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But, on consideration, I think that we may take it that the Court below—though this was not done in express terms—meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect discerned by the Court of appeal in the plaint, the basis of the suit and the decree.

Taking this view of the meaning and effect of the decree before us, I see no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code; and in this view of the case I readily concur in the order proposed by my brother Straight.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

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November 21.

DURGA PRASAD (DEPENDANT) v. SHAMBHU NATHI AND OTHERS
(PLAINTIFFS) *

Mortgagee for possession of the mortgaged property—Sale of mortgagee—Mortgagor—Pre-emption—Purchaser for value without notice—Adversely—Act XV of 1877 (Limitation Act), sch. ii, No. 144.

Under a registered mortgage dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties, the mortgagors remained in possession, the right of the mortgagee to obtain possession against them being, however, kept alive. In October, 1869, the mortgagors sold the property, and thereupon one *R* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to *D*. In 1883, the mortgagee brought a suit against *D* to obtain possession under his mortgage.

Held, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee v. Dhondroo Chunder Mookerjee* (1) distinguished.

Held, also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having

* Second Appeal No. 156 of 1885, from a decree of G. E. Knox, Esq., District Judge of Agra, dated the 4th November, 1884, affirming a decree of Bahu Abinash Chandar Banarji, Subordinate Judge of Agra, dated the 5th March, 1884.

notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bonâ fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India.

Held, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase.

On the 20th May, 1869, Kunj Behari Lal, a defendant in this suit, on his own behalf, and as the *sarbarakar* or manager of Musammat Tejo, also a defendant in this suit, executed a deed of mortgage in favour of one Bakhtawar Mal in respect of a share in a village called Baroli and of other shares in other villages. The deed provided that the mortgagor should deliver possession of the mortgaged property to the mortgagees; that the latter should pay the Government revenue out of the profits, and also pay him ^{Rs. 100} Rs. 270 yearly as interest, and pay the balance to the mortgagors; and that if what remained after the payment of the Government revenue did not amount to Rs. 270, the mortgagors should make good the deficiency, and as long as they did so, the mortgagors should not sue for the principal till the end of the year 1280 fasli, corresponding with the 7th September, 1873.

The mortgagees did not deliver possession of the property, and on the 13th September, 1870, the mortgagors sued them for Rs. 270, the interest for the first year, and obtained a decree against Kunj Behari Lal alone, Tejo being exempted. The mortgagors then came to an arrangement with the mortgagee. On the 18th March, 1871, they gave one Sham Lal, a servant of the mortgagee, a general power-of-attorney, which authorized him to take possession of all their property, including the mortgaged property, and to realize the profits and, after paying them a certain sum by way of maintenance, to pay the balance to the mortgagee on account of his debt. This power also authorized Sham Lal to collect the debts due to the mortgagors and pay them to the mortgagee on the same account. This power was apparently not acted on. On the 28th September, 1871, the mortgagors gave the mortgagee a bond for Rs. 1,000, out of which sum they were only paid Rs. 226, the balance being deducted as follows:—Rs. 375 were deducted as due under the decree mentioned above; Rs. 349 were deducted as the interest due on the mortgage-deed from the date of that decree, to

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the date of the bond, and Rs. 60 were deducted on account of moneys advanced subsequently to the date of the mortgage-deed.

On the 19th June, 1874, Tejo executed a deed of sale of certain property in favour of the mortgagee in part satisfaction of the principal and interest due on the mortgage-deed, and Kunj Behari Lal also executed deeds of sale of certain properties in favour of the mortgagee in part satisfaction of the moneys due on the mortgage-deed and the bond. On the 21st September, 1874, the latter made another payment of Rs. 325, in part satisfaction of the money due on the mortgage-deed and the bond, by executing a deed of sale for that amount of certain property in favour of the mortgagee. In this deed the several sums which had been paid, to the mortgagee on account of the mortgage and bond were set out, and it was stated that a balance of Rs. 3,105 was due to him.

In the meantime, on the 7th October, 1869, Kunj Behari Lal sold to one Bansidhar the share in the village Baroli, part of the property mortgaged by the deed of the 20th May, 1869, to Bakhtawar Mal. One Raghobar claimed the share by right of pre-emption and obtained a decree for it on the 2nd August, 1870. On the 20th April, 1871, Raghobar sold the property to Durga Prasad. Bansidhar and Raghobar had been in possession of the share, and Durga Prasad obtained possession of it on the date of the sale to him.

The present suit was brought in March, 1883, by the next friend of Shambhu Nath, the heir of Bakhtawar Mal, for possession of the property mortgaged to him by the deed of the 20th May, 1869. Durga Prasad and certain other persons to whom other portions of the mortgaged property had been transferred were made defendants jointly with the mortgagors.

The plaintiff alleged in his plaint that, having regard to the acknowledgments and part-payments by the mortgagors, the suit was within time, and that his cause of action arose in January, 1883, when the defendants refused to give him possession.

All the defendants defended the suit on the ground that it was barred by limitation, more than twelve years having elapsed from the date of the mortgage; and the defendant Durga Prasad further defended it on the ground that he and his vendor

had been in adverse possession of the share in the village of Baroli for more than twelve years, and the suit as regards that share was barred by limitation.

