

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

1951 KRISHNA TUKARAM BHOORE (ORIGINAL OPPONENT), PETITIONER *v.*
August 7 MAHADEV KRISHNAJI GITE (ORIGINAL APPLICANT), OPPONENT.*

Indian Limitation Act (IX of 1908), art. 180—Civil Procedure Code (Act V of 1908), O. 21, r. 95—Application by court-purchaser for possession—Destruction of application by fire—Second application for reconstruction of destroyed application—Second application rejected—Third application for revival of original application made more than three years after auction-sale—Whether application for revival is time-barred.

In execution of a money decree passed against the petitioner in 1932 his property was sold at a court-sale and purchased by the opponent. The auction-sale was confirmed by the Court in 1936. In the same year the opponent presented an application for possession of the property under O. 21, r. 95 of the Civil Procedure Code, 1908, but the proceedings on that application were stayed from 1938 to 1948 by reason of injunction orders issued against the opponent from time to time in a suit and the appeals following it filed by the petitioner's sons for a declaration that the decree and the auction-sale were not binding on their shares in the property. In the meanwhile in 1942 the Court in which the application for possession was pending was burnt down and all its record including the application was destroyed. In 1944 the opponent applied for reconstruction of his application which had been destroyed but the Court rejected it and asked him to file a fresh application if he so desired. In 1949 after the suit filed by the petitioner's sons was finally disposed of the opponent made a fresh application praying for the revival of his earlier application or in the alternative for possession. The petitioner opposed that application on the ground that the Court had no jurisdiction to permit the earlier application for possession to be revived in view of the fact that in 1949 when the later application was filed the remedy of the opponent had been barred by limitation under art. 180 of the Indian Limitation Act, 1908:

Held, overruling the petitioner's contention that the application of 1936 was in time when it was presented and that application had never been disposed of by the Court, and hence the application of 1949 was only a reminder to the Court that the earlier application remained undisposed of and should be decided.

Jateendrachandra Bandopadhyay v. Rebateemohan Das⁽¹⁾ and *Abdul Azim Sahib v. Chokkan Chettiar*,⁽²⁾ relied on.

CIVIL REVISION APPLICATION against the decision of S. D. Sansare, Esquire, Joint Civil Judge at Wai.

In 1932 one Shinde filed a suit against Krishna (petitioner) on a promissory note and obtained a money decree. In execution of that decree a house belonging to the joint family of the

* Civil Revision Application No. 1180 of 1950.

⁽¹⁾ (1934) 62 Cal. 66.

⁽²⁾ (1934) 58 Mad. 893 (F. B.).

petitioner and his sons situate at Wai was sold through Court on July 1, 1935, and was purchased by Mahadev (opponent). The auction-sale was confirmed by the Court on August 31, 1936. In the same year the opponent filed an application under O. XXI, r. 95 of the Civil Procedure Code, 1908, for possession of the property, being Miscellaneous Application No. 92 of 1936 on the file of the Second Class Sub-Judge's Court at Wai.

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During the pendency of the Miscellaneous Application No. 92 of 1936, the petitioner's four sons filed a suit in 1938 against the said Shinde and the opponent for a declaration that the debt under the decree was incurred for immoral and Avyavaharik purposes and, therefore, the decree and the sale were not binding on their 4/5 share in the property. That suit was dismissed by the trial Court on June 30, 1941. An appeal against it to the District Court was dismissed on February 26, 1944. There was a second appeal to the High Court and that too was dismissed on January 9, 1948. In all these proceedings the petitioner's sons had obtained an injunction against the opponent restraining him from taking possession of the property.

In the meantime in 1942 the civil Court at Wai was burnt down and all its record including the Miscellaneous Application No. 92 of 1936 was destroyed. Therefore, on December 14, 1944, the opponent applied to that Court for reconstruction of his earlier application which had been destroyed, but it was rejected on March 26, 1945, and the opponent was asked to file a fresh application if he so desired.

On July 22, 1949, the opponent filed the present application praying for revival of his Application No. 92 of 1936 or in the alternative for possession of the property. The petitioner resisted the claim on the ground that the application for revival having been filed more than three years after the confirmation of the sale was not in time.

