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sale after disallowing the appellant's objection to the sale. The material point is whether the order is one we should interfere with. Now, assuming that the first application made on the minor's behalf by his mother was improperly made, as she did not legally represent him, and that the Subordinate Judge was right in refusing to entertain it, the second application of objection to the sale was made by a duly authorized guardian, Balwant Singh; and with regard to s. 7 of the Limitation Act it must be held not to be barred by limitation—on this point there is the authority of the Privy Council in *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (1). It was therefore an application which the judgment-debtor-appellant had a right to make, and which it was the duty of the Subordinate Judge to have entertained and dealt with before he proceeded to confirm the sale or grant a sale-certificate. No doubt s. 312 contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, but if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not the Court below could entertain such objections after it had confirmed the sale, we are of opinion that this Court, when the case has come before it in appeal, is bound to interfere, and to see that objections which by the law the appellant is empowered to make, are heard and determined before a sale of his property shall be confirmed or become absolute.

We set aside the order of the Court below of the 2nd August and the order confirming the sale, and remand the case in order that the objections of the appellant be heard and determined, and the case disposed of according to law.

Costs to be costs in the cause.

Case remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

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February 2.

GHERAN (PLAINTIFF) *v.* KUNJ BEHARI AND OTHERS (DEFENDANTS).*

Act I of 1872 (*Evidence Act*), *s.* 115—*Equitable estoppel—Decrees, priority of.*

A decree-holder at a sale in execution of his decree purchased a zamindari share belonging to his judgment-debtors. Afterwards, in execution of a subse-

* Second Appeal No. 501 of 1886 from a decree of Maulvi Shah Ahmadullah, Subordinate Judge of Gorakhpur, dated the 10th February 1886, reversing a decree of Maulvi Abdul Razzak, Munsif of Bansi, dated the 3rd December, 1885.

(1) I. L. R., 1 Calc., 226.

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quent decree held by another person, the same with other property was again put up for sale. Prior to the sale, the subsequent decree-holder applied to the officer conducting it, stating the fact of the sale and purchase under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtors' interest which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decree-holder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn, and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decree-holder did not bid again. Afterwards the prior decree-holder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction-sale in execution of the subsequent decree.

Held that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale. *Rai Sheta Ram* v. *Kishan Dass* (1), *McConnell* v. *Mayer* (2), *Agrawal Singh* v. *Fouljdar Singh* (3), and *E. Solano* v. *Ram Lall* (4) distinguished.

A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces.

THIS was a suit which was brought under the following circumstances. The plaintiff, Gheran, held a money-decree against Kunj Behari, Ram Salik, and Ganesh, who, with their brother Rajkumar, owned a 1 anna 6½ pies zamindari share; and, in execution of the decree, the interest of the judgment-debtors, *i.e.*, 1 anna 1⅞ out of the 1 anna 6½ pies share, was sold by auction, and purchased by the decree-holder, on the 20th January, 1880. Subsequently to this sale and purchase, the whole 1 anna 6½ pies shares was advertized for sale in execution of a later decree obtained by one Jolpi against all four brothers in respect of a debt incurred by their deceased father, but, on the 20th April 1880, Jolpi made an application to the officer conducting the sale, in which he stated that a 1 anna 1⅞ pies share had already been sold to and purchased by the plaintiff, and prayed that the interest of Rajkumar only, *i.e.*, a 4⅝ pies share, might be sold in execution. This application was disallowed, and the entire 1 anna 6½ pies shares was put up for sale by auction. The plaintiff was present at the sale and made one bid. Ultimately the officer conducting the sale withdrew the 6½ pies, and put up for sale

(1) N.-W. P., H. C. Rep., 1868, p. 402.
(2) N. W. P., H. C. Rep., 1870, p. 315.
(3) 8 Calc. L. R. 346.
(4) 7 Calc. L. R., 481.

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a 1 anna share only, apparently because it was found that this would be sufficient to satisfy Jolpi's decree. The plaintiff did not again bid. The purchaser was one Abdul Baki, who, on the 20th May, 1880, conveyed his rights and interests to another; and this gave rise to a suit for pre-emption brought by one Indar Dat, who obtained a decree, and, on the 4th February, 1882, took possession of the one-anna share.

The present suit was brought by the plaintiff for a declaration that the 1 anna 1⅞ pies share which he had purchased on the 20th January, 1880, was not affected by the sale of the 20th April, 1880. To this suit Indar Dat and Kunj Behari, Ram Salik, Ganesh, and Rajkumar were joined as defendants. The suit was defended by Indar Dat principally upon two grounds. The first ground was that the plaintiff by his conduct in bidding at the auction-sale of the 10th April, 1880, and concealing the fact of his prior purchase, was estopped from disputing the validity of Abdul Baki's purchase. The second was that inasmuch as the decree obtained by Jolpi and under which Abdul Baki had purchased, was in respect of a debt incurred by the father of the judgment-debtors, who were a joint Hindu family, and such a debt would have precedence over the debt incurred by the judgment-debtors to the plaintiff after their father's death, the decree of Jolpi, though subsequent in date to that of the plaintiff, had priority, and consequently the possession of the defendant thereunder should not be disturbed.

