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monses for the appearance of the witnesses to the lease, if he required them, calling on the party in whose favour they were to testify to pay the *báttá*. The Court also observe that the lease was only produced from the Senior Assistant Judge's records on the very day that the decree was passed, so that the defendants had no time or opportunity to produce the witnesses thereto. We are, therefore, constrained to remand the case again for this purpose; and the decree of the Senior Assistant Judge is accordingly reversed, and the case remanded for re-trial on its merits.

Decree reversed and case remanded.

Sept. 15.

Special Appeal No. 752 *of* 1867.

LA'LCHAND AMBA'IDA'S, heir of AMBA'IDA'S NA'GANDA'S .....*Appellant.*

SAKHARA'M valad CHANDRA'BHA'I *et al.*.....*Respondents.*

Limitation—Sale in Execution of Decree—Suit to recover possession of Lands sold—Act XIV. of 1859, *Sec.* 1., *cl.* 3 *&* 12—*Civ. Proc. Code, Secs.* 246 *and* 269.

The plaintiff's tenant having been ejected from certain immoveable property of the plaintiff under an auction sale in execution against a third party, the plaintiff made no application to the Court, under Sec. 246 or 269 of the Civ. Proc. Code, to prevent or set aside the sale.

Held that he was not bound to do so, but that he was entitled to file a regular suit to establish his title and recover possession at any time within twelve years from the date of the dispossession, under cl. 12, Sec. 1., Act XIV. of 1859.

Krishnáji V. Joshi v. *Mukund Chimanshet* (2 Bom. H. C. Rep. 18) overruled.

THIS was a Special Appeal from the decision of A. Bosanquet, Acting Judge of the District of Ahmednagar, in Appeal Suit No. 251 of 1867, modifying the decree of the Munsif of Sangamner.

The appeal was argued before COUCH C.J., and NEWTON, J.

Shántárám Náráyan for the appellant.

Nánábhái Haridás for the respondents.

The facts of the case fully appear from the following judgment, delivered by

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LA'LCHAND AMBA'IDA'S N. v. SAKHA'RA'M CHANDRA-BHA'I *et al.*

COUCH, C. J.:—This suit was brought by the special appellant to obtain possession of a shop at A'kolá, which he alleged Lakshuman and Rávji had, by two deeds in the years Shake 1775 and 1776 (A.D. 1853 and 1854), mortgaged to Mangalji Bháichand for Rs. 365-4-0; and Mangalji had, by a deed dated Chaitra Vadya 7, Shake 1779 (16th April 1857) sold the mortgage to the plaintiff's father, Ambáidás, for Rs. 449; and the plaint stated that Hukamchand Kisandás, had obtained a decree against Talakchand, the brother of Mangalji, and, in pursuance thereof, attached and sold Talakchand's mortgage right in the house; that the defendant, Sakhárám, bought that mortgage right, and the plaintiff's tenant, Rámdás, was ejected from the shop, and it was made over to Sakháram; but Mangalji and Talakchand were divided in estate, and Talakchand had no right in the shop.

Sakhárám's defence was that the action was barred by lapse of time, it not having been brought within one year from the sale of the shop; that Rávji had mortgaged the shop to Mangalji and Talakchand, who never divided the family estate.

The defence of Rámdás was that the plaintiff had let the shop to him; that the house had been subsequently attached; and that on the 2nd of March 1863 he was ejected from the shop, and it was made over to Sakhárám.

The Munsif of Sangamner decreed for the defendants, on the ground that the suit was virtually a suit to set aside a sale of property sold under an execution of a decree of a Civil Court, and, therefore, barred by cl. 3, Sec. 1. of Act XIV. of 1859, it not having been instituted within one year from the date of the sale; and he found that, Mangalji and Talakchand being divided in estate, Mangalji had bought the mortgage on the house, and had sold it to the plaintiff's father, Ambáidás, and when the shop was attached it was occupied by the plaintiff's tenant, Rámdás.

Against this decree the plaintiff appealed to the District Court, which held that the suit was not barred by the law of

limitation; and—finding that Mangalji and Talakchand were not divided in estate; that Mangalji sold his mortgage to the plaintiff's father, Ambáidás; and that, when the shop was attached, it was occupied by Rámdás as the plaintiff's tenant—modified the Munsif's decree, by ordering that on the plaintiff paying to Talakchand's legal representative, Sakhárám, Rs. 224-8-0, the value of Talakchand's share in the mortgage, as estimated in the mortgage-bond to Ambáidás, the defendant Sakhárám should make over the shop to the plaintiff.

Against this decision there is a special appeal, on the grounds that the Court has made an award in favour of the representatives of Talakchand, who, it was not proved, had any interest in the original mortgage; and, it not being found that Mangalji was acting on behalf and for the benefit of Talakchand, his representatives could not be allowed to take advantage of it. At the hearing of the appeal it was objected for the respondent Sakhárám that the suit was barred by the law of limitation; and this is the first question which we have to consider.

In Special Appeal No. 773 of 1864, *Krishṇáji V. Joshi* v. *Múkund Chimanshet* (*a*), the plaintiff had purchased land at an auction sale held by the Court on the 27th of March 1858, and had taken possession of it. The defendant subsequently purchased the same land at another auction sale, held through the Court, and took forcible possession of it. The Assistant Judge of the Konkan held, reversing the decree of the Munsif, that a suit by the plaintiff to recover possession of the land was barred by the law of limitation, and this Court, on special appeal, confirmed his decree; and in Special Appeal No. 526 of 1866, heard on the 29th of January 1867, in which the plaint stated that the plaintiff was a mortgagee; that the money was due to him on the mortgage, and that the land had been sold by auction and he had been dispossessed; and sought that he should be put in possession as before, this Court, following previous decision, held that

(*a*) 2 Bom. H. C. Rep. 18.

