severe. It is reduced to nine months' rigorous imprisonment. The sentence of fine, or imprisonment in default, will stand.

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MUSAI SINGH v. EMPEROR.

E. H. M. *Rule discharged.*

APPELLATE CIVIL.

Before Mookerjee and Beachcroft, JJ.

BHAGIRATHI DAS

v.

BALESHWAR BAGARTI.*

1913
March 6.

Res Judicata—Estoppel—Mortgage by Hindu widow claiming an absolute estate—Reversioner, previous independent title of.

On 28th August, 1879, one Musammat Bhamo was declared to have preferential title to one Satyabadi in certain lands. On the 30th September, 1904 Bhamo executed a conditional mortgage. In a suit for foreclosure brought by the mortgagee against Bhamo and Satyabadi's brother Baleshwar who was made a party on the allegation that he was in possession as a donee of the equity of redemption, a decree *nisi* was granted to the mortgagee, and Baleshwar (who repudiated the title of Bhamo and set up a title in himself alleging that the property belonged to him, and Bhamo was in possession as his guardian) was dismissed from the suit. Subsequently, the mortgage decree having been made absolute, and the mortgagee having been unable to obtain possession of the lands in question, a suit for recovery of possession was filed on the 19th June 1906 by the mortgagee against Baleshwar. This latter suit was decreed on the 17th September 1906 and both Courts of Appeal subsequently confirmed this decree. Shortly after the decision of the High Court in the above appeal, Bhamo died, and, on the 2nd April 1909, Baleshwar brought a suit against the mortgagee for declaration of title and recovery of possession.

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* Appeal from Appellate Decree, No. 4172 of 1910, against the decree of J. C. K. Peterson, District Judge of Sambalpore, dated Sept. 15, 1910, reversing the decree of Ram Lal Das, Subordinate Judge of that district, dated April 23, 1910.

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Held, that the decision in the litigation of 1879 could not operate as *res judicata*.

Baleshwar Bagarti v. *Bhagirathi Das* (1) followed.

Held, also, that the decision in the mortgage suit could not operate as *res judicata*.

Jaggeswar Dutt v. *Bhuban Mohan Mitra* (2) referred to.

Held, further, that the plaintiff was bound by his allegations in the suit for recovery of possession and could not now be permitted to say that Bhamo was in possession as a Hindu mother and that he himself was entitled to succeed on her death.

Bhaja Chowdhury v. *Chuni Lal Marwari* (3) referred to.

SECOND APPEAL by the defendants, Bhagirathi Das and others.

The facts are as follows:

Mouza Resam in tehsil Bargar, district Sambalpur, belonged to one Nabho Gour, who left him surviving a widow named Musammat Mathura and their son Muna married to Bhamo, and their son Lakhan who died in 1859. Samo the son of Musammat Nirasi, Nabho's wife in *churi* form, died in 1878 leaving two sons Satyabadi since dead, and Baleshwar the present plaintiff. When Nabho died he was succeeded by his son Muna alone, who was succeeded by his son Lakhan who died in 1859. After his death his paternal grandmother, Mathura, came into possession of the property though it is admitted that his mother Musammat Bhamo was entitled to succeed as his heiress. His grandmother continued in possession till 1866 when she was ousted by his uncle Samo who died in 1878. After the death of Samo, Bhamo the mother of Lakhan obtained possession. This led to a dispute between Bhamo and a cousin of Lakhan by name Satyabadi who dispossessed her from the village in suit and managed

(1) (1908) I.L.R. 35 Calc. 701, 716.

(2) (1906) I.L.R. 33 Calc. 425; 3 C. L. J. 205.

(3) (1906) 5 C. L. J. 95, 105.

to get his name registered. Bhamo then brought a suit (No. 46 of 1879) against Satyabadi in the Court of the Deputy Commissioner, Sambalpur, and obtained a decree on 28th August, 1879, the Deputy Commissioner holding that Bhamo had preferential title to Satyabadi who was the son of Nabho's illegitimate son.

"On 31st April, 1899, Bhamo and Markand jointly executed a mortgage by conditional sale for 24 *purugs* of *dhan* in favour of defendants Nos. 1 and 2 by the former hypothecating the village in suit, and the latter a different village of his. In 1904, defendants Nos. 1 and 2 brought a foreclosure suit against Bhamo and Markand, in which the present plaintiff was also impleaded as a defendant, on the allegation that he was in possession of a portion of the profits by gift from Bhamo. That suit was numbered 104 of 1904. The suit was decreed against Bhamo and Markand, but dismissed against the present plaintiff, on the ground that the mortgagee failed to prove that he had any right in the equity of redemption. This decree was upheld in appeal.

