1922.

DHUNDIRAJ BALKRISHNA v. RAMCHANDRA GANGADHAR.

compel the other to give or to accept a different and a substituted way. In *Hamid Hossein* v. *Gervain* [1] Norman C. J. observed: "We think it is clear that if any person has a right of way from one place to another over a particular line, if he and his ancestors have been accustomed to use that way from a long time past, he has a right to go over it and cannot be compelled to use *a different* and *substituted* way." Similarly, in *Varajlal Parbhudas* v. *Moti Kuber* [2], where the facts were not widely different from those in this case, this Court held that: "If the defendant's right of way was directly from the door in plaintiff's *osri* to the defendant's *osri*, the plaintiff cannot obstruct that right of way and offer him another way through his *chowk*." In my opinion, therefore, the decision of the lower appellate Court is right.

Appeal dismissed.

R. R.

[1] (1871) 15 W. R. 496. [2] (1893) P. J. 473.

APPELLATE CIVIL.

1922.

January 31.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

NAGABHATTA TIMMANBHATTA BOPPANHALLI, HEIR OF GANGAMMA KOM SUBBAYYA (ORIGINAL PLAINTIFF), APPELLANT *v.* NAGAPPA SUBBAYA HAVIK AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Decree—Execution—Court sale—Property not subject to mortgage included by mistake and sold in execution—Remedy of the owner to have the sale set aside—Indian Limitation Act (IX of 1908), Articles 96, 12.

The plaintiff mortgaged seven out of eight of his properties first; and some time afterwards again mortgaged all the eight properties. In a suit to redeem the second mortgage, the plaintiff recited the first mortgage but by mistake described all the eight properties as subject to that mortgage. In the redemption suit, a decree was passed that the plaintiff should pay off the first

* Second Appeal No. 538 of 1921.

mortgage by annual instalments, and in case of default in pa men liberty was given to bring the mortgaged property to sale. There was default in payment; and the first mortgagee brought all the eight properties to sale at a Court sale. The properties were sold to defendant No. 2 in 1916. The plaintiff sue n 1918 to recover from the defendant No. 2 the value of the eighth prope y which was not the subject of the first mortgage:—

Held, that the suit having been brought to recover from a Court-purchaser what he had purchased at the Court sale, it could not lie until the sale was set aside, *unless the sale could be considered a nullity.*

Held, further, that the plaintiff having been aware that the Court had sold the property which was not contained in the first mortgage, had thirty days from the date of the sale to apply to have the sale set aside.

Held, moreover, that although Article 96 of the Indian Limitation Act might apply to the suit as originally framed it could not apply to the suit as it ought to have been framed in view of the fact that the Court sale had to be set aside and could not be considered as a nullity.

Held, also, that the case was governed by Article 12 of the Indian Limitation Act.

SECOND appeal from the decision of F. W. Allison, District Judge of Kanara, reversing the decree passed by V. R. Guttikar, Subordinate Judge at Sirsi.

Suit to recover the value of a house.

The house in dispute, along with seven other properties, originally belonged to the plaintiff's husband Ramayya.

In 1913, Ramayya mortgaged the seven other properties to one Venkata Bhatta, who transferred his mortgage rights to the husband of defendant No. 1 in 1903.

In 1897, Ramayya mortgaged all the eight properties to one Tammanna Bhatta.

Ramayya sued to redeem the second mortgage in 1910. In the plaint, the mortgage of 1893 was recited, but by mistake it was stated that all the eight properties were subject to that mortgage. In the redemption decree it was provided *inter alia* that Ramayya

1922.

NAGABHATTA v. NAGAPPA.

was to pay off the amount of the mortgage of 1893 by annual instalments and that on failure in payment the mortgagee was at liberty to bring the mortgaged property to sale. There was default in payment. The mortgagee brought all the eight properties to sale. At the Court sale which followed, the eight properties were sold to defendant No. 2 in 1916.

In 1918 the plaintiff brought the present suit to recover the value of the materials of the house which was not included in the first mortgage.

The trial Court decreed the suit.

On appeal the decree was reversed by the District Judge, who held that the Court sale was not a nullity; that the remedy open to the plaintiff was to take within due time the course prescribed in Order XXI, Rule 90 of the Civil Procedure Code, or to bring a suit to set aside the sale; and that in either case, it was barred by Article 12 of the Indian Limitation Act.

The plaintiff appealed to the High Court.

