lisa, or revenue paying, the revenue still remains assessed. It often happens that Government remits the revenue of revenue paying estates for several years, on various grounds, but the estates do not cease to be considered revenue paying, so far as to be subject to the conditions attaching by law to such estates.

We decree the appeal with costs, and set aside the order of the Judge, and set aside the sale.

Decree reversed.

APPELLATE CIVIL.

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May 28.

Before Mr. Justice Turner, and Mr. Justice Oldfield.

PARAM SINGH (DEFENDANT) *v.* LALJI MAL (PLAINTIFF).*

Agreement not to execute decree—Breach of faith—Deed of conditional sale—Defeating claims of third persons—Disavowal of trust—Estoppel—Execution—Exparte decree—Fictitious transaction—Foreclosure proceedings—Justice, equity, and good conscience—Limitation—Position under deed—Prejudice—Real nature of transaction—Relief—Suit to enforce agreement—Wrongful execution.

The plaintiff sued in 1875 to recover possession of immoveable property which the defendant had obtained in 1873, in execution of an *ex-parte* decree dated the 8th June 1861. That decree was founded on a deed purporting to be a deed of conditional sale dated the 24th December 1853, executed by the plaintiff in favor of the defendant. The plaintiff alleged that the deed was executed in order to protect the property against the claims of plaintiff's son, and the plaintiff sought to set it aside on account of defendant's breach of an agreement dated the 16th January 1856, whereby the defendant stipulated that plaintiff's possession should not be disturbed. The defendant *inter alia* pleaded estoppel, and the bar of limitation, against plaintiff's suit.—*Held*, that the suit was not barred by limitation, as plaintiff's cause of action only arose when defendant first practically disavowed the trust by seeking more than nominal execution of decree, and (following (1) and (2)) that plaintiff is not estopped from showing the real truth of the transaction between plaintiff and defendant, and from obtaining relief through the Court against defendant's breach of good faith, because of plaintiff's attempt to hinder or defeat the possible claim of a third party, the maxim "*in pari delicto potior est conditio possidentis*," not being applicable without qualification to India, where justice, equity, and good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed when the parties claiming under it, or their representatives, have been induced to alter their position on the faith of such instrument.

* Regular Appeal, No. 7 of 1876, from a decree of Maulvi Muhammad Wajh-ul-lah Khan, Subordinate Judge of Moradabad, dated the 30th November 1875.

(1) 13, Moo. I. A. 551. Ram Saran Singh v. Musammat Ram Peary.
(2) 27, L. J., N. S. 262. Bowes v. Foster.

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The plaintiff in this suit, filed on the 27th July 1875, claimed to "recover possession of a ten biswa share in each of the mauzas Mayola and Dudhrajpur, pargana Thakurdwara, valued at Rs. 8,000, by cancelment and invalidation of a deed of conditional sale dated the 24th December 1853," in favor of defendant. The plaint set out that the deed of conditional sale was a fictitious transaction entered into with the defendant, an intimate friend, to protect the property in consequence of disagreements between plaintiff and his son, that the defendant had executed an agreement on the 16th January 1856 stipulating that should the deed of conditional sale be followed by foreclosure proceedings and a decree of Court, nevertheless that the defendant would not attempt to disturb plaintiff's possession over the property,—that in breach of this agreement defendant attempted in 1877 to execute decree for possession obtained on the 8th June 1861, when plaintiff's claim to the property was allowed by the Munsif. The Munsif's order was dated 19th April 1873 and was reversed by the Principal Sadr Amin on the 27th July 1874, on appeal by the defendant, on the ground that it was not competent to the Munsif to set aside a decree on the miscellaneous side, the questions of collusion and fraud involved in the Munsif's order, being properly the subject-matter of a regular suit. The cause of action alleged in the plaint was the High Court judgment dated the 11th December 1874, affirming the Principal Sadr Amin's decision of the 27th July 1874, in the miscellaneous proceedings in execution of decree above referred to, which awarded possession of the property in dispute to the defendant.

The defendant's written statement, filed on the 31st August 1875, put forward the following pleas in defence, that the decree dated 8th June 1861 having been passed *ex parte*, and plaintiff not having applied to set it aside under s. 119 of Act VIII of 1859, the decision became final, and the suit was barred under s. 2 of Act VIII of 1859; that the claim to set aside the deed of conditional sale was barred by cl. 92 of sch. II of Act IX. of 1871, which provides that a claim to cancel and set aside an instrument must be brought within three years from the date of execution of the instrument; that the claim to set aside the decree of the 8th June 1861 was barred by cl. 96, sch. II of Act IX of 1871,

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which provides a period of three years' limitation from the time when the fraud became known to the party wronged, and that the claim for specific performance of the contract, as based on defendant's alleged agreement dated 16th January 1856, was barred by cl. 113 of Act IX of 1871, which provides that specific performance of a contract must be sought within three years from the time when plaintiff has notice that his right is denied. On the merits, various defences were set up which are stated in the judgment.

