

PRIVY COUNCIL

Chandra Mani Saha

Vs.

Anarjan Bibi

P.C.A No.87 of 1932

(Lords Blenesburgh Wright and Sir Lancelot Sanderson JJ.)

10.05.1934

JUDGMENT

SIR LANCELOT SANDERSON J.

1. These are two consolidated appeals from two decrees dated 19th August 1930, of the High Court of Judicature at Port William in Bengal, which reversed two orders dated 28th February, 1929, of the Court of the First Subordinate Judge of Tippera at Comila. The question for determination is, whether the appellants, who purchased with the leave of the Court at two auction sales certain mortgaged property in execution of two mortgage decrees in their favour, are entitled to delivery of possession of the said property. It was alleged on behalf of the respondents that the two applications which were made by the appellants for delivery of possession of the said property were out of time and barred by the Limitation Act 1908. The Subordinate Judge held that the applications were not barred and made an order for delivery of possession of the property referred to in each application. Respondents 1 to 3 appealed in each case to the High Court, and on 19th August 1930, the learned Judges of the High Court delivered a judgment which disposed of the two appeals. In pursuance thereof decrees were made setting aside the orders of the Subordinate Judge and dismissing the applications for possession on the ground that they were barred by the Limitation Act. From these decrees the appellants have appealed to His Majesty in Council. The respondents were not represented. The material facts are as follows.

2. In 1901 respondents 1 to 8 or their predecessors executed a mortgage in respect of 19 immovable properties in favour of appellant 1 who took the mortgage for himself and his cosharers the other appellants or their representatives. In 1914 the appellants sued on the mortgage making the mortgagors respondents 1 to 8 or their predecessors

principal defendants and the remaining respondents or their predecessors perform defendants. On 10th July 1919, the final mortgage decree for sale was passed. The same respondents executed in 1903 in favor of the appellants another mortgage in respect of the same 19 and 19 other immovable properties and in 1914 the appellants sued the respondents in the same manner as mentioned before. On 10th July 1919, the final mortgage decree for sale was passed. In March 1922, the appellants took out execution of both decrees, the first for Rs. 19,315-3-0 and the second for Rs. 32,180-15-9. At auction sales in execution in both cases the appellants purchased with the leave of the Court on 10th February 1923, the mortgaged properties, in the first case for Rupees 18,225 and in the second case for Rs. 30,026. Applications, to the Subordinate Judge were made on behalf of the judgment-debtors under Order 21, Rule 90, Civil P. C. 1908, to set aside the sales. On 15th April 1923 the Subordinate Judge made orders disallowing the said applications, and on 22nd April 1924, he confirmed the sales in pursuance of Order 21, Rule 92, of the said Code. On 21 July 1924 appeals by certain of the judgment debtors were filed in the High Court against the orders of the Subordinate Judge, dated 15th April 1924.

3. On 17th March 1927, the High Court dismissed the said appeals. In pursuance of Order 21, Rule 94, the Subordinate Judge granted sale certificates to the appellants in the first case on 19th May 1928, and in the second case on 6th June 1928. On 10th September 1928, the appellants made an application in each case to the Subordinate Judge for possession of the properties purchased by them at the said auction sales. The applications were made under Order 21, Rule 95, Schedule 1, Civil Procedure Code. Respondents 1 to 3 objected to the said applications on the ground that they were barred by limitation. They alleged that the sales had become absolute on 22nd April 1924. When the Subordinate Judge confirmed the sales, and that inasmuch as the applications for delivery of possession were not made until 10th September 1928, the said applications were out of time by reason of Article 180, Lim. Act, which provides that such an application must be made within three years from the time when the sale becomes absolute. As already stated, the Subordinate Judge held that the applications were not out of time; he considered that inasmuch as the judgment-debtors appealed against his orders of 15th April 1924, time did not begin to run until the date of the disposal of the appeals, viz., the 17th March 1927, and therefore, the applications for possession made on 10th September 1928 were made within three years specified by Article 180, Lim. Act. The learned Judges of the High Court were of opinion that the sale became absolute on 22nd April 1924, when the Subordinate Judge confirmed the sales, and therefore that the applications for possession, which were made on 10th

September 1928, were barred by reason of the said article.

4. There is no doubt that Article 180, Lim. Act, 1908, is applicable to the matter now under consideration. It provides that a purchaser of immovable property at a sale in execution of a decree for delivery of possession, must take the application within three years from the time when the sale becomes absolute. In order to ascertain when such a sale as is referred to in the said article becomes absolute, reference must be made to the Civil Procedure Code, and the orders and rules contained in Sch.1 thereto, for that is the Code which contains the provisions relating to the sale of immovable property in execution of decrees. Order 21, Rules 82 to 96, in the said schedule are applicable to sales of immovable property. Rules 89, 90 and 91 deal with applications to set aside a sale and Rule 92 (1) provides as follows :

"Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute."

