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to the suit, the object of which would seem to be that the matter should be investigated in the presence both of the judgment-debtor and claimant if necessary. We think, therefore, that the lower Courts were right in holding that the decree in Suit 886 of 1879 did not operate as *res judicata*, there being no evidence to show that the judgment-creditor, in point of fact, represented the plaintiff so as to constitute the judgment-debtor a party to the suit.

It was urged before us that, at any rate, the plaintiff must be deemed to have been a party against whom the order was made, and that the present suit is, therefore, barred by the Statute of Limitations; but we agree with the reasoning in *Imbichi Koya* v. *Kakkunnat Upakki*(1) and *Mannu Lal* v. *Harsukh Dás*(2), that a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but that it must depend upon the facts of each case. And as the question of the statute of limitations is now raised for the first time in second appeal, this Court cannot decide that question against the plaintiff. We must, therefore, confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 1 Mad., 391. (2) I. L. R., 3 All., 233.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

PAREKH RANCHOR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I VAKHAT AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Limitation Act XV of 1877, *Sch. II, arts.* 12, *cl. (a), and* 95—*Suit by reversioner to establish his title to property sold in execution of decree obtained against a widow as representative of her deceased husband's estate—Fraud—Collusion—Remarriage of widow—Act XV of* 1856, *Sec.* 2.

The plaintiff, as the nearest heir of one Odhav Tuljá, who died intestate in 1873, sued to set aside a sale of certain immoveable property belonging to the estate of the deceased, which had been sold on the 3rd November, 1875, in execution of a money decree obtained by the defendant, Jagannáth, against Bái Vakhat, the widow of Odhav Tuljá. Bái Vakhat had married a second time in 1876, and her second

* Appeal No. 107 of 1883.

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husband was the brother of the purchaser at the execution sale. The plaintiff alleged that the decree had been fraudulently and collusively obtained on a bond in Odhav Tuljá's name, which had been forged by Jagannáth. The suit was brought on the 28th January, 1878, and the plaintiff prayed that the sale might be cancelled, having been made in order to defeat his rights; that he might be declared the heir of Odhav Tuljá; and that possession of the property, with mesne profits, might be awarded to him.

The lower Courts dismissed the suit, holding that it was barred by article 12, clause (*a*) of Schedule II of the Limitation Act XV of 1877.

On appeal to the High Court,

Held, that article 12 did not apply; for, although the plaintiff sued to set aside a sale held in execution of a decree, he did so, not as one who would have been bound by the sale if the suit had not been brought, but in order to obtain a declaration that he was not bound by it, the decree under which the sale was held having been fraudulent and collusive; so that the cause of action could only have arisen when he became aware of the fraud. Article 95 of Schedule II of Act XV of 1877 applied to the present suit, which was, therefore, in time.

A widow of a deceased Hindu represents the estate of the reversioner for some purposes; but it is her duty not only to represent the estate, but to protect it. When a suit is brought on the ground that the widow did not in a former suit protect the interests of the person who was to take after her death, but collusively suffered judgment against herself and sale of her husband's property in execution, then if such person on that ground treats the sale as inoperative, and seeks for a declaration that it is not binding on him, article 12, clause (*a*) of Schedule II of the Limitation Act XV of 1877 does not apply to the suit.

Held, also, on the evidence, that the suit against Bái Vakhat was collusive, and that the sale in execution was in fraud of the plaintiff's right. He was, therefore, entitled to a decree declaring that he was not bound by the sale of the 3rd November, 1875, in the suit brought by Jagannáth against Bái Vakhat as representative of her deceased husband, Odhav Tuljá. Whether the plaintiff was entitled, also, to immediate possession of the property in the suit, depended on the question whether Bái Vakhat's life-estate was defeasible on her remarriage. She belonged to a caste in which remarriage was permitted. The following issue was accordingly sent to the lower Court for trial:—"Whether, by the usage of the country, the rights and interests of Bái Vakhat by inheritance in her deceased husband's property, the subject of this suit, ceased and determined on remarriage in 1876, as if she had then died."