The Subordinate Judge decreed the suit, and the defendant appealed to the High Court on grounds which, in effect, recapitulated the pleadings contained in defendant's written statement, given above.

Pandits *Bishambhar Nath* and *Nand Lal* for appellant.

Munshis *Hanuman Prasad*, *Sukh Ram*, and Babu *Barodha Prasad* for respondent.

The judgment of the Court was delivered by TURNER, J.—"The respondent was the owner of a ten-biswa share in each of the mauzas Mayola, Dudhrajpur, and on the 24th December 1853 he executed a deed of conditional sale transferring these properties to the appellant for an alleged consideration of Rs. 1,000, repayable with interest at twelve per cent. in four years. The deed declared that possession had been given to the conditional vendee. In 1860 the appellant caused a notice of foreclosure to be issued, and on the 28th June 1861, he obtained an *ex parte* decree for possession.

On the 18th July 1861, Nathmal Das obtained a decree for money against the respondent, and in execution of that decree he attached the rights and interests of the respondent in the property above mentioned. The appellant intervened, and on his objection the property was released on the 26th January 1865. Nathmal Das then instituted a suit to contest the order. He alleged that the conditional sale-deed of December 1853 was fraudulent and collusive. The appellant and respondent were both made parties to this suit. The appellant appeared and contended that the mortgage was valid, and he also pleaded the foreclosure and decree obtained in 1861. The respondent did not appear. The Principal Sadr Ami l

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that Nathmal Das had failed to establish his case, and dismissed the suit, and on appeal his decree was affirmed.

The first occasion on which the appellant applied for execution of his decree of the 8th June 1861, was on 25th April 1864. On the 28th June 1864, it was ordered that notice should issue, and the amin's fee be deposited. It does not appear whether notice was served: the proceedings were struck off the file on the 11th July 1864, because the amin's fee had not been deposited.

The next applications were made on the 19th June 1865, and on the 10th August 1866, but the decree-holder did not proceed with them. On the 24th June 1869, another application for execution was put in, and notice issued. On the 10th July the decree-holder informed the Court that inasmuch as arrears of revenue were still due, he did not desire to obtain possession, and prayed that the proceedings might be struck off the file. On the 13th July 1869, the respondent put in a petition in which he alleged the decree was collusive, and that the applicant was, in fact, a trustee for him.

On the 2nd March 1870, the appellant presented another application for execution, but immediately afterwards, he informed the Court he did not desire to proceed with it, and that if any settlement took place, a sulehnamah would be filed.

At last, in 1872, the appellant seriously took proceedings to execute his decree and obtained posses ion. The respondent resisted the application. He alleged, as he alleges in this suit, that in order to prevent his eldest son, by his first marriage, from obtaining the property, he had arranged with the appellant, his intimate friend, to make a pretended transfer of the property to him, and that in pursuance of this arrangement he executed the deed of conditional sale of December 1853, that in fact no money passed as consideration for the deed, that in 1856 the appellant, at his instance, executed a deed acknowledging the respondent's title to the property, that the decree of 1861 was also obtained to conceal the true ownership of the property, and that he had all along remained in possession, and dealt with the property as his own, to the knowledge of the appellant. The Munsif allowed the objection, and dismissed the application for execution. The Principal Sadr Amín reversed the Munsif's

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order, and the High Court affirmed the Principal Sadr Amín's order, on the ground that it was not competent to a Court executing a decree, to annul the decree. The appellant consequently obtained possession.

The respondent then instituted the suit which is now before this Court in appeal. He averred that the deed of conditional sale had been executed without consideration, and with a view to defeat a claim which he thought might be made by his son by his first wife, that in prosecution of the design to conceal the ownership of the property he contrived the foreclosure proceedings, and the suit which customarily follows such proceedings, that in fact it was not intended the property should pass to the appellant, that he was a mere trustee, *ismfarzi*, for the respondent, that the respondent had, notwithstanding the proceeding above referred to, remained in possession of the property, and exercised acts of ownership, until by the execution of the decree, in fraud of the respondent, the appellant obtained possession. The respondent also relied on the terms of an agreement, which he asserted had been executed by the appellant on the 16th January 1856, and which is in the following terms :—