R. A. Jahagirdar, for the appellant (original plaintiff):—The Court had no jurisdiction to sell the property as it was not the subject of the mortgage. No doubt the property was mentioned in the plaint, but it was by mistake, as found by both the Courts below; and our cause of action to set aside the sale arose when the mistake became known to us. The sale took place on 17th January 1916 and the suit was brought in 1918 which was well within three years, the period prescribed by the Indian Limitation Act, i.e., Article 96. Defendant No. 2 may be a *bona fide* purchaser for value, but we are not concerned with the *bona fides*. The sale was bad on account of the mistake, the consequence of that must attach, so far as the present question goes, as much to the case of an auction-purchaser as to the case of a decree-holder.

The authority cited by the lower Court, viz., *Malkarjun* v. *Narhari*[1], has no application in view of the Privy Council decision of *Khiarajmal* v. *Daim*[2].

Nilkanth Atmaram, for respondent No. 1 (the Court-purchaser), was not called upon.

MACLEOD, C. J. :—The plaintiff sued to recover from the second defendant the price of the materials of the house mentioned in the plaint, and also to recover possession of the house site and Hittal &c., appertaining thereto, the said properties having been purchased by defendant No. 2 at a Court sale held at the instance of defendant No. 1 in Darkhast No. 295 of 1914. The suit was decreed in the trial Court, but was dismissed in appeal. The facts, as set out by the learned District Judge, show that one Ramayya, the husband of the plaintiff, owned eight properties. He mortgaged seven of them to one Venkata Bhatta, and four years later he mortgaged all the eight properties to one Tammanna Bhatta. In 1910, the plaintiff filed a suit to redeem this latter mortgage, and in her plaint she recited the fact of the former mortgage, but by mistake in describing the property mortgaged to Venkata Bhatta, she included the eighth property, which was only subject to the second mortgage. In the redemption suit a decree was passed that the plaintiff should pay to Rudrappa, the transferee from Venkata Bhatta, who had been made a party, the amount due under the first mortgage and costs by annual instalments, with liberty to bring the mortgaged property to sale in default. In the decree was included the eighth property, which as a matter of fact was not mortgaged originally to Venkata Bhatta. As the plaintiff did not pay her instalments, the first defendant (her husband Rudrappa having died) took out execution and brought all the property to sale. At the Court sale the second defendant was the purchaser.

(1) (1900) 25 Bom. 337. (2) (1904) 32 Cal. 296.

1922.

NAGABHATTA v. NAGAPPA.

This is not a suit to set aside that sale, but a suit to recover from the purchaser what he had purchased at the Court sale, and it is difficult to see how such a suit could lie until the Court sale is set aside, unless it could be considered as a nullity. Now it was entirely the fault of the plaintiff that she allowed the decree to be passed, because she must have been aware that the eighth property was entered in the decree for redemption which she obtained with regard to the first mortgage, and she has allowed the Court to sell the eighth property in execution of that decree. So that on the question of mistake, it is perfectly clear that the plaintiff was alone responsible for the eighth property having been sold. It is difficult then to see how she could say that the sale was a nullity. If necessary it would have to be held that the plaintiff was not even entitled to take such a plea.

What is the proper view in such a case, when objections are raised to a Court sale, was clearly laid down in *Malkarjun* v. *Narhari*[1]. In that case the Court issued a notice to the wrong party, and not to the party against whom execution was applied for. It was then argued that the Court had no jurisdiction to sell the property, but the Privy Council at page 347 held that—

"[Although the Court made a mistake,] a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact ; and that if he is to be held

[1] (1900) 25 Bom, 337.

bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a Court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do".

Then at p. 352 their Lordships say :

" The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequentia on the annulment of the sale is sought, the protection is exceedingly small."

Obviously then the plaintiff being perfectly well aware of the facts, being aware that the Court had sold the property which was not contained in Venkata Bhatta's mortgage, had thirty days from the date of the sale to apply to have the sale set aside.

There is no question of fraud in this case, and therefore, Article 95 of the Indian Limitation Act cannot possibly apply. It has been argued that the case comes under Article 96 on the ground that the plaintiff is seeking for relief on the ground of mistake. But although that Article might apply to the plaintiff's suit as originally framed it cannot apply to this suit as it ought to have been framed seeing that the Court sale has to be set aside, and cannot be considered as a nullity. Therefore the case is governed by Article 12 of the First Schedule of the Indian Limitation Act. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

R. R.