The trial Court granted the application and ordered the possession of the property to be given to the opponent. The learned Judge observed in his judgment:

"The present application being not within three years from that date, it is argued that the same may be treated as time-barred. However, as can be seen from the ruling cited above [i. e. *Jateendrachandra Bandopadhyaya v. Rebatee Mohandas*⁽¹⁾] an application such as the present one can be taken as one for continuance or revival of a former one if the former application was rendered infructuous not for any fault or latches on the part of the auction purchaser but by an obstacle which could not be removed even in the proceedings under O. 21, r. 97 of the

⁽¹⁾ (1934) 62 Cal. 66.

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Civil Procedure Code. In the case cited above the cause of action for delivery for possession was cancelled by a court decree. In the present case, though it was not actually cancelled, it was held in abeyance almost to the same effect. So long as the stay order was there it was not possible for the decree-holder to proceed with his efforts for obtaining possession. The facts of the present case, therefore, are quite analogous to the facts in the ruling cited above and observations laid down in the latter must be held applicable to the present case.....In those circumstances it was also held in that case that the second application can be treated as one for continuance or revival of the former one because the real effect of the order of dismissal of the former application was not to finally dispose of the application in the eye of the law but to keep it pending. Relying, therefore, on the said ruling I hold that the present application for delivery of possession is not barred by limitation and that the same can be treated as an application for the revival of the former Miscellaneous Application No. 92/36."

The petitioner applied in revision to the High Court.

B. N. Gokhale, for the petitioner.

G. A. Desai, for the opponent.

CHAGLA C. J. A rather interesting point arises on this revision application. The facts briefly are that one Shinde filed a suit against the petitioner in 1932 and he obtained a money decree. In execution of that decree a house belonging to the petitioner was sold on July 1, 1935, and the opponent purchased the house at the auction-sale. The opponent's sale was confirmed by the Court on August 31, 1936. The petitioner's son filed a suit, being suit No. 438 of 1938 against the decree-holder and the auction purchaser for a declaration that the decree and the sale of the house were not binding on him as the alienation made by the petitioner was not for legal necessity. In this suit an injunction was issued against the opponent restraining him from taking possession of the property. On June 30, 1941, the suit was dismissed. There was an appeal to the District Court and the decree of the trial Court was confirmed in 1944. There was a second appeal to this Court and the second appeal was dismissed on January 9, 1948. The auction purchaser presented an application for possession of the property under O. XXI, r. 95, in 1936, being miscellaneous application No. 92 of 1936. The Court in which this application was pending, the Court at Wai, was burnt down and all the records had been destroyed including this application for obtaining possession under O. XXI, r. 95. On December 14, 1944, the auction purchaser applied for reconstruction of his application which had been destroyed. On March 26, 1945, the Court rejected his application and asked him to file a fresh petition. On July 22, 1949, he filed the

present application from which this revision application arises. In this application he prayed for a revival of his application No. 92 of 1936; in the alternative he applied for possession. The trial Court granted the application, and it is from that order that this revision application is preferred.

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The contention of Mr. Gokhale is that the Court had no jurisdiction to permit application No. 92 of 1936 to be revived. He says that when the present application was made, viz. July 22, 1949, the remedy of the auction purchaser had been barred by limitation under art. 180 and that bar could not be removed by the device resorted to by the Court of permitting the application No. 92 of 1936 being revived. One significant fact in this case is that application No. 92 of 1936 was never disposed of by the Court. It is true as Mr. Gokhale points out that under art. 180 only one application can be presented and that application must be presented within three years from the date when the sale becomes absolute. That date is August 31, 1936. Therefore, application No. 92 of 1936 was in time when it was presented. If it had been disposed of, then Mr. Gokhale is right that no fresh application could have been made after that date. Mr. Gokhale says that inasmuch as the Court refused the application of the auction purchaser to reconstruct his application of 1936, the present application in 1949 must be looked upon as a fresh application. I am not disposed to accept that contention. When the Court made the order of March 26, 1945, rejecting the application of the auction purchaser for reconstruction of his old application, the Court did not dispose of application No. 92 of 1936. It merely took the view that it was unnecessary that that application should be reconstructed and suggested to the auction purchaser that he should file a fresh application. In my opinion, the application of July 22, 1949, was a reminder (if I might use the language of the decision to which I shall presently refer) to the Court that application No. 92 of 1936 remained undisposed of and should be decided.