APPEAL from the decision of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat.

This suit was brought by the plaintiff as the nearest heir of one Odhav Tuljá, who died intestate in 1873-74, to set aside a sale of certain immoveable property of the deceased Odhav, which was sold on the 3rd November, 1875, in execution of a

money decree obtained by the defendant Jagannáth against Odhav's widow, Bái Vakhat. The purchaser at the said sale was the defendant, Gopál; but the plaintiff alleged that Gopál was merely the nominee of his brother, the defendant Kuber, who had married Bái Vakhat in May, 1876, and who, with her, was in possession of the land. The plaintiff alleged that Jagannáth's decree against Vakhat, under which the sale had taken place, had been collusively and fraudulently obtained on a bond in Odhav's name, which had been forged by Jagannáth. The plaintiff prayed that the sale might be set aside; that he might be declared the heir of Odhav; and that Odhav's property, which had been in the possession of the defendants, might be restored to him with mesne profits.

The plaintiff brought this suit on the 28th January, 1878, in the Court of the First Class Subordinate Judge of Surat, who held the suit barred under clause 12 (*a*) of Schedule II of the Limitation Act XV of 1877, as a suit for setting aside the sale of the 3rd November, 1875.

From this decree the plaintiff preferred an appeal to the High Court.

Shántárám Náráyan for the appellant:—Article 12 of the Limitation Act XV of 1877 was wrongly applied by the lower Court. The question is, whether the suit is to set aside the sale or to set aside the decree. The suit is really one to set aside the decree on account of fraud, and is, therefore, governed by article 95 of the Limitation Act XV of 1877. The suit, having been brought within three years, is not barred.

Gokuldás Kahándás for the respondents:—This suit is to set aside the sale, and, not having been brought within one year, is barred under article 12, clause (*a*) of the Limitation Act. If the Court chooses, the decree may be set aside, and the sale may stand, though, as against a purchaser at the Court sale, the remedy is to set aside the sale and not the decree.

BIRDWOOD, J.:—The plaintiff sued as the nearest heir of Odhav Tuljá, who died in 1873-74, for the cancellation of an auction sale, held on the 3rd November, 1875, of Odhav's im-

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moveable property, including a *bhág*, &c., on the ground that the decree, in execution of which the property was sold, had been collusively obtained by the defendant Jagannáth against the defendant Vakhat, Odhav's widow, on a bond which had been forged, in Odhav's name, by defendants Jagannáth and Máháshankar. After the institution of the suit, the defendant Máháshankar's name was struck off at the instance of the plaintiff; and he is not, therefore, a party to this appeal. It is stated in the plaint that the purchaser at the Court sale, the defendant Gopál, really purchased on behalf of his brother, the defendant Kuber, who married the defendant Vakhat on the 4th May, 1876, and that the land remained, after the sale, in the possession and management of Kuber and Vakhat. It is further a part of the plaintiff's case that, previously to the Court sale, the property had been *mortgaged*, under a fictitious bond, dated the 13th March, 1874, in the name of Vakhat, to Kuber, who obtained a decree against her on the 14th October, 1874, which he sold collusively to Máháshankar, and that the bonds and decrees referred to in the plaint and the sale to Máháshankar and the purchase by Gopál under Jagannáth's decree were all collusively and fraudulently designed to defeat the plaintiff's rights. The plaintiff sued also for a *declaration that* he was the heir of Odhav, and for possession of the property, with mesne profits.