"I, Param Singh, son of Bhup Singh, by caste Jat, and resident of mauza Jahangirpur, pargana Thakurdwara, do hereby declare that whereas Lalji Mal, a resident of mauza Mayola, has executed in my favor an ismfarzi deed of conditional sale, dated the 24th December 1853, in respect of a ten biswa share in each of the mauzas Mayola aforesaid and Dudhrajpur in pargana Thakurdwara, because Ganga Ram, the son of the said Lalji Mal, by his first wife, deceased, quarrels with him, and is trying to get the said share from him. I record and agree that even if I, as a matter of expediency, obtain a decree by suing on the said deed of conditional sale, or if I should try directly or indirectly, privately or through the Court, to take or obtain possession of the property entered in the said deed of conditional sale, or if any of my heirs should wish to take or obtain possession, I, or my heir, or successor, shall not, according to the agreement, be competent to be the owner of the said property, and that should I in contravention of the terms of this agreement obtain possession, or endeavour to obtain possession,

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all the proceedings connected with the sale and the foreclosure shall be deemed invalid according to this instrument. I have, therefore, executed this agreement that it may serve as evidence."

(Sd.) PARAM SINGH, with his own pen.

The stamp paper on which this agreement is written, bears an endorsement to the effect that it was purchased by the appellant, a few days before the date of agreement.

The appellant replied that the *ex parte* decree obtained on the 8th June 1861, the order obtained by him when objecting to the execution of Nathmal's decree, the dismissal of the suit brought against him by Nathmal, and the rejection of the respondent's objection when he took out execution of the decree of 1861, estopped the respondent from maintaining the suit, and that the claim, involving the supersession of the conditional sale deed executed in 1856, and the decree of 1861, was barred by limitation. On the merits, the appellant pleaded that the deed of conditional sale had been executed for the consideration therein expressed, and he denied the execution of the agreement of 1856, and accounted for the stamp endorsement by asserting that in 1869, he had been attacked by Kesri, the brother-in-law of the respondent, and had been robbed of a bundle of papers from which a blank paper, bearing a stamp, might have been extracted, and the agreement fabricated. The Subordinate Judge overruled the defences set up on points of law, and on the issues of fact, while he considered the appearance of the agreement suspicious, he considered the proof of its execution, on the whole, trustworthy, and apart from the agreement, adopting the reasons given by the Munsif in support of his order in April, 1873, the Subordinate Judge declared he entertained no doubt that the deed of conditional sale, the foreclosure, and decree for possession, were obtained by collusion, and he pointed out that this was admitted by Azmat Ali, a witness, who had been summoned by the appellant. The Subordinate Judge, considering that both parties had been parties to a fraud, nevertheless held that the appellant ought not to obtain the benefit of the further fraud he had practised on the respondent, and, therefore, he passed a decree in favour of the respondent. In appeal, it is contended on the part of the appellant, that the suit is not maintainable in that the respondent cannot be allowed to set up his own fraud, but is bound

thereby, that the decree of June 1861 having become final, the suit is barred, that inasmuch as the claim involves the setting aside of the decree of 1861, it is barred by limitation, that the execution of the deed of conditional sale for consideration is proved, that the alleged agreement of 1856 is false and fabricated, and that the decree of 1861 was not obtained in collusion with the respondent.

Before entering on the question of law, it will be more convenient to determine the question of fact raised in the appeal. We see no reason to dissent from the conclusion at which the Subordinate Judge has arrived, as to the facts of the case. (The learned Judge after discussing the evidence relating to consideration proceeded as follows:)

On the facts, then, found by the Court below and by this Court, is the respondent entitled to relief? That the suit is not barred by limitation, is clear. The cause of action alleged by the respondent, is the possession obtained by the appellant in 1875. According to the averments of the respondent, no cause of action accrued to him until the appellant disavowed the trust, and proceeded to obtain possession of the property, against the will of the respondent. The mere proceeding to keep alive the decree, would not be a disavowal of the trust. The appellant seriously sought to execute his decree in 1872, and limitation ought not to be computed from an earlier date than that application; if the suit is to be regarded as a suit not merely for possession, but for a declaration that the conditional sale deed was not intended to pass the property, and that the decree should not operate to injure the right of the respondent, in which view of the suit, six years is the period prescribed; or if, by rejecting as surplusage the claim for the invalidation of the conditional sale-deed, the suit be, as we think it should, a claim for possession, the period of limitation is 12 years, to be computed from the date on which possession was obtained in execution of the decree of 1861, which could not have happened till the Munsif's order was reversed by the Judge in 1873; consequently, in either view, the suit instituted in July 1875 was not barred by limitation.

We have next to determine whether, on the facts found, the respondent was entitled to maintain the suit. Four several issues arise

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on this point. 'Is he estopped by the execution of the deed of conditional sale from asserting that it was executed, not to secure the repayment of a loan, but for the purpose of creating an apparent title in the appellant? Is he estopped by the decree obtained after foreclosure in 1861? Is he estopped by the judgment in the suit brought by his creditor against the respondent and the appellant? and, lastly: Is he estopped by the circumstance that he is obliged to have recourse to the Court for relief, by reason of his attempt to hinder, or defeat, the possible claim of a third party?

