

under appeal, and allow the defendants their costs throughout.

The cross-objections which are not pressed are dismissed with costs.

KEMP, J. :—I agree that the appeal should be allowed, and the decree of the Subordinate Judge allowed to stand.

Decree reversed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Shah and Mr. Justice Marten.

SHRINIWAS APPACHARYA JAHAGIRDAR AND ANOTHER (HEIRS OF ORIGINAL DEFENDANTS), APPELLANTS *v.* JAGADEVARPA BIN KALLAPPA PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 70, Order XXI, Rule 72 — Bombay Civil Circulars, Chapter II, Clause 91, sub-clause 16† — Execution

* Second Appeal No. 1188 of 1916.

† The material portion of the sub-clause runs as follows :—

(16) The following powers are conferred on Collectors or such of their gazetted subordinates to whom a decree has or may hereafter be referred under rule 4 :—

(1) The power referred to in section 294, Order XXI, Rule 72, of the Code of Civil Procedure to grant express permission to the holder of a decree, in execution of which property is sold, to bid for or purchase the property : provided that the Collector or other officer aforesaid to whom an application for such permission may be made shall not grant such permission, unless the decree-holder—

(a) satisfies him that the application is made in good faith, and that the judgment-debtor is not a minor ;

(b) undertakes that he will not himself or through any other person bid or purchase for a sum less than such amount as the Collector or other officer granting the permission, having regard to the fair market value of the interest to be sold, may determine; and that the permission shall be subject to this condition ;

(c) agrees that if the decree-holder or any one on his behalf becomes the purchaser, the purchase-money shall be paid to the Collector or other officer executing the decree.

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proceedings transferred to the Collector—Court's power to entertain application for leave to bid at Court sale—Set-off cannot be allowed by Court.

When the execution of a decree is transferred to the Collector, the Court has no power to entertain an application by the decree-holder for leave to bid at the auction-sale; it should be made to the Collector under sub-clause 16 of clause 91 of the Manual of Bombay Civil Circulars. No set-off can be allowed either by the Collector or the Court.

SECOND appeal from the decision of A. C. Wild, District Judge of Bijapur, dismissing appeal from the order passed by S. S. Phadnis, First Class Subordinate Judge at Bijapur.

Execution proceedings.

In 1911, the respondent obtained a decree for redemption against the appellant's grand-father Ramacharya. The decree directed Ramacharya to hand-over possession of the mortgaged property forthwith to the respondent; and ordered the respondent to pay the amount of mortgage in instalments.

The respondent failed to pay. The appellant applied for sale of the mortgaged property. The execution was transferred to the Collector.

The appellant applied to the Civil Court for permission to bid at the auction sale, and for being allowed to set off the purchase money against the mortgage debt. The Court dismissed the application on the ground that it had no power to grant it. The lower appellate Court was of opinion that no appeal lay against the order. Hence this appeal.

R. A. Jahagirdar, for the appellant.—The lower Court erred in thinking that it had no power to grant permission to bid. An order passed under section 47 of the Civil Procedure Code of 1908 is appealable as a decree. Under the rules framed for his guidance, the Collector has no power to grant a set-off. If, in such a

case the Civil Court also declines to exercise its power to grant the set-off, the provisions of Order XXI, Rule 72, would be nugatory.

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G. P. Murdeshwar, for the respondent :—The lower Court was right in holding that no appeal lay from an order refusing permission to bid : *Jodoonath Mundul v. Brojo Mohun Ghose* ⁽¹⁾ ; *Ko Tha Hnyin v. Ma Hnin* ⁽²⁾ . Section 47 of the Civil Procedure Code refers to questions arising between the parties to the suit. When execution proceedings are once transferred to the Collector, the Court cannot interfere with the proceedings : see section 70 (2) of the Civil Procedure Code ; *Muhammad Said Khan v. Payag Sahu* ⁽³⁾ and *Daulat Singh v. Jugal Kishore* ⁽⁴⁾ .

SHAH, J. :—It is unnecessary in this case to express any final opinion as to whether a second appeal lies to this Court because even if no appeal lay against the order made by the First Class Subordinate Judge on the 25th of November 1915 it would be open to us to consider the question of jurisdiction, which arises in the case, under section 115 of the Civil Procedure Code. We have, therefore, considered the question of jurisdiction on its merits.

In this case an order was made on the 15th November 1915 directing execution of the decree to be transferred to the Collector. Subsequently an application was made by the mortgagee-defendant for permission to bid at the auction and also for permission to set off the decretal amount against the sale price. The Court was of opinion that it had no power to grant any such permission after the execution was transferred to the Collector.

(1) (1886) 13 Cal. 174.

(3) (1894) 16 All. 228.

(2) (1911) L. R. 38 I. A. 126.