The suit was brought on the 28th January, 1878; and the Subordinate Judge, First Class, of Surat held that it was barred by article 12, clause (*a*), of Schedule II of Act XV of 1877, as it was not brought within one year from the date of the Court sale. But while rejecting the claim on this ground, he expressed his opinion on certain points, to which we refer, as we are unable to concur in his finding on the question of limitation. He was of opinion, on the evidence, that the plaintiff was an agnate of the deceased Odhav, and that there was no other *pitrai* of equal or nearer degree; and it has not been contended before us that this view of the evidence is wrong. The Subordinate Judge thought, also, that the bonds impugned by the plaintiff and Kuber's decree were not proved to be collusive, false, or fraudulent, though he was led to suspect

that one of the bonds, *viz.*, Kuber's mortgage-bond, was collusive and fraudulent. He also presumed, for want of evidence to the contrary, that Gopál purchased the property with his own money, on his own behalf. He expressed an opinion on certain other points also, to which, however, it is not necessary for us to refer,—the argument in this Court having been directed only to the question of limitation and to the character of the several transactions and proceedings which ended in the sale of Odhav's property to Gopál.

The Subordinate Judge has, in our opinion, wrongly applied article 12, clause (*a*) of Schedule II of Act XV of 1877 to the case; for though the plaintiff seeks to set aside a sale in execution of a decree, he does so, not as one who would have been bound by the sale, if the suit had not been brought, but in order to obtain a declaration that he is not bound by it, the former suit having been fraudulent and collusive, so that a cause of action could only have been given him when he became aware of the fraud. The rule in article 12, clause (*a*) of Schedule II of the Act is the same as in clause (3) of section 1 of Act XIV of 1859, upon which a strict construction was put by Sir R. Couch in *Lálchund* v. *Sakhárám*[1]. It was there held that the concluding words of clause (3), *viz.*, "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," are inapplicable to a suit where a dispossession is the cause of action, which may not have taken place till some time after the confirmation of the sale. "They seem," Sir R. Couch said, "to refer to a suit by a party to the suit in which the execution issued, or by the purchaser, who are bound by the confirmation of the sale, and *not to a suit by a person not bound by it.*" And a similar construction must, we think, be put on the present Act. "The policy of the Legislature requires," as pointed out in *Venkápá* v. *Chenbasápá* [2], "that a person who has once commenced to litigate should carry his litigation to an end within a reasonable time." If this be the reason for the one-year rule, it applies as well to one who connects him-

(1) 5 Bom. H. C. Rep., A. C. J., 139. (2) I. L. R., 4 Bom., at p. 24.

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self with litigation, either by intervening to prevent the sale of property under an attachment, or by becoming a purchaser of property sold in execution, as to a party to the litigation. It has no necessary application to a person who has not been connected in any such way with litigation, or whose rights, even though in a certain sense represented, have not been properly protected in litigation, of which he has been kept in ignorance. When a Hindu widow is sued, not personally, in her own right, as widow, but as representative of her husband, for her husband's debt, she, no doubt, represents the estate; and a sale in execution, ordinarily, in such a case, passes not merely her own life-interest, but the whole estate. (See the remarks at pp. 281, 282 of the Report in *Baijun Doobey* v. *Brij Bookun Lall Awusti*[1].) In *Nathá Hari* v. *Jámni*[2], it was held that "so long as no legal administrator has been appointed, the childless widow of a separated Hindu is the only person who can defend a suit as his representative," and that "a decree obtained against the widow will enable a creditor to attach and sell, not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman;" and in the case referred to at p. 96 of West and Bühler's Digest of Hindu Law, 3rd ed., it was held that the widow would completely represent the estate, and under certain circumstances the Statute of Limitations might run against the heirs to the estate, whoever they might be.

But though a sale under a decree against the defendant Bái Vákhat, for Odhav's debt, might, under certain circumstances, have bound the plaintiff, the Statute would clearly not run against him if he is in a position to seek relief on the ground of fraud. The case would then be governed by other considerations than those ordinarily applicable. As pointed out by Markby, J., in *Brammoye Dasee* v. *Kristo Mohun Mookerjee*[3], "the rule, that a decree against a widow binds the reversioner, is subject to this qualification, that there has been a fair trial of the right at the former suit. That is laid down in what is com-