The Court of first instance (Subordinate Judge of Agra) held on the first point that, inasmuch as the mortgagors had down to the year 1874 repeatedly acknowledged the title of the mortgagee in several documents executed by them, and had not only paid him down to the 21st September, 1874, interest on the mortgage-deed, but had also paid him a portion of the principal, the suit was not barred by limitation simply because it had not been brought within twelve years from the date of the mortgage, but the plaintiff was entitled to the benefit of ss. 19 and 20 of the Limitation Act. The Subordinate Judge referred to *Mankee Koer v. Sheikh Mannoo* (1).

On the second point it was contended for the defendant Durga Prasad that the principle laid down by the Privy Council in *Brijonath Koondoo Chowdry v. Khebut Chunder Ghose* and *Anundoo Moyee Dossee v. Dhonendro Chunder Ghose* (2) applied to him, there being no difference between his position and that of a purchaser at an execution-sale. On this point the Subordinate Judge held that the defendant Durga Prasad was not in the position of a purchaser at an execution-sale, but was a person claiming under a voluntary alienation from the mortgagor. The Subordinate Judge further observed as follows:—"As a private alienee of the mortgagor a slight inquiry at the registration office would have disclosed to him the mortgage in favour of Bakhtawar Mal. If he did not make such inquiry, it was his fault, and he cannot be considered to be a *bona-fide* purchaser without notice. There is nothing to show that Bakhtawar Mal wilfully concealed his mortgage from him. Durga Prasad must therefore be held to have purchased the property subject to the plaintiff's mortgage."

The Subordinate Judge in the result gave the plaintiff a decree for possession of the mortgaged property, which, on appeal by the defendant Durga Prasad, the lower appellate Court (District Judge of Agra) affirmed.

(1) 14 B. L. R. 315. (2) 14 Moo. I. A. 144; 3 B. L. R. 104.
(3) 14 Moo. I. A. 101; 3 B. L. R. 122.

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The defendant Durga Prasad again contended in second appeal that the suit was barred by limitation so far as it affected him.

Babru Dwarka Nath Banarji, the appellant.

Mr. T. Conlan, for the respondents.

OLDFIELD and BROOKHURST, JJ.—Kunj Behari and Musammamat Tejo mortgaged the property in suit by a registered deed, dated 29th May, 1869, to the plaintiff. Under the deed the plaintiff had a right to immediate possession: by arrangement, however, between the mortgagors and mortgagee, the former remained in possession. The right, however, of the plaintiff to obtain possession as against the mortgagors was kept alive. The mortgagors, however, on the 7th October, 1869, sold the mortgaged property in suit to one Bansidhar. One Raghobar brought a suit in respect of the sale to enforce pre-emption and obtained a decree in his favour and got the property; and he made a sale of it on the 2nd of February, 1871, to the defendant in this suit.

The plaintiff mortgagee has now brought this suit against the defendant to obtain possession under his mortgage. The suit was instituted on the 17th of March, 1883. His claim has been decreed, and the material question in appeal is, whether the defendant can successfully plead limitation against the plaintiff.

It has been contended that Raghobar, who obtained the property by asserting a right of pre-emption by suit, is in a better position than an ordinary purchaser by a private sale, and has a position analogous to that of a purchaser at an execution-sale; and that his possession was not as mortgagor and in acknowledgment of the continuance of the title of the mortgagee, but as absolute owner; and his possession and subsequent possession of defendant will be adverse to the right of the mortgagee, and the suit barred by limitation; and we are referred to the case of *Anundoo Mnyac Dossee v. Dhonendro Chunder Mookerjee* (1). The position, however, of a person who purchases property by asserting a right of pre-emption is not, in our opinion, analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser and enters into the same contract of sale with the vendor that the purchaser was making. There is privity

(1) 14 Moo. I. A. 101; 8 B. L. R. 122.

between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. The case of *Anundoo Moyee Dossee* (1) is therefore not applicable. Moreover, that case was not governed or decided under the present Limitation Act. Art. 144, Act XV of 1877, is the law which governs this case; and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. There is nothing to show—and it is not pretended—that until recently, when the present dispute arose, there were any conflicting claims in respect of the mortgage from which the assertion of an adverse title on the defendant's part against the plaintiff can be gathered, so as to make his possession adverse. The lower Courts have further held that the defendant-appellant had constructive notice of the mortgage by reason of the instrument being registered. This is a question which need not be discussed. It would be ~~no~~ to show that the defendant had in any way by fraud ~~been~~ t out of knowledge of the mortgage; but his not ~~being~~ ce of it other ~~will~~ will not affect his liability.

The principle on which Courts of Equity in England refuse to interfere against *bond-fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, has no applicability in our Courts.

There is no equitable ground why the plaintiff's right under the mortgage should be defeated by the defendant's purchase. It has priority; and if the defendant had no notice, it will not affect the plaintiff, who was not responsible for that.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BHAGWANT SINGH AND ANOTHER (PLAINTIFFS) v. TEJ KUAR AND OTHERS
(DEFENDANTS) *

Civil Procedure Code, s. 13—Res judicata.

Two-thirds of a village were sold by T, P, and B. B was the widow of S, her name being recorded in respect of the property formerly recorded in his

* Second Appeal No. 72 of 1885, from a decree of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 12th November, 1884, affirming a decree of Maulvi Muhammad Ismail, Munsif of Bisauli, dated the 30th June, 1884.

(1) 14 Moo. I. A. 101; 8 B. L. R. 122.