(4) (1899) 22 All. 108.

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It is argued before us that even when the execution of the decree is transferred to the Collector, the Court has the power under Rule 72 of Order XXI to entertain such an application and to grant the necessary permission if a case for such permission is made out. It seems to me, however, that the operation of this rule in this case is excluded in virtue of section 70, sub-section (2) of the Code of Civil Procedure which provides that a power conferred by rules made under sub-section (1) upon the Collector shall not be exercisable by the Court. In the present case we have sub-clause 16 of clause 91 at page 105 of the Manual of Civil Circulars which distinctly provides that the power conferred by section 294 of the Code of Civil Procedure (that is, by Rule 72, Order XXI), may be exercised by the Collector subject to certain conditions; and one of the conditions is that the decree-holder must agree to pay the purchase money to the Collector or other officer executing the decree if he becomes the purchaser. This rule is in clear conflict with Rule 72, Order XXI, and as the power is specifically conferred upon the Collector subject to the condition which I have already mentioned, I feel clear that the civil Court has no power to exercise the discretion which is vested in it under Rule 72 after the execution of the decree is transferred to the Collector.

There is apparently no power given to the Collector under this rule to allow a set-off; but that is a point with which we are not concerned. The only point that we have to consider is whether the civil Court has any power under the circumstances of the case to allow permission to the decree-holder to bid and to claim a set-off. It is clear that the Court has no such power after the execution is transferred to the Collector.

I would, therefore, dismiss the appeal with costs.

MARTEN, J. :—In my judgment, liberty to bid at the auction-sale and liberty to set off the amount of the

decree against the purchase money are powers within the meaning of section 70, sub-section (1) (b) of the Civil Procedure Code, as being "powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector". If, therefore, the Local Government have made rules in that respect, then under section 70, sub-section (2) a Civil Court cannot exercise any power so transferred.

Now turning to the rules which have been made under section 70, one finds that the power to bid is dealt with by the rule set out at p. 105 of the Manual of Circulars, Chapter II, para. 91, sub-section 16 (1), for that Rule expressly transfers to the Collector the power to give liberty to bid, but adds a condition in sub-clause (c) that the decree-holder is to pay the purchase-money to the Collector. In my opinion that condition in sub-clause (c) expressly negatives the right to set off the purchase money. That being so, I think that on these rules the Collector has no power to allow a set-off. I am also satisfied that under the above circumstances, the Civil Courts in the present case have no power either to give liberty to bid at the auction-sale or to set off the decretal amount.

As regards Order XXI, Rule 72, which has been referred to, liberty to set off only arises if the decree-holder has got the permission of the Court to bid at the auction. No liberty to bid was given by the Court nor indeed could it be given. On that ground alone it follows that the Court has no power to give liberty to set off under Order XXI, Rule 72 (2). I say that because the pleader for the appellant stated in the course of his argument that at some period or another which was not made clear to me the Collector did in fact give liberty to bid at the auction, although he declined liberty to set off as he thought he had no power so to do. The fact that the

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liberty to bid was given by the Collector negatives any power of the Court under Order XXI, Rule 72 (2) to allow a set-off, for that order contemplates both liberties being given by the same authority, viz., the Civil Court, which in fact was not the case here.

In my opinion, therefore, this appeal ought to be dismissed with costs.

Appeal dismissed.

R. B.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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LAXMAVA KOM HUCHHAPPA NASIPUDI (ORIGINAL DEFENDANT No. 3),
APPELLANT v. RACHAPPA BIN CHANBASAPPA KARAVEERHETTI
(ORIGINAL PLAINTIFF), RESPONDENT.^o

Limitation Act (IX of 1908), Article 44.—Sale of minor's property by his mother—Suit to set aside the sale brought more than three years after the minor attains majority.

The mother and natural guardian of a minor having sold the minor's property, a suit to set aside the sale was brought more than three years after the minor attained majority :—

Held, that the suit was barred under Article 44 of the Indian Limitation Act, 1908.

Balappa v. Chanbasappa⁽¹⁾ and *Anandappa v. Totappa*⁽²⁾, distinguished.

SECOND appeal from the decision of E. Clements, District Judge of Dharwar, reversing the decree passed by V. B. Halbhavi, Subordinate Judge at Hubli.

Suit to recover possession of property.

The facts were that the property in dispute, which belonged to defendant No. 1, were sold during his minority by his mother and natural guardian on the 31st May 1909, to the husband of defendant No. 3. Defendant No. 1 attained majority on the 29th September 1909; and sold the property to the plaintiff on the 25th September 1912.

^o Appeal No. 35 of 1917 from order.

⁽¹⁾ (1915) 17 Bom. L. R. 1134. ⁽²⁾ (1911) 17 Bom. L. R. 1137, footnote.