(1) L. R., 2 I. A., 275. (2) 8 Bom. H. C. Rep., A. C. J., 37.
(3) I. L. R., 2 Calc., 222.

monly called the *Shivagunga Case* (1) and in * * *Mohima Chunder Roy Chowdhry* v. *Rám Kishore Acharjee Chowdhry* (2). It was there pointed out that the Privy Council, in a more recent case (*N. C. Ghose* v. *Sreemutty* (3)) have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate, but to protect it also." Where the ground of action really is that the widow did not, in the former suit, protect the interests of the person who was to take after her death, but collusively suffered judgment against herself and sale of her husband's property in execution, then if such person on such ground, treats the sale as inoperative, and seeks for a declaration that it is not binding on him, article 12, clause (*a*) of Schedule II of the Limitation Act would not apply to the suit. The circumstances in *Kishen Bullub* v. *Roghoonundun* (4) are similar, in some respects, to the present case. "The plaintiff there had obtained a decree against Pearee Lall Mahtá for certain sums of money. Pearee Lall Mahtá (the judgment-debtor) then died, and after his death, his wife, for the purpose of preventing her husband's property being taken in execution, made a sham sale of it in the first instance to a third person, and a collusive suit followed, in which a decree was fraudulently obtained, and the property sold under that decree to another party. In this state of things, the plaintiff, (the execution creditor) brought a suit to set aside the collusive sale and subsequent proceedings, upon the ground that they were all one entire fraud, connected for the purpose of defeating his judgment." With reference to that suit, Sir R. Garth remarked that it was obvious that it was "not a suit to set aside a decree within the meaning of clause 14" of Schedule II of Act IX of 1871 —*Abul Munsoor* v. *Abdul Hamid* (5). We are of opinion that article 95 of Schedule II of Act XV of 1877 applies to the present suit, which was instituted within three years from the date of the sale under Jagannáth's decree, and could not, therefore, have been barred.

(1) 9 Moore's I. A., 543.
(2) 15 Beng. L. R., 142.
(3) 11 Moore's I. A., 241.
(4) 6 Calc. W. R. Civ. Rul., 305.
(5) I. L. R., 2 Calc., 98.

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The question then remains, whether, in Jagannáth's suit against Vakhat, the interests of the present plaintiff were protected by Vakhat. The record of that suit is not before us. We have called for it from the District Judge, who reports that the papers have been destroyed; but he has given us the following information regarding it, which he has obtained from the register of the suit. The suit was registered as No. 230 of 1875, and was brought by Jagannáth Ranchod against Odhav Tuljá, deceased, represented by his heir, his widow Bái Vakhat, on an instalment bond dated the 21st November, 1871, passed by the deceased, to recover principal, Rs. 149, and interest, Rs. 149, in all Rs. 298. The 11th March, 1875, was fixed for the hearing, and on that date an *ex-parte* decree was made in Jagannáth's favour. The Subordinate Judge has, in the present suit, expressed the opinion that Jagannáth's bonds (for he seems to have held two bonds) are proved by the attesting witness, Dwárká (No. 108), and are not shown to be forgeries. It does not appear whether the Subordinate Judge had the bond on which Jagannáth sued Bái Vakhat before him, when he expressed this opinion in August, 1883; but he had not the advantage of himself examining the witness Dwárka and observing his demeanour, the evidence in this case having been recorded before the Subordinate Judge of Broach, in whose Court the plaint was, at first, filed. The witness Dwárká was examined in 1881, regarding transactions which took place in 1871; and it is not likely that, after a lapse of ten years, he could really have remembered all the particulars of the payment of the consideration of Jagannáth's bond to which he deposes. His evidence does not appear to be of any value. There is nothing, moreover, to show that Odhav was ever under the necessity of borrowing money. On the contrary, he was the owner of several houses and of the land in suit, of which the annual rental was, apparently, not less than Rs. 600, (see exhibit No. 95). Bái Vakhat says that, when he died, he had debts due to him to the extent of Rs. 3,000 or Rs. 4,000, though afterwards she contradicts this statement, and says that he owed debts to that amount. Her evidence, however, is really worthless, for it is obvious that she is interested in justifying the sale which the plaintiff seeks