The Court of first instance (Munsif of Bansi) decreed the claim. On appeal, the Subordinate Judge of Gorakhpur reversed the first Court's decree. The material portion of the judgment of the Subordinate Judge was as follows:—

"The Munsif is clearly wrong in holding that the rule of estoppel is not applicable to the case. It is admitted that at the second sale, which took place on the 20th April, 1880, after the plaintiff's purchase, the plaintiff made bids, concealing the fact of his purchase ..... By his conduct he caused it to be believed that he had acquired no right in the share by virtue of his previous purchase. Therefore, the plaintiff respondent cannot, under s. 115 of the Evidence Act, sue for possession of the share by virtue of his purchase at the sale of the 20th January, 1880..... The

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rule of estoppel will, in a case like this, operate as between the plaintiff and the subsequent auction-purchaser, and not as between the plaintiff and the decree-holder. The purchaser at the second sale, who purchased the share in good faith, and in ignorance of the first sale, and who was led to believe from the plaintiff's act or omission that there was no risk in purchasing the property, cannot be deprived of his right in consequence of the plaintiff's present action. The plaintiff is by all means estopped."

The plaintiff appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Lala *Juala Prasad* and Munshi *Sukh Ram*, for the respondents.

EDGE, C. J.—In this case the plaintiff, under a decree against three out of four brothers, brought to sale a 1 anna and 1⅞ pies share, which was the share of those three brothers in a 1 anna 6½ pies share which belonged to those three brothers and the fourth. On the 20th January, 1880, the plaintiff purchased at the auction-sale the 1 anna and 1⅞ pies share. Subsequently, another person obtained a decree against all the four brothers, and under that decree he got execution against the property of the four brothers. The 20th April, 1880, was the day fixed for the sale of the 1 anna 6½ pies share under the latter decree. On the 20th April, 1880, this subsequent decree-holder made an application to the officer conducting the sale, requesting him to sell only a 4⅝ pies share, which was the share of the fourth brother, whose interest had not been already sold to the plaintiff, stating also in that application the fact of the previous sale of the 1 anna and 1⅞ pies share to the plaintiff. The officer conducting the sale ordered that application to be filed, being of opinion that he could not comply with the request or order of the decree-holder, but was bound to execute the decree which had come to him, and he proceeded to sell the 1 anna and 6½ pies share. The plaintiff who was present, on that made a bid for the 1 anna and 6½ pies share. Ultimately, however, the officer conducting the sale, finding, I assume, that sufficient money would be realized by the sale of a 1 anna share, withdrew the 6½ pies, and put only a 1 anna share up for sale. After that the plaintiff did not bid. That 1 anna share was purchased by the

predecessor in title of the defendants in this action. That purchaser subsequently dealt with this 1 anna share, and any interest which he obtained became vested in the defendants.

Now, under these circumstances, the plaintiff has brought his action for a declaration that his 1 anna and $1\frac{7}{8}$ pies share was not affected by the auction sale of the 20th April, 1880. The lower appellate Court has found in favour of the defendants, its finding being, in effect, that the plaintiff had given bids, and had concealed the fact of his purchase; and then, after giving some of the facts of the case, he says :—" The rule of estoppel will, in a case like this, operate as between the plaintiff and the subsequent auction-purchaser, and not as between the plaintiff and the decree-holder. The purchaser at the second sale in the execution of decree, who purchased the share in good faith and in ignorance of the first sale, and who was led to believe from the plaintiff's act or omission that there was no risk in purchasing the property, cannot be deprived of his right in consequence of the plaintiff's present action." I have no hesitation in saying that there is no evidence on the record—at least none has been brought to our notice—to support any one of those conclusions to which the lower appellate Court has arrived.

It is contended here, in the first instance, that this is a case which falls within s. 115 of the Indian Evidence Act, and that an estoppel arises in this case. That section provides that " when a person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief," he shall not subsequently deny the truth of that thing. Now, in order to bring this case within that section, it would be material that there should be evidence that the plaintiff by bidding at the sale in which the decree-holder had already given a notice that a portion of the property had previously been purchased by the plaintiff, intentionally permitted or caused another person to assume that the plaintiff had no title in the property. Of any such intention I can see no possible evidence. The intention of the plaintiff in bidding must have been this, that as notice had already been given of the previous sale of a greater portion of the property to him, very few persons were likely to purchase it, and so he would acquire the whole of this property in which he had already purchased an interest, and get it cheap. I cannot conceive that by bidding he

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meant to show that he had no title to the property. I put that point to Mr. *Juala Prasad*, one of the learned pleaders for the respondents, and he very candidly admitted that the predecessor in title of his clients must have known of the objection raised to the sale by the decree-holder and of the previous purchase by the plaintiff. But he contends that the subsequent conduct of the plaintiff in bidding misled the purchaser, who thought the plaintiff had waived his title. I, however, cannot agree with that contention. This not being, therefore, a case under s. 115 of the Indian Evidence Act, is there any other authority to show that an estoppel arises in this case? Mr. *Sukh Ram*, on behalf of the respondents, has cited three or four cases, of which the first is *Rai Seeta Ram* v. *Kishun Dass* (1). In that case the plaintiff actually was the person who had negotiated the loan, and had actively concealed from the defendant, who was advancing money on the security of the property, the fact that he, the plaintiff, had a lien upon the property. That is a very different case. There a fraud was perpetrated upon the defendant, the lender of the money, and the plaintiff there would have obtained the benefit of the fraud if he had been allowed to say that he had a good prior subsisting lien.