Now, there are two decisions which on facts are much more favourable to Mr. Gokhale than the facts in this case. One is a Calcutta decision in *Jateendrachandra Bandopadhyay v. Rebateemohan Das*⁽¹⁾. In that case a mortgage decree was obtained and the wife of the mortgagor filed a suit for a declaration that the mortgaged property could not be sold on the allegation that the mortgagor had no title to the property.

⁽¹⁾ (1934) 62 Cal. 66.

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Pending the suit the mortgaged property was sold and the sale was confirmed. Then the decree-holder purchaser applied for delivery of possession and that application was dismissed for default. The suit instituted by the wife of the mortgagor was decreed, but the decree was reversed in appeal, and after the dismissal of the appeal the auction purchaser again applied to the Court for delivery of possession. Therefore, there we have a case where an application for possession was actually dismissed and a fresh application was presented, and yet the Court took the view that the original application which was dismissed for default was not finally disposed of but remained pending in the eye of the law, and the fresh application for delivery of possession should, therefore, be treated as one for continuance or revival of the former, and the reason which led the Calcutta High Court to this conclusion was that the cause of auction of the auction purchaser was suspended during the period when the suit filed by the mortgagor's wife remained undisposed of and the cause of action was revived when the appellate Court ultimately dismissed her suit.

The Madras High Court in a full bench in *Abdul Azim Sahib v. Chokkan Chettiar*⁽¹⁾ considered a case where an application for possession by the auction purchaser was dismissed on the ground of obstruction offered to him. Thereafter a fresh application was presented which was beyond time, and the Madras High Court took the view that there had never been any objection by the judgment-debtor to possession being given to the auction purchaser, nor was there any adverse order against the auction purchaser, and, therefore, there never was any valid disposal of the application, and under these circumstances the subsequent application must be looked upon as a reminder to the Court to take up the matter again.

Therefore, in my opinion, the learned Judge below was right in looking upon the application of July 22, 1949, not as a fresh application but as a revival of the application made by the auction purchaser in 1936 and which application had never been disposed of by the Court.

Mr. Gokhale then contends that the learned Judge was wrong in making the order on this application without giving an opportunity to his client to argue the matter on merits. Mr. Gokhale says that the only order the Court could have made was to revive application No. 92 of 1936 and this application

⁽¹⁾ (1934-35) 58 Mad. 893, F. B.

No. 92 of 1936 should have been heard on merits. I see no force in this contention. Mr. Gokhale's client is the judgment-debtor. The application of the auction purchaser is to obtain possession from the judgment-debtor, and under O. XXI, r. 95, if the property is in possession of the judgment-debtor or of some person on his behalf or of some person claiming under the title created by the judgment-debtor, the Court is empowered to give possession to the auction purchaser and to remove any obstruction caused by the judgment-debtor or anyone on his behalf. This is not a case where a stranger is in possession where certain inquiry may be necessary. It seems that although the sale was confirmed in 1936, and we are in 1951, the ingenuity of Mr. Gokhale's client is not yet by any means at an end, and if this matter was again sent down to the executing Court, I am sure some very ingenious defences would be put forward as to why the auction purchaser should not be given possession. I am not disposed to encourage any further continuation of this unduly long litigation.

The result is that the application fails. Rule discharged with costs.

Rules discharged.

M. W. P.

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Before Mr. M. C. Chagla, Chief Justice.

RAMCHANDRA HUKUMCHAND (ORIGINAL OPPONENT), PETITIONER *v.*
TUKARAM SAVALARAM PANASARE (ORIGINAL APPLICANT),
OPPONENT.*

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Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), s. 2 (5)
(a) (iii)—*Application for adjustment of debts filed by ordinary resident of Mahad in Mahad Court—Applicant cultivating lands in Bhore State during material period—Bhore not part of Bombay Province—Maintainability of application—Subsequent merger of Bhore with Bombay Province and extension of Act to it—Effect of subsequent events—Preamble to Act—Reference to preamble when permissible.*

On June 17, 1947, an ordinary and permanent resident of Mahad made an application to the Mahad Court under s. 4 of the Bombay

* Civil Revision Application No. 3 of 1951.

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