to set aside. Odhav must have been a man of some substance, as the whole village was feasted on the occasion of his death, and the plaintiff says that this is only done when a man dies free from debt. However, as the bond said to have been executed by him on the 21st November, 1871, is not before us, and cannot now be produced, we are not really in a position to record a definite finding as to its genuineness. But, having regard to the circumstances of the case generally, we are inclined to doubt whether any such bond was ever executed by Odhav; and we are of opinion that, in the proceedings taken on it, which terminated in the sale to Gopál, the plaintiff's rights, as nearest heir of Odhav, were not protected. Those were not the only proceedings taken with a view to the sale of Odhav's immoveable property. Kuber brought his suit against Bái Vakhat on the mortgage-bond in her name, for Rs. 2,500, on the 3rd August, 1874; and the property was attached at the instance of Maháshankar, as assignee of Kuber's decree, which he is said to have bought for Rs. 1,500. The proceedings in that suit have a bearing on the subsequent proceedings in Jagannáth's suit. If Bái Vakhat collusively suffered a decree in Kuber's case for a debt not due by her, there would be some ground for suspecting her honesty in the subsequent suit. If there is ground for suspecting that the former suit was really contrived by the money-lender Maháshankar for his own ends, then the connection between the two suits becomes the more apparent, when it is remembered that Jagannáth is not an independent money-lender, but is in the service of Maháshankar as his *gumásta*, and that Gopál, the purchaser at the sale in Jagannáth's suit, was the brother of Kuber, the plaintiff in the first suit, who, though he says that he and Kuber tilled their lands separately before Kuber married Vakhat, must be presumed to have been in union with him at the date of his purchase; for he alleges a partition of which no record was made in writing, and of which no one but he and his brother (who is now dead) had any knowledge. (See his deposition, exhibit No. 71.) Bái Vakhat again says that the brothers separated, *after her marriage with Kuber*, in 1876. Again, though Gopál paid Rs. 5,000 for Odhav's property, we cannot hold with the Subordinate Judge that that money was his own, and that he was acting independently on his

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own account. He was not, apparently, asked where the money came from; but he was forced to admit that he was in debt to Maháshankar, from whom he had once borrowed as much as Rs. 700. He cultivates about 26 *bighás* of land; but he seems to depend on Maháshankar for the payment of the assessment on this land; and he admits, also, that Maháshankar was present at the sale, though he does not say that Maháshankar made any bid at the sale. It is impossible, therefore, not to suspect that Maháshankar was as much interested in the second suit as the Subordinate Judge, with good reason, thinks he was in the first.

We not only agree with the Subordinate Judge, that the proceedings in the first suit are open to suspicion; but we go further, and find that they were collusive throughout. If the bond for Rs. 2,500, dated the 13th March, 1874, had been executed for a real advance, the evidence as to the time of its execution would not probably have been so contradictory as it is. Vakhat was sentenced to imprisonment for six months, in or about 1875, for causing abortion. She says she borrowed the money during her trial. Gopál says that she executed the bond before she was sentenced. Kuber says that she executed it after her release from jail. Then, again, it is not likely that Kuber had more money at his command than his brother, with whom he was united. It is not likely that he would have been in a position to lend Vakhat Rs. 2,500. He himself admits as much; for he says that he had "collected" the money. He says also that he lent her the money, because he "wanted land;" and that he had never lent money to any one before. There is no satisfactory evidence to show that Vakhat was under the necessity of borrowing so large a sum, or any sum at all, on the security of the valuable property left her by her husband, which Kuber admits was worth Rs. 5,000. She says that Rs. 1,800 were due to two persons, who, however, had not sued her; and that though she paid off their claims, they would not give up their bonds,—a most preposterous statement. And then it is more than a merely suspicious circumstance, that Kuber did not engage his own pleader in his suit against Vakhat. The pleader was engaged for him by Maháshankar; and Kuber says that he paid the pleader's fee to Maháshankar. We see no ground