"The defendants Nos. 1 and 2 failing to get possession brought a title suit No. 128 of 1906, on the allegation that the present plaintiff, in collusion with Bhamo, forcibly kept them out of possession. The defendants Nos. 1 and 2 got a decree on 17th September 1906, which was upheld by the District Judge on 24th June 1907, and ultimately by the High Court in Second Appeal No. 1375 of 1907 on 7th April 1908. See ***Baleshwar Bagarti* v. *Bhagirathi Das*** (1).

"Musammat Bhamo died in June 1908. The plaintiff now claims to recover possession of the village,

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in suit, on the ground, that he is the only reversionary heir to the estate, and that the mortgage made by Bhamo was without legal necessity.

Dr. Rashbehary Ghose (*Mr. G. Sircar* with him), for the appellant. The plaintiff is estopped from setting up any claim and the defendants deny plaintiff's title. The decision in *Baleshwar Bagarti* v. *Bhagirathi Das* (1) must certainly operate as *res judicata* even if the decree in the previous suit does not. Refers to the judgments in the previous suits. See *Nilkant* v. *Suresh* (2). Upon the findings of the lower Appellate Court, plaintiff cannot be reversioner, of either Lakhan or Bhamo. Then if Bhamo's right to this was as *stridhan*, plaintiff now claims as heir to her *stridhan*, and not by survivorship as heir to Lakhan. The question of *res judicata* arises both by the title and foreclosure suit. It was defendants' duty to foreclose the fee simple: see *Srinath Das* v. *Hari Pada Mitter* (3), *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dosee* (4). Defendants sought to foreclose the estate itself, and it was plaintiffs' duty to challenge it then. This question of necessity cannot be agitated now, as it could have been done in the foreclosure suit to which plaintiff was a party. If Bhamo had no right by survivorship, then her possession was adverse to plaintiffs.

Mr. S. P. Sinha (*Babu Jogendra Chandra Ghose* and *Babu Umacharan Laha* with him), for the respondent. Defendant's case throughout was that Bhamo was an absolute owner. The question of legal necessity has not been properly tried. The debt was Rs. 90 only and the widow's interest would be a sufficient

(1) (1908) I.L.R. 35 Calc. 701. 717. 12 C. W. N. 657.
(2) (1885) I. L. R. 12 Calc. 414, 423.
(3) (1899) 3 C. W. N. 637.
(4) (1867) 11 Moo. 241, 267.

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security for this mortgage debt. The plaint in the foreclosure suit shows that only Bhamo's right, title and interest got from her husband was in suit.

[MOOKERJEE, J. Are you not precluded by your conduct in the foreclosure suit from taking up your present position: see *Kameswar Prasad* v. *Rai Kumari Ruttan Koer*(1). For the doctrine of Election, see *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur*(2).]

In a suit for possession, the question of passing only of right, title and interest could not be raised and so could not be *res judicata*. Title has been found in fact to be in Bhamo and therefore neither of these previous suits operates by way of estoppel.

Babu Jogendra Chandra Ghose (following). Adverse possession by Bhamo follows from the judgment of 1879. What does it declare except her widow's right and title? See *Ram Chandar* v. *Kallu*(3).

MOOKERJEE AND BEACHCROFT, JJ. This is an appeal on behalf of the defendants in a suit for declaration of title to village Resam and for recovery of possession thereof. The subject-matter of the litigation belonged admittedly to one Lakhan who died in 1859. After his death, his paternal grandmother Mathura came into possession of the property, though it is admitted that his mother Bhamo was entitled to succeed, as his heiress. His grandmother continued in possession till 1866 when she was ousted by his uncle Samo who died in 1878. After the death of Samo, Bhamo the mother of Lakhan obtained possession. This led to a dispute between Bhamo and a cousin of Lakhan, by name Satyabadi, and there was a litigation between them, which

(1) (1892) I.L.R. 20 Calc. 79.
(2) (1907) 12 C.W.N. 590, 597.
(3) (1908) I.L.R., 30 All. 497.

