Special Appeal No. 773 *of* 1864.

1864.
Dec. 22.

KRISHNA'JI' V. JOSHI ..... *Appellant.*
MU'KUND CHIMANSHET ..... *Respondent.*

Sale under Decree, Suit to set aside—Act XIV. of 1859, *Sec.* 1., *Cl.* 3 *and Cl.* 12—*Act VIII. of* 1859, *Secs.* 229, 230, 246, *and* 247—*Construction—Acts in pari materiâ.*

A purchased immoveable property at an auction sale. The same property was subsequently purchased by B at another auction sale.

Held that a suit brought by A against B to recover the property was virtually a suit to set aside the last sale, and that it should have been brought within one year from the date of that sale; and that Cl. 3 (and not Cl. 12) of Sec. 1. of Act XIV. of 1859 was applicable.

THIS was a special appeal against the decision of W. H. Newnham, Assistant Judge of the Konkaṇ District, in Appeal Suit No. 86 of 1864.

Krishṇáji brought the original suit, in the Court of the Múnsif of Peṇ, to recover possession as owner of land, measuring 35¼ bighas, situated in the Sánksí táluká: stating that the land had been purchased by him at an auction sale held by the court on the 27th of March 1858 for Rs. 10-8-0, and had been in his possession; but that the defendant had since taken forcible possession of, and cultivated, the land, alleging that it was purchased by him at an auction sale in 1861.

The defendant answered that he had purchased the land at an auction sale, held through the court at the instance of one Lakhmá Rághoji Márwáḍí; and contended that the promoter of the sale ought to have been the defendant.

The Munsif, finding that the plaintiff had acquired a superior title to the land in dispute, decreed in his favour.

On appeal, the Assistant Judge agreed with the Munsif in his finding on the questions raised before him; but reversed his judgment, on the ground that the plaintiff's suit was barred by the law of limitation: holding that, the action being to set aside a sale, and not to recover immoveable

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property, Cl. 3, Sec. I. of Act XIV. of 1859 was applicable, and not Cl. 12, as was contended. The plaintiff was dispossessed on the 9th of June 1861, and ought to have brought his suit within one year from that date: whereas the plaint was filed on the 1st of July 1862, *i.e.*, nearly two years after the sale. He, therefore, reversed the decree of the Munsif.

The case was heard before COUCH and NEWTON, JJ.

Pándurang Balibhadrá (with him *Shántárám Náráyan*), for the appellant:—This is not a suit to set aside a sale. Even though the plaintiff had not brought it within one year of dispossession, he could not be prevented from urging his claim. It was possible that parties having an interest might not be aware of sales; but such was not the case with the plaintiff, who urged his claim in the Revenue Court, before filing his plaint in a Court of Adálat, and this shows that due diligence was exercised by him. He did not apply under Sec. 269 of the Civil Procedure Code, but his suit was to recover immoveable property. The limitation specified in Cl. 3 of Sec. I. of Act XIV. of 1859 does not apply; and supposing it did, the time during which he prosecuted his suit in the Revenue Court must be excluded from computation, under Sec. XIV. of the Act.

Dhirajlál Mathurádás, for the respondent:—The Revenue Courts look merely to the fact of possession within six months of the filing of the suit: they have nothing to do with title. The plaintiff should not be allowed the time spent in the Revenue Court, as that court was not unable to decide upon the cause of action, from defect of jurisdiction or other cause: Sec. XIV. The present suit is clearly brought to set aside the sale, and, therefore, Cl. 3 of Sec. I. of Act XIV. of 1859 applies to it.

Pándurang replied.

Cur. adv. vult.

COUCH, J.:—The question is whether, the suit being to set aside a sale, it comes within Cl. 3 or Cl. 12 of Sec. I. of Act XIV. of 1859.

In construing the provisions of the Limitation Act we must look to those of Act VIII. of 1859. Claims to attached property are considered in Secs. 246-247. It is also important to observe what is provided for in previous sections. Sec. 229 provides how an obstruction made in the execution of a decree for immoveable property by a *bonâ fide* claimant, other than the defendant, is to be dealt with; and Sec. 230 prescribes the procedure in the case of a person who disputes the right of the decree-holder to dispossess him of such property. The period allowed in such cases for the claimant to prefer an application is one month from the date of such dispossession.

Secs. 246 and 247 prescribe how and when claims and objections to sales of attached property are to be preferred and investigated. Sec. 246 is as follows :—

"In the event of any claim being preferred to, or objection offered against, the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree, or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220. And if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, at the time when the property was attached, or that being in the possession of the party himself at such time it was so in his possession not on his own account, or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was in possession of the party against whom execution is sought as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the

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occupancy of ryots or cultivators or other persons paying rent to him, at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

The time limited by the latter part of this section for a person, whose claim has been disallowed, to bring a suit to establish his right, is any time within one year from the date of the order. In the present case the plaintiff has not followed the course prescribed in Sec. 246. But he was at liberty, under Cl. 3 of Sec. 1. of Act XIV. of 1859, to bring his suit within one year. It provides—

"To suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by royal charter, when such suit is maintainable; to suits to set aside the sale of any property, moveable or immoveable, for arrears of Government revenue or other demand recoverable in like manner; to suits by a putneedar or the proprietor of any other intermediate tenure saleable for current arrears of rent, or other person claiming under him, to set aside the sale of any putnee talook or such other tenure sold for current arrears of rent; to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other officer of revenue—the period of one year from the date at which such sale was confirmed, or would otherwise have become final and conclusive if no such suit had been brought."

We are of opinion that the present is a suit to enforce the same right which would be enforced by the suit referred to in Sec. 246 of Act VIII. of 1859. We must construe the acts *in pari materiâ*. We cannot, therefore, but come to the conclusion that the present suit falls within the provision in Cl. 3 of Sec. 1. of Act XIV. of 1859, and ought to have been brought within one year. That being so, and because there is a previous provision of the Act applicable to the case, we hold that Cl. 12 of Sec. 1. of Act XIV. of 1859 does not apply.

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There is another reason for coming to this conclusion. The sale under a decree is an important matter. It has greater effect than an ordinary sale; and the Legislature may have thought that a shorter period ought to be allowed for impeaching it.

The decree of the lower court is, therefore, affirmed.

Decree affirmed.

Special Appeal No. 237 *of* 1864.

1865.
Jan. 11

BA'BA'JI' SAKHOJI' .....*Appellant.*
RA'MSHET PA'NDUSHET and another..... *Respondents.*

Ancestral Land, Sale of—Suit to Set Aside—Burden of Proof—Common Family Necessity.

In a suit brought by a Hindú son, for himself and on behalf of three infant brothers, to set aside a sale of certain ancestral lands, which had been made by his father without his concurrence:—

Held that the *onus* of proving that the payment of the debts, on account of which the property was sold, was not a common family necessity, was properly laid by the District Judge upon the plaintiff.

THIS was a special appeal from the decision of C. Gonne, Joint Judge of the Konkaṇ District, in Appeal Suit No. 79 of 1861.

The case was heard before TUCKER and WARDEN, JJ.

Mádhavráv Krishṇa Kharkar for the appellant.

McCombie (with him *Dhirajlál Mathurádás*) for the respondent.

The facts are stated in the judgment.

Cur. adv. vult.

TUCKER, J.:—This action was brought by a Hindú son, for himself and on behalf of three infant brothers, to set aside a sale of certain ancestral lands, which had been made by his father without his concurrence.

Both the father and the purchaser were made defendants. The father did not answer, but appeared at the trial, and was examined, when he stated that he had not received full consideration for the deeds which he had executed.