5. There is no doubt that the above-mentioned rule is applicable to the present case; for as already stated the judgment-debtors did apply to set aside the sale, and the Subordinate Judge disallowed the applications on 15th April 1924, and on 22nd April 1924, he confirmed the sales. The sales therefore became absolute on 22nd April 1924, at any rate so far as the Court of the Subordinate Judge was concerned. But the judgment-debtors had a right of appeal under Order 43, R. (1) (j) against the orders of the Subordinate Judge by which he disallowed their applications to set aside the sales. This right of appeal the judgment-debtors exercised. Upon the hearing of the appeals, the High Court, by reason of the provisions of Section 107(2) of the Code had the same powers as the Court of the Subordinate Judge. In the present case, the High Court dismissed the appeals and on such dismissal the orders of the Subordinate Judge confirming the sales became effective and the sales became absolute. In considering the meaning of the words in Article 180, Lim. Act, it is useful to consider the converse case. Take a case in which the Subordinate Judge allowed the application to set aside the sale; in that case, of course, there could be no confirmation of the sale as far as the Subordinate Judge was concerned, as there would be no sale to be confirmed. But if, on appeal, the High Court allowed the appeal, and disallowed the application to set aside the sale, the High Court would then be in a position to confirm the sale, and on such an order of confirmation by the High Court the sale would become absolute. Again, take a case in which the Subordinate Judge disallowed the application to set aside the sale; there would then be confirmation of the sale by the Subordinate Judge

and the sale would become absolute as far as his Court was concerned. If the High Court allowed an appeal, and set aside the sale, there would then be no sale, and, of course, no confirmation and no absolute sale.

6. Upon consideration of the sections and orders of the Code, their Lordships are of opinion that in construing the meaning of the words "when the sale becomes absolute" in Article 180, Lim. Act, regard must be had not only to the provisions of Order 21, Rule 92 (1) of the schedule to the Civil Procedure Code, but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under Order 21, Rule 92 (1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180, Lim. Act, until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above-mentioned application.

7. Their Lordships therefore are of opinion that on the facts of this case the sales did not become absolute within the meaning of Article 180, Lim. Act, until 17th March 1927, and that the applications for possession of the properties purchased at the auction sales were not barred by the Limitation Act. Their Lordships' attention was drawn to certain cases decided by the High Court at Calcutta, from which it appears that there has been a difference of opinion on the point now under consideration. The learned Judges in their judgment in this case referred to two unreported cases which in their opinion covered the point. The first of these cases, decided on 27th July 1928, viz : *Neckbar Sahai v. Prakash Chandra Nag Chaudhuri* This is undoubtedly a decision which supports the judgment of the learned Judges now under consideration, for it was held that :

" The period of three years provided for in Article 180, Lim. Act 1908, for an auction-purchaser's application for delivery of possession should be reckoned from the date of the confirmation of the sale under Order 21, Rule 92 and not from that of the final disposal of the judgment-debtor's application under Order 21, Rule 90."

8. The decision of the High Court in the present case *Anarjan Bibi v. Chandra Mani Saha* was given on 19th August 1930, and followed the decision in the above-mentioned cited case. It may be noted that it is now reported in 56 Cal LJ, at p. 574 AIR 1932 Calcutta 75. On an earlier page of the same volume of the Calcutta Law Journal, the case of *Chhogan Lal Bagri v. Behari Lal Saha Ray*, is reported. That case

was decided by a Division Bench of the High Court at Calcutta on 15th July 1932, i.e., nearly two years later than the decision in the case now under appeal. In *Chhogan Lal Bagri v. Behari Lal Saha Ray* the head-note is as follows :

" the decree-holder (appellant) in execution of his mortgage decree purchased the property on 17th September 1924. An application for setting aside the sale by one of the judgment-debtors was dismissed on 30th May 1925, and the sale was confirmed on that date. An appeal was afterwards filed against the order dismissing the application for setting aside the sale, and the appeal was dismissed on 25th July 1927. The present application for delivery of possession was made on 18th January 1929."

9. It was held that the application, being governed by Article 180, Schedule 1, Lim. Act, was in time ; that the three years ran from 25th July 1927, when there was a final, conclusive and definite order confirming the sale, and not from 30th May 1925. The learned Judges were able to distinguish the case of *Neckbar Sahai v. Prakash Chandra Nag Chaudhuri (Supra)*, from the case which they were considering, and held that it was not an authority against the appellants. Their Lordships find considerable difficulty in appreciating that conclusion, for it seems to them that the decisions in the two above-mentioned cases are directly in point on the matter now under consideration, and that the decisions are in conflict. Reference was also made to the case of *Muthu Korakki Chetty v. Md. Madar Ammal* which was a decision of a Pull Bench; the question which was referred to the Full Bench was :

" Whether the existence of the cause of action for an application for delivery of possession to which Article 180, Schedule 1, Lim. Act, applies, is suspended during the pendency of proceedings for setting aside the sale."

10. In their Lordships' opinion, the decision on that question, apart from observations which were made in the judgments, does not assist in the present appeal, for there is here no question of any suspension of any cause of action. For the reasons already given, their Lordships agree with the decision of the High Court in *Chhogan Lal Bagri v. Behari Lal Saha Ray (Supra)* so far as it relates to the matter now under consideration. Two further points were raised on behalf of the appellants (1). That there was no right of appeal from the decision of the Subordinate Judge on the question of limitation, and (2) that if the application under Order 21, Rule 95 was out of time, a suit might have been brought by the appellants to recover possession and that the suit would have been in time. Neither of these points was taken in the High Court, and in view of their Lordships' above-mentioned conclusion, it is not necessary

for them to express, and they do not express, any opinion in respect of either of them. The result is that their Lordships are of opinion that the appeals must be allowed the decrees of the High Court dated 19th August 1930, set aside, and the orders of the Subordinate Judge of 28th February 1929, restored, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the High Court and of these appeals.

Appeals allowed.

Cases Referred.

AIR 1930 Calcutta 86=120 IC 107=56 Cal 608.

AIR 1932 Calcutta 75=134 IC 1188=56 CLJ 574,

AIR 1933 Calcutta 311=147 IC 881.

AIR 1920 Madras 1=54 IC 66=43 Mad 185 (FB),