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ultimately terminated in favour of Bhamo. On the 30th April 1899, Bhamo executed a conditional mortgage in favour of the predecessor of the defendants. On the 30th September 1904, the mortgagee obtained a foreclosure decree. To this suit the present plaintiff was joined as a defendant on the allegation that he was in possession as a donee of the equity of redemption from the mortgagor. He repudiated, however, the title of the mortgagor and set up title in himself, with the result that he was dismissed from the suit. On the 13th May 1905 the decree *nisi* was made absolute. The mortgagee decree-holders, however, were unable to obtain possession and on the 19th June 1906 sued to eject the present plaintiff. In that suit the mortgagees stated explicitly that their mortgagor Bhamo was in sole, exclusive and adverse possession of the village Resam for over thirty years. This was controverted in the written statement and it was stated that Bhamo had never been in adverse possession of the disputed property or held it as owner. It was further stated on behalf of the defendant that the property belonged to him and the undoubted possession of Bhamo was sought to be explained on the ground that she was his guardian and managed the property on his behalf. On these pleadings, an issue was raised in the following terms. "Was Bhamo in adverse possession of the village for over twelve years as alleged?" The Subordinate Judge found upon the evidence that her title had been perfected by adverse possession for over twelve years as alleged, and that she had become the owner of the village Resam. In this view the Subordinate Judge decreed the suit on the 17th September 1906 and declared that the then defendant, now the plaintiff, had no title to the land. This judgment was confirmed on appeal by the District Judge. In his

judgment, the District Judge stated that the question was whether Bhamo was the sole owner of the village or not, and held that the evidence adduced showed that her possession was in her own right. He consequently agreed with the lower Court in its conclusion, that Bhamo was the sole owner of the village in suit. This decree was ultimately affirmed by this Court on the 7th April 1908: *Baleshwar Bagarti* v. *Bhagirathi Das*(1). Shortly after the decree of this Court, Bhamo died, and on the 2nd April 1909 Baleshwar, who had been defeated in the previous litigation, commenced the present action for declaration of title and recovery of possession. His allegation now is that Bhamo was in possession as a Hindu mother, and that upon her death, he is entitled to succeed to the property as the reversionary heir to her son the last full owner. The defendants contend that the claim is barred by the principle of *res judicata* and that it had been conclusively established in the previous litigation that the plaintiff had no title and that Bhamo had an absolute interest in the village in dispute, which, by virtue of the decree in the foreclosure suit, had passed to the defendants. The Subordinate Judge held that the suit was barred by the doctrine of *res judicata*. Upon appeal that decision has been reversed by the District Judge.

The substantial question in controversy in this apppeal is, whether or not the claim is barred by *res judicata*. In support of the plea that the claim is so barred, reference has been made to the decisions in the three previous suits. The first of these is the litigation of 1879 between Bhamo on the one hand and Satyabadi on the other. It has not been seriously contended that the decision in that litigation can in any way bar the present suit. In fact as

(1) (1908) I.L.R. 35 Calc. 701.

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was pointed out by this Court in *Baleshwar Bagarti* v. *Bhagirathi Das*(1), that decision cannot operate as *res judicata*, for this reason amongst others that the present plaintiff was not a party to the decision and Satyabadi cannot be said to have been a party to that suit in a representative character.

The second litigation to which reference is made is the suit for foreclosure brought on the conditional mortgage. It has been argued on behalf of the appellant that the present plaintiff was brought before the Court in that litigation and that if his present allegations are well-founded in fact, it was incumbent upon him to resist the claim for foreclosure on the ground that the mortgage had been executed by Bhamo under circumstances which did not make it binding upon him as reversionary heir to the estate of the last full owner; and in support of this view, reference has been made to the cases of *Mohima Ch. Roy Chowdhury* v. *Ramkishore Acharjee Chowdhury*(2), *Nugender Chunder Ghose* v. *Sm. Kaminee Dossee*(3), *Sreenath Das* v. *Haripada Mitter*(4) and *Nilkant* v. *Suresh*(5). It has been argued, on the other hand, that a reversionary heir is not a proper party to a mortgage suit because he cannot be invited to redeem the mortgage as pointed out in the case of *Ram Chandar* v. *Kallu*(6). It has also been contended that the principle of the decision in *Nilkant* v. *Suresh*(7) has no application, because in the foreclosure suit the mortgagees did not seek to enforce their security on the assumption that it had been granted by a Hindu mother in respect of an estate in which she had only a limited interest. It is

(1) (1908) I. L. R. 35 Calc. 701, 716.
(2) (1875) 15 B. L. R. 142.
(3) (1867) 11 Moo. I. A. 241.
(4) (1899) 3 C. W. N. 637.
(5) (1885) I. L. R. 12 Calc. 414; L. R. 12 I. A. 171.
(6) (1908) I. L. R. 30 All. 497.
(7) (1885) I. L. R. 12 Calc. 414.