whatever for holding that Kuber's suit was a *bonâ-fide* proceeding to recover a debt really due. The real object of the suit was evidently to bring Odhav's land to sale in execution. It is not satisfactorily explained why Kuber parted with his decree for so small a sum as Rs. 1,500, if that sum or any sum was ever really paid for it; but as Maháshankar was the purchaser, it is not necessary perhaps to seek an explanation. Kuber himself says that he was told that the decree was "invalid" and "unsustainable;" but if that was so, why should it be sold for value at all? The property was not actually brought to sale under the decree. To save it from sale, the plaintiff paid Rs. 1,115-6 into Court. It is not likely that Maháshankar would have been satisfied with this payment, if the decree had been a *bonâ-fide* one and had cost him Rs. 1,500; and it is possible, also, that he did not press for full satisfaction of the decree, because he was aware that it was not one against Vakhat as representative of her deceased husband, but one under which only her own life-interest could be sold; and perhaps that is what Kuber meant by describing the decree as invalid and unsustainable.

In the subsequent suit, however, a larger interest than that of the widow was brought to sale. Of that suit we think the plaintiff was kept in ignorance. The purchaser Gopál says that the plaintiff was present at the sale. The plaintiff, who however, is not an intelligent witness, denied all knowledge of it. If he had been present at the sale, it is most unlikely that he would have allowed it to proceed. If he was willing, on a former occasion, to pay Rs. 1,115-6, to save the family property, he would surely have paid the amount of Jagannáth's decree (only Rs. 298) to save it again. And then it would be impossible to hold that Vakhat, if she had been really desirous to protect the plaintiff's interests, would have allowed the whole family property to be sold to satisfy a decree for so small a sum. The circumstance that she did so, is altogether unexplained by her. She may have been, and most likely was, a tool in the hands of others, but none the less she failed in her duty. The probabilities of the case all point in one direction; and, on a full and careful consideration of such evidence as there is on the record, we find that the proceed-

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ings in the two suits against Bái Vakhat were collusive, and that the sale in the second suit was in fraud of plaintiff's rights.

The decree of the lower Court will, therefore, be reversed. The plaintiff is entitled to a decree declaring that he is not bound by the sale of the 3rd November, 1875, in the suit, No. 230 of 1875, brought by the defendant Jagannáth against the defendant Bái Vakhat, as representative of her deceased husband, Odhav Tuljá. Whether the plaintiff is entitled, also, to immediate possession of the property in the suit, must depend on the question whether Bái Vakhat's life-estate was defeasible on her remarriage. She belongs to a caste in which remarriage is permitted. The provisions of section 3 of Act XV of 1856 have, therefore, no application to the case. The question whether, by the usage of the country, similar provisions are enforced in her caste, was not raised or considered at the trial. We must, therefore, send down the following issue for the lower Court to try and determine on such evidence as may now be adduced by the parties:—

"Whether, by the usage of the country, the rights and interest of Bái Vakhat, by inheritance, in her deceased husband's property, the subject of this suit, ceased and determined on her remarriage with Kuber, on the 4th May 1876, as if she had then died."

The Subordinate Judge to forward his finding on the above issue, with the evidence, within three months.

Issue sent down accordingly.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1886. *November* 21.

VISHNU KESHAV, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RA'MCHANDRA BHA'SKAR, (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, *Sch. II, Art.* 12—*Minor, when bound by proceedings against him—Minor's Act (XX of* 1864,*) Sec.* 2—*Suit by a minor, one year after attaining majority, to recover property sold in execution of a decree obtained against him during minority.*

In 1870 a creditor of the plaintiff's father brought a suit (No. 573 of 1870) against the plaintiff, and obtained a money decree against him. The plaintiff was

* Second Appeal, No. 153 of 1884.