, the plaintiffs are not barred by limitation.

3. But it is further contended on behalf of the defendants that, according to a decision of Steer, J., in *Bebee Suboorun v. Sheikh Golam Nujee* 2 W.R., 55, the plaintiffs or their ancestor had no right, when they were dispossessed by the notice given to the ryots that their interest had been sold, to lie by, and that they ought, under s. 269 of Act VIII of 1859, to have complained of their dispossession to the Court by which the decree was executed; and that if they did not do so, they would have only the same period from the date of dispossession to bring their action as they would have had under that section from

the date of the order, if they had complained to the Court under that section, and the Court had decided against them, i.e., one year. We are of opinion that the plaintiffs or their ancestor were not bound to complain under that section. If they were bound to complain, and had only the same time to bring their suit as they would have had if they had made their complaint, the period of limitation would seem to be one month from the date of dispossession, for s. 269 requires the person who is dispossessed, if he intends to make a complaint, to make that complaint within one month from the time of his having been dispossessed. Steer, J., does not say that they would be bound by the period of one month, but by the period of one year from the time of their dispossession. The period of a year, which is fixed by a, 269, is not to date from the time of dispossession, but from the date of the order made under the complaint. Where no complaint is made, there can be no order, and it would be impossible to ascertain whether the suit was brought within one year from the time at which the order would have been made if a complaint had been preferred; and there is no reason for saying that if there is no order from which the year is to date, the period of one year must be reckoned from the date of the dispossession instead of from the date of the order, which, if a complaint had been made, must have been subsequent to the dispossession, and in some cases a considerable time after it. It therefore appears to us that the ruling of Steer, J., to this extent is not correct, and that a party is not bound to make an application under s. 269, unless he pleases. If he chooses to make an application, and a decision against him is passed upon that application, he is not entitled to appeal against the order, but must bring a regular suit to establish his right within one year from the time of the order. But if he does not choose to apply to the Court which is executing the decree for a summary decision, but prefers to bring a regular suit in ordinary course, then the period of limitation prescribed by cl. 12, s. 1, Act XIV of 1859, is the period by which he is bound. It is also urged that the decision by Trevor and Campbell, JJ., in *Ram Gopal Roy v. Nundo Gopal Roy* 4 W.R., 42, is rather opposed to the present view of the Court. But all that that case decided was that, when a man is dispossessed by a Court in execution of an auction sale, he must sue within one year to reverse the sale proceedings. The facts of that particular case are not sufficiently detailed to enable the Court to say precisely what was intended. If a person makes an application under s. 269 of Act VIII of 1859, and the Court decides against him by holding that he was properly dispossessed, that may be said to be a dispossession by a Court. If that is what was intended by a dispossession by the Court, then the case is right. But the case would not fall within s. 1, Act XIV of 1859, but within s. 269, Act VIII of 1859. There may possibly be other cases of dispossession by a Court in which it may be necessary to set aside the order of the Court before a regular suit to recover possession can be maintained. It is not necessary to express any opinion upon that point at present. It is sufficient to say that, in the present case, the plaintiffs having been dispossessed under a certificate of sale, which was not conformable to or warranted by the sale itself, and having made no complaint to the Court which was executing the decree, have a right to bring their suit for confirmation of their title, and to be restored to the possession of the property from which, they have been ousted, within twelve years from the time of their dispossession. With this intimation of the opinion of the Full Bench, the case will be sent

back for further orders to the Division Court which referred it for our opinion.