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property for consideration. The general proposition which has been relied on on behalf of the appellants must be taken to have been stated with reference to the particular case and cannot be treated as overruling the current of decisions of this Court on that point. We must, therefore, give effect to the rule as recognized in this Presidency and must hold that the mortgage was valid so far as it related to Narayan's share in the property mortgaged.

Lastly, it is urged that the suit is barred under Article 120 of the Indian Limitation Act. It is clear, however, that that Article cannot apply to a suit based on a mortgage. The point was urged on the footing that the mortgage was void. But the point as to the validity of the mortgage having failed, this point also must fail.

The result is that the decree of the lower appellate Court must be confirmed and the appeal must be dismissed with costs.

HAYWARD, J. :—I concur with the conclusions and reasons of my learned brother.

Decree confirmed.

R. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Heaton.*

MARTAND TRIMBAK GADRE AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS v. DAYA BIN ABAJI PHATAK (ORIGINAL DEFENDANT),
RESPONDENT.*

*Civil Procedure Code (Act V of 1908), Order XXI, Rules 72 (2) and 73—
Decree—Execution—Collector—Decree-holder allowed permission to bid by
the Collector—Set-off—Power of the Court to allow set-off.*

* Second Appeal No. 47 of 1918.

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A decree-holder having received from the Collector permission to bid, and having been declared to be the highest bidder, can apply to the Court for permission to set off the decretal amount against the purchase money.

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SECOND appeal against the decision of P. E. Percival, District Judge of Poona, confirming the decree passed by B. R. Mehendale, Subordinate Judge of Haveli.

Proceedings in execution.

A decree was obtained by the plaintiff. It was transferred to the Collector for execution by sale of the judgment-debtor's property. The plaintiff decree-holder was allowed permission to bid by the Collector and at the auction sale he purchased the property. The decree-holder, thereafter, applied to the Court to set off the decretal amount against the purchase money.

The Subordinate Judge held that he had no power to allow a set-off and rejected the application.

On appeal, the District Judge confirmed the decree.

The plaintiff decree-holder appealed to the High Court.

P. V. Nijsurè, for the appellants.

No appearance for the respondent.

MACLEOD, C. J. :—In this case the decree was transferred to the Collector for execution. Under Rule 91 (16) (1) at page 105 of the Manual of Circulars regarding the powers of the Collector, the Collector can 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 *inter alia* agrees that if the decree-holder or any one on his behalf becomes the purchaser, the

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purchase-money shall be paid to the Collector or other officer executing the decree.

The Collector, therefore, has no power to allow a decree-holder to set off the decretal amount against the purchase money. The question before us is whether the decree-holder having received from the Collector permission to bid, and having been declared to be the highest bidder, can apply to the Court for permission to set off the decretal amount. If the sale is held in execution under Order XXI of the Code, under Rule 72 (2), "where a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

It would naturally follow from the fact that a decree-holder obtains permission to bid, that he should be entitled to set off the decretal amount against the purchase money, provided that there are no other attaching creditors entitled to rateable distribution under section 73 of the Code, and it appears to me that power to give permission to set off was not granted to the Collector, because the Collector would not be in a position to know what other attachments there were against the property sold in execution, but I see no reason why a decree-holder, after getting permission from the Collector to bid, should not apply to the Court for an order entitling him to a set-off. It would naturally follow from a permission to bid granted by the Court itself. We have been referred to a decision of a Bench of this Court in *Shrinivas Appacharya v. Jagadevappa*⁽¹⁾. In that case the defendant who had applied to execute a decree, and whose decree had been transferred to the

(1) (1918) 42 Bom. 621.

Collector for execution, applied to the Court in the first place for leave to bid at the sale, and then for permission to set off the price against the decretal debt. It was held that the Court had no power to entertain the application for leave to bid, nor could it permit a set-off. It is quite clear that the Court had no power, once a decree had been transferred to the Collector for execution, to entertain an application by the decree-holder for leave to bid. But I do not think that the point that arises in this case was before the Court in that case, and although there was an expression of opinion on the part of the Court that an application to set off could not be entertained, that must be read in connection with the application which was then made, which was primarily one for permission to bid. It is certainly unreasonable to suppose that a decree-holder, who has obtained permission to bid from the Collector, should not be able to obtain from the proper authority the right to set off, which is the natural consequence of having received permission to bid. The reason why he must apply to the Court is clear. The Court which transferred the decree for execution would be the Court which would know what other applications for attachment had been made, and it would, therefore, be the only authority to know whether the decree-holder could set off the whole of the decretal amount against his purchase money, or what amount he should pay into Court in order that there might be rateable distribution in favour of himself and other attaching creditors. If the Court had not this authority to grant leave to set off after the decree has been transferred to the Collector for execution, it follows that a successful decree-holder at the sale would have to pay to the Collector the whole of the purchase money, and might then have to wait a very considerable time before he got back the money again to which he was entitled

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under his decree. In my opinion, therefore, this appeal should be allowed, and an order made giving the decree-holder permission to set off the decretal amount against the purchase money, as it is not suggested that there are any attaching creditors who have executed their decrees against this particular property which has been sold.

It follows that the agreement the applicant had to make with the Collector to pay in the whole of the purchase money becomes null and void to the extent of the set-off: The appeal is allowed with costs throughout.

HEATON, J.:—I concur. There can, I think, be no doubt that when leave is given to a decree-holder to bid at an auction sale, a necessary consequence is that he shall be permitted to set off the amount due to him under his decree against the amount he is required to pay, if he is the highest bidder at the auction. That is apparent from Rule 72 of Order XXI of the Code, and as my Lord the Chief Justice has pointed out, it has convenience to recommend it, and great inconvenience would result from any other course. As the power to allow a decree-holder to bid at an auction sale is transferred to the Collector in cases of the kind we are considering, I should infer, if there were nothing to the contrary, that the Collector also had power to allow a set-off, because by allowing it he would be merely exercising what would be an ordinary and reasonable ancillary power in the conduct of the business entrusted to him. There is, however, specific provision in the rules which implicitly forbids the Collector to allow a set-off. That is clause (16) (c) of Rule 91 of the rules which appear on page 106 of the Manual of Circulars of this Court. Now, is that limitation on the Collector's powers intended to prevent a set-off in such cases, or is it merely intended to provide that the Court, and not

the Collector, shall allow the set off? It seems to me that this clause is not intended to prohibit a set-off altogether, because to do so is unnecessary. It is inconvenient, and it is contrary to the general purpose of the law in cases of this kind. But the Collector is not the person to allow the set-off for the simple but very sufficient reason that in many cases he would not be in a position to know whether there were other attaching creditors who had a claim to rateable distribution. That information is in the possession of the Court, and I conclude that as that information is in the possession of the Court, it is intended that the Court, and not the Collector, should give leave to set off. It is true that the rules might have made this clearer. It is also true that in the case of *Shriniwas Appacharya v. Jagadevappa*^(a), there is an expression of opinion to the contrary. But that expression of opinion was not necessary for the purpose of the decision arrived at, nor in that case was any mention made of what seems to us to be the dominating consideration in this matter, and that is that by reason of the possibility of rateable distribution the Collector is not, whilst the Court is, in a position to decide whether a set-off should be allowed or not. Therefore I agree in the order proposed.

Decree reversed.

J. G. R.

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