The next case is that of *McConnell v. Mayer* (2). In that case it was very rightly held that when a person who claimed an interest in the property which was being sold, upon inquiry by the intending purchaser, gave an evasive answer, he could not afterwards be allowed to say that he had such interest. This evasive answer was in effect a deliberate falsehood, which misled the purchaser.

The next case is that of *Agrawal Singh* v. *Fouljar Singh* (3). It is only an authority to show that a man may so act as to make evidence against himself. It does not say that what was so done would create an estoppel.

The next case is that of *E. Solano* v. *Ram Lall* (4). That is a case very dissimilar to the present case. In that case the defendant had previously become the purchaser of an interest in the property, and subsequently he obtained a decree against the person, a portion of whose interest in the property he had previously pur-

(1) N.-W. P., H. C. Rep., 1868, p. 402.
(2) N.-W. P., H. C. Rep., 1870, p. 315.
(3) 8 Calc. L. R. 346.
(4) 7 Calc. L. R., 481.

chased, and he put up to sale the whole property without mentioning that he had previously purchased a portion of it. There also was a direct representation by the vendor in execution that the whole was being sold without any incumbrance. (concealing)

The only other authority is the statement in paragraph 385 of Story's *Equity Jurisprudence*, Vol. I, that "in many cases a man may innocently be silent, for, as has often been observed, *aliud est tacere, aliud celare.* But in other cases, a man is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale, and knowing his title stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by, and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase." In that case it says —if a man stands by and encourages the sale. The plaintiff in this case did nothing of the kind. There was already a notice showing what title the judgment-debtors really had in the property. It cannot be said that by bidding the plaintiff encouraged another person to purchase. I cannot see what necessity there was for the plaintiff to forbid the sale. He had no power to forbid the sale, and the decree-holder who had power, had already forbidden it. Under these circumstances I am of opinion that no case of estoppel has been made out here.

There is only one other point to be considered. Mr. *Sukh Ram* asks us to remand this case for the decision of a certain issue. He alleges that the decree under which his client's predecessor in title purchased, although subsequent to the plaintiff's decree, was in respect of a debt incurred by the father of the judgment-debtors who were living as a joint Hindu family, and he says that that decree therefore, by reason of its being in respect of a prior debt incurred by the father, took precedence over the decree under which the plaintiff purchased, which was in respect of a debt incurred by the sons after the father's death. I have asked him for any authority for such a proposition, and he has not shown any. My belief is that a decree takes priority in respect of the date on

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which it was passed, and does not depend upon the priority of the debt. I decline therefore to remand this case. For the above reasons the appeal is allowed, the decision of the lower appellate Court is reversed, and that of the Court of first instance is restored and confirmed with costs.

BRODHURST, J.—I concur.

Appeal allowed.

1887
February 7.

CRIMINAL REFERENCE.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* McCARTHY.

Act III of 1884 (*Criminal Procedure Code Amendment Act.*) *s.* 8 (6)—*European British subject—Trial by District Magistrate with a jury—Procedure "in a trial by jury"—Criminal Procedure Code*, s. 307—*Power of District Magistrate dissenting from verdict to submit the case to High Court—Powers of High Court under* s. 307—*Criminal Procedure Code*, ss. 418, 423 (*d*)—*Defamation—Act XIV of* 1860 (*Penal Code*), s. 499, *Explanation* 4—*Words per se defamatory.*

The effect of cl. 6 of s. 8 of Act III of 1884 (Criminal Procedure Code Amendment Act) is to confer upon the District Magistrate precisely the same authority as the Sessions Judge has, under s. 307 of the Criminal Procedure Code, to submit to the High Court a case in which he disagrees with the verdict of a jury so completely that he considers a reference necessary. The expression "trial by jury" as used in cl. 6 of s. 8 does not only refer to proceedings up to the time when the jury pronounce their verdict, but refers generically to cases triable with a jury as contradistinguished from cases tried with the help of assessors or in any other manner mentioned in the Criminal Procedure Code.

No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal, and causing conviction and sentence to be entered against the accused.

The provisions of s. 307 of the Criminal Procedure Code are not in any way cut down by ss. 418 and 423; and the High Court has power, under s. 307, to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, *i.e.*, misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law.

Explanation 4 of s. 499 of the Penal Code does not apply where the words used and forming the basis of a charge are *per se* defamatory; though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a