In this country where *ismfarzi* transactions are so common, and when they have been so commonly recognized by the Courts, we should establish a dangerous precedent were we to rule that, under all circumstances, a party is bound by his deed, and concluded from showing the truth. That the respondent may show that nothing was due on the deed, that, certainly, if he were defendant, he would not be estopped from showing the real truth of the transaction, we have authority in Ram Saran Singh *v.* Musammat Ram Peary (1) where the defendant, a widow, was allowed to prove, in answer to a claim brought by her brother, on a deed of conditional-sale, that the deed was concocted by her, and her brother, to defeat the claim of her husband's heirs. If the party to a deed is to be precluded from questioning his solemn act, much injustice would be wrought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced, must be proportioned to the degree of care and intelligence, which the natives of the country, in practice, bring to bear upon their transactions. What is ordinarily known in these provinces as a deed, is an attested agreement, prepared without any competent legal advice, and executed and delivered, by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity, and good conscience require no more than that a party to such an instrument, should be precluded from contradicting it, to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument; but where the ques-

(1) 13, Moo. I. A. 551.

tion arises between parties, or the representatives in interest of parties, who, at time of the execution of the instrument, were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice, in this country, will be more surely obtained, by allowing any party, whether he be plaintiff or defendant, to show the truth. We hold that the respondent is not estopped by the deed, from showing the nature of the transaction.

In the precedent already cited, it was also ruled that a pleading by two defendants against the suit of another plaintiff, cannot amount to an estoppel as between them, still less can it be held that a defendant is estopped by a plea, which he does not raise, but which is raised by a co-defendant. The dismissal of the creditor's suit on the appellant's plea, does not then estop the respondent from questioning the truth of the plea.

Nor is the decree of 1861, a bar to the suit. The question now raised is, whether or not the respondent suffered judgment to go by default in that suit on the understanding that the decree would not be executed without his consent, or, if executed, that the property would be restored to him. This neither was, nor could have been, determined in the former suit; consequently, the respondent is not estopped by the decree of 1861. But, if it be held that he is so far bound by the decree, that he cannot contend that the appellant was not entitled to possession, in virtue of the mortgage and foreclosure, the respondent is, in our judgment, entitled to insist upon the agreement, and on the strength of it, to recover back possession from the appellant, unless he is precluded by the plea which we have still to determine.

The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court finding a man embarrassed by a deceit, to which he was himself a party, will not interfere to relieve him from the consequences, must not be accepted without qualification. The English Court of Exchequer in Bowes *v.* Foster (1) allowed a plaintiff to recover from the defendant, goods which he had deposited with

(1) 27, L. J., N. S., 262.

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the defendant, in order to defeat or hinder the claims of creditors who might sue out execution, although the plaintiff had, for the purpose of deceit, furnished the defendant with evidence of a sale by handing to him a priced invoice of the goods, and a receipt for the price; the Court held that, inasmuch as in fact no sale had taken place, the plaintiff was entitled to recover. In the case before the Court, the respondent furnished the appellant with a deed of conditional sale which did not, by itself, operate to pass the property in the lands therein mentioned, the foreclosure made the sale absolute, the decree awarded possession, but had not the decree been executed, the property would have remained the property of the respondent; the parties, *ex-hypothesi*, did not intend that the property should pass, but that by the deed, foreclosure, and decree, a semblance of title should be created in the appellant. If this be so, the case before us does not appear distinguishable from Bowes *v.* Foster (1); but, if it be distinguishable, on the ground that by the deed, foreclosure, or decree, or by all of them, the property passed, then, it appears to us, the respondent is entitled to rely on the agreement. The respondent may then say, let it be granted that a conditional sale was executed in favor of the appellant, that a right of foreclosure was about to accrue to him, he promised me that if I consented to allow the foreclosure to proceed, and a decree in the subsequent suit to pass by default, he would not execute the decree, or if he did execute it, he would deliver possession to me. I accordingly neither opposed foreclosure, nor pleaded to the suit, and I now claim re-delivery of the property. It appears to us that, under such circumstances, the parties could not be held to be *in pari delicto*, and the respondent would be entitled to succeed.

We have arrived at this conclusion, not without considerable hesitation, and if the value of the property is sufficient, and the appellant desires it, we consider that leave to appeal to the Privy Council should be granted. We affirm the decree of the Court below, but, under the circumstances, we direct each party to bear his own costs.

Decree affirmed.

(1) 27, L. J., N. S., 262.