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the claim was barred. On that occasion the case of *Ram Gopal Roy* v. *Nundo Gopal Roy* (*b*) was quoted, where it was held by Trevor and G. Campbell, JJ., that a man dispossessed by the Court in execution of an auction sale must sue within one year to reverse the sale proceedings; but if he is dispossessed by the purchaser otherwise than through the Court, he can sue within twelve years of his cause of action.

The plaint in the present suit must be construed as alleging that the plaintiff's tenant was ejected from the shop through the Court in execution of the auction sale, and the question is, whether a suit to recover the possession is within cl. 3 of Sec. 1. of Act XIV. of 1859.

Sec. 246 of the Civil Procedure Code provides, in the event of a claim being preferred to, or an objection offered against, the sale of attached property as not liable to be sold in execution of a decree against the defendant, for an investigation by the Court of the question whether the property attached was in the 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 occupancy of *rayats* or cultivators or other persons paying rent to him, at the time when the property was attached; and the order passed by the Court is not to be subject to appeal, but the party against whom it may be given is at liberty to bring a suit and establish his right within one year from the date of the order. Where a claim is made, or an objection offered to the sale, and an investigation follows under the section, it is clear that the party making the claim or objection, if unsuccessful, must sue within one year from the date of the order, if he seeks to establish a right to possession. The order of the Court has the same effect as if he had been originally made a defendant in the suit, and is binding like any other judgment, only that, instead of being subject to appeal, it may be set aside by a suit, and the property declared not to have been liable to be sold. If a suit were sub-

(*b*) 4 Calc. W. Rep., Civ. R. 42.

sequently brought, between the same parties, it would not be necessary for the defendant to rely on the law of limitation Sec. 2 of Act VIII. of 1859 would be an answer to it.

Sec. 269 enables the Court, on the complaint of any person claiming as proprietor, mortgagee, lessee, or under any other title, who shall be dispossessed, to inquire into the matter of the complaint, and pass such order as may be proper, which order is not subject to appeal, but the party against whom it is given may bring a suit to establish his right at any time within one year from its date.

But suppose a person, as he may do (8 Cal. W. Rep., Civ. R. 358), abstains from preferring a claim, or objecting to the sale, or not knowing of the sale, is dispossessed after it has been completed and makes no complaint under Sec. 269: within what time must he bring a suit? Its object is to render the sale void and totally inoperative as regards the property in question. Though not in form to set aside the sale, it is virtually a suit to do so; and in Special Appeal No. 773 of 1864, we were of opinion that, as it was a suit to enforce the same right which would be enforced by the suit referred to in Sec. 246 and Sec. 269 of Act VIII. of 1859, it ought to come within cl. 3 of Sec. 1 of Act XIV. of 1859; and this agrees with the opinion of the High Court at Calcutta in the case before quoted. But, as there are contrary decisions in that Court we have thought it right to reconsider our opinion. The principal of these are reported in 7 Cal. W. Rep. 253 and 256, and were by a Full Bench. Cl. 3 of Sec 1. of Act XIV. of 1859 is in terms applicable only to suits to set aside the sale, and the concluding words appear to show that it is to be construed strictly. They are—"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." These words are inapplicable to a suit where the dispossession is the cause of action, and it may not have taken place till some time after the sale was confirmed. They seem to refer to a suit by a party to the suit in which the execution issued or by the

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purchaser, who are bound by the confirmation of the sale, and not to a suit by a person not bound by it; and although looking at Secs. 256 and 257 of Act VIII. of 1859, suits of the former description are likely to be rarely brought, they may sometimes occur. When we decided Special Appeal No. 773 of 1864, we thought it was not the intention of the Legislature to provide for these cases by cl. 3 of Sec. 1. of Act XIV. of 1859, and that suits to recover property, the title of the defendant to which rested upon a sale in execution of a decree, and where the sale, though not in form sought to be set aside, was sought to be rendered totally inoperative, were contemplated; and in coming to this conclusion we were influenced by a consideration of the means afforded by Act VIII. of 1859 for determining whether the property was liable to be sold in execution of the decree, and of the diminution of price which must arise from the uncertainty of the title, and the possibility of the property being claimed by a third person at any time within twelve years from the taking possession under the sale. We are now, however, of opinion that this conclusion cannot be supported, and that the decision must be considered as overruled.

The District Judge then having rightly held that the suit was not barred by the law of limitation, it is necessary to consider the other grounds of appeal. He has found that Mangalji and Talakchand were undivided, and consequently that the money secured by the mortgage to Mangalji was their joint property, and that Sakhárám, by his purchase at the sale in execution of the decree against Talakchand, was entitled to stand in his place. This would have been correct if there had been no sale by Mangalji; but it may be that Mangalji was the manager, and that the sale was made under such circumstances as to render it valid against Talakchand or any one claiming under him, or that the money advanced to Lakshuman and Rávji was the self-acquired property of Mangalji, and the entire interest in the mortgage security belongs to the plaintiff. The suit must, therefore, be remanded for re-trial: the costs to follow the final decision.