not necessary for the purposes of the present case to decide the general question raised on behalf of the appellant, namely, whether a reversionary heir is a proper party to a mortgage suit, though it may be conceded that there is a fundamental distinction between two classes of cases, namely, the case where a mortgagee sues a widow to enforce a mortgage executed by her husband, and the case where a mortgagee sues a widow to enforce a mortgage executed by herself. In the former case, no question of propriety of the transaction arises, in the latter case if the mortgagee seeks to obtain a decree entitling him to proceed against not merely the qualified interest of the widow but the entire inheritance, the question of legal necessity arises which can be finally decided only in the presence of the reversioner. But it does not follow that a reversionary heir, when so drawn into the litigation, is not entitled to urge that as he cannot be called upon to redeem, he would prefer to be left alone with liberty to contest the title of the mortgagee or of the purchaser at the sale in execution of the mortgage decree if he should ever succeed as the actual reversionary heir. In the present case, however, as already explained, the mortgagees did not sue on the assumption that they had taken a mortgage from a Hindu mother in possession of the estate of her son, nor did they join the plaintiff in their suit on the assumption that he was the reversionary heir to such estate. Their theory, on the other hand, was that the mortgagor was the absolute owner of the property and was competent to deal with it in any way she chose. The present plaintiff was brought on the record as an alleged transferee of the equity of redemption from the mortgagor, and the obvious object of the mortgagee was to give him an opportunity to redeem. He took up the position that the

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mortgagor had no title whatsoever to the property which belonged to himself. Under these circumstances, he was rightly discharged from the suit: *Jaggeswar* v. *Bhuban* (1). This may preclude him from now asserting that he had, at the time of the previous litigation, a subsisting interest in the equity of redemption [*Nilkant* v. *Suresh* (2)] but in view of the frame of that suit and the scope of the present litigation, it cannot be successfully contended that the decison therein operates as *res judicata* upon the questions now in controversy.

The third litigation to which reference is made in support of the plea of *res judicata* is the suit for recovery of possession. It is argued on behalf of the appellants that, upon the pleadings therein, the question was raised in the fourth issue, whether or not Bhamo had acquired an absolute title in the village Rasam by adverse possession for the statutory period. This question was decided in favour of the mortgagee; it was on this basis that a decree for possession was made in their favour and a declaration was made against Baleshwar that he had no interest whatsoever in the property. It is consequently asserted that this decision operates as *res judicata*. On behalf of the plaintiff-respondent it is contended that it is not *res judicata*, because it was not necessary for the plaintiff in that suit to allege that Bhamo was in possession as a Hindu mother, because such a defence if taken would have meant a confession of judgment. On this basis it is argued that the plaintiff is at liberty to contend that the decision in the previous suit has become practically inoperative by reason of the death of Bhamo, that there has been a complete change of circumstances, and that he can now succeed on a ground not asserted in the previous litigation.

(1) (1906) I.L.R. 33 Calc. 425; 3 C.L.J. 205.

(2) (1885) I.L.R. 12 Calc. 414.

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We are of opinion that this view is unsound. The decision in the suit for possession to the effect that Bhamo was the absolute owner of the property is conclusive between the parties and cannot be ignored. Besides, the plaintiff cannot resile from the position he deliberately adopted on two previous occasions. When he was joined as a party to the foreclosure suit, he stated that Bhamo had no title and that the title to the property was in himself; he was consequently dismissed from that suit. When on the basis of the decree in the foreclosure suit, he was sued in ejectment, he pleaded that he was the owner of the property and that the then plaintiff had acquired no title by virtue of the decree founded on a mortgage granted by Bhamo who had no interest whatsoever in the property. That defence was negatived. The plaintiff cannot now be permitted to take up a position inconsistent with the position previously adopted by him. It is well settled that a litigant is not allowed to occupy inconsistent positions in Court; he cannot be allowed to approbate and reprobate. If parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of Courts of Justice would in most cases be paralysed: *Bhaia Chowdhry* v. *Chuni Lal Marwari*(1). The conclusion follows that the plaintiff is bound by his allegations in the suit for recovery of possession and cannot now be permitted to assert that Bhamo was in possession as a Hindu mother and that he himself was entitled to succeed on her death.

The result is that this appeal is allowed, the decree of the District Judge reversed, and that of the Court of first instance restored with costs throughout.

G. S. *Appeal allowed.*

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(1) (1906) 5 C. L. J. 95, 105.