

nothing so far as Binda, Kamraj and Suraj Pal are concerned.

We dismiss the appeals of Binda, Kamraj and Suraj Pal and we confirm in each case the conviction of murder and the sentence of death, and we direct that in each case the death sentence be carried out.

Appeals dismissed.

APPELLATE CIVIL.

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EMPRESS
v.
MULKA.

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May 11.

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

JHINKA (DEFENDANT) v. LALDEO SAHAI (PLAINTIFF)*

Mortgage—Suit for sale by mortgagee against auction purchaser, mortgagee having accepted part of the proceeds of the former sale—Act VIII of 1859 s. 271—Estoppel.

On the 10th of February 1872, one S. R. mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March 1877, J. P. and G. P. brought to sale in execution of money decrees against S. R. two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction purchaser for sale of one biswa in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage.

THE facts of this case sufficiently appear from the Judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J. and BLAIR, J. This case is a simple one. The suit is for a declaration that a one biswa share purchased by the defendant, Musammat Jhinka, at an auction sale under a decree in 1877 is liable to be brought to sale and sold under a mortgage held by

* Second Appeal No. 185 of 1890, from a decree of Maulvi Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 30th October 1889, confirming a decree of Babu Madhub Chandar Banerji, Munsif of Barcilly, dated the 17th April 1889.

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the plaintiff. The plaintiff got a decree on his mortgage and sought to bring this share to sale. The defendant Musammat Jhinka, who is the appellant in this appeal, filed objections, and her objections were allowed; hence this suit. One Sita Ram, who was a defendant to the suit, but is not a party to the appeal, was the owner of three biswa shares. On the 10th of February 1872, he mortgaged one biswa share without defining it or indicating it in any way to the plaintiff. On that mortgage the plaintiff brought a suit on the 16th of April 1877, and obtained a decree on the 10th of May 1877. It was a decree for enforcement of his lien. The decree was as indefinite as the mortgage as to the biswa share against which it might be enforced. Now, one Jwala Prasad and one Ganga Prasad obtained each of them a decree, each decree being apparently a money-decree, against Sita Ram. These decrees were put into execution and two biswas out of the three biswas of Sita Ram were sold at auction sale under these decrees and purchased by the defendant-appellant for Rs. 2,475. That sale took place on the 20th of March 1877. It was confirmed on the 23rd of April 1877. The proceeds of that sale were applied in the first instance to discharging the moneys due to the decree-holders under whose decrees the two biswas were sold, and the balance was applied in this way; part of it in payment to one Shib Dat, an execution creditor, and Rs. 1,464-14-9 in payment on the 13th of June 1877 to the plaintiff. The two biswas which were sold to the defendant-appellant at the auction sale of the 20th of March 1877 were specifically ear-marked and there can be no doubt as to their identity. The plaintiff now seeks to bring to sale one of those two biswas in execution of his decree, in default of his demand for Rs. 650 and costs being satisfied. The question is whether the biswa in suit is the biswa mortgaged to the plaintiff on the 10th of February 1872. The late Subordinate Judge of Bareilly found that it was. He arrived at that conclusion from a consideration of certain transactions to which the defendant here was no party. He came to the conclusion that the biswa in question was the biswa mortgaged to the plaintiff, because under another mortgage one biswa of the three biswas was mortgaged to Bansidhar. The mortgage in each case was absolutely indefinite in the sense that it did not define or

specify the biswa. The biswa in suit might just as well, from anything that can be inferred from that evidence, have been the biswa mortgaged to Bansidhar as the biswa mortgaged to the plaintiff; but, indeed, it appears to us that it was not open to the plaintiff to allege that the biswa in suit was the biswa which was mortgaged to him. At the time when the plaintiff received out of the proceeds of the sale to the defendant the Rs. 1,464-14-9 Act No. VIII of 1859 was in force. S. 271 of that Act is the section which must be applied to this case. The Munsif apparently thought that s. 295 of the present Code of Civil Procedure was the section which was to be regarded in ascertaining what were the rights of the parties. He did not pay attention to the date of the transaction in 1877. Now it appears to us that if in 1877 the plaintiff desired to assume the position that either of the two biswas sold to the defendant was sold subject to his mortgage, he was not entitled to obtain from the Court a payment to him of any portion of the proceeds of the sale. That section provides for distribution of sale proceeds and it contains this proviso :—“When any property is sold subject to a mortgage the mortgagee shall not be entitled to share in any surplus arising from such sale.” As the law stood then that was an equitable and just provision, and undoubtedly it was intended to prevent the occurrence of such a case as this; if indeed the plaintiff's mortgage covered either of the biswas sold. Here the plaintiff in 1877 went into Court and claimed the surplus of the proceeds of the sale of the two biswas, and, having got the surplus of the sale into his pocket he now turns round and says that the defendant whose money has been lying in the plaintiff's pocket all these years obtained nothing as against him, and that he, the plaintiff, was entitled to bring this property to sale in discharge of his mortgage, so that he would get part payment of the mortgage debt out of the innocent defendant, and if his case be correct, he would the next day be entitled to sell in satisfaction of his mortgage the property which the defendant had paid for the day before. In our opinion the plaintiff, having taken Rs. 1,464-14-9 on the 13th of June 1877, is not now entitled to say that either of the biswas thus sold was the one undefined and unear-marked biswa mortgaged to him

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in 1872. Ss. 270 and 271 of Act No. VIII of 1859 were not as wide or as carefully drafted as is s. 295 of the present Act. The plaintiff's suit ought to have been dismissed on two grounds, that he was estopped from alleging that the biswa in suit was the biswa mortgaged to him, and that even if there had been no estoppel he had failed to establish the identity of the two biswas. The suit as against Musammat Jhinka will stand dismissed with costs in all Courts, this appeal being allowed.

Appeal decreed.

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May 16.

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

MOHAN LAL AND ANOTHER (DEFENDANTS) v. BILASO (PLAINTIFF).*

Civil Procedure Code, s. 43—Splitting remedies—Suit for declaration of title and for possession—Subsequent suit for possession.

Where a previous suit for a declaration of title to immovable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure. *Jibanti Nath Khan v. Shib Nath Chuckerbutty* (1) followed.

THE facts of this case are as follows :—On the 13th of September 1878 one Dodraj made a disposition of his property by way of a deed of gift, or deed of partition, in favour of his daughter-in-law, the plaintiff, Musammat Bilaso, and of Mohan Lal, his grandson, and Vidya Ram, his great-grandson, who were defendants in the suit. Under this deed the plaintiff became entitled to a share in certain property known as the "White Mahál" of mauza Barkhera, and certain other land known as "Talayawali" land. On the 8th of September 1888, the plaintiff instituted a suit in the Court of the Subordinate Judge in which she claimed a declaration of her rights in respect of mauza Barkhera, but that suit was dismissed on the ground that her possession over the land in question was not proved. On the 5th of March 1889 the plaintiff instituted a second suit, on this occasion for partition and separate possession of her share in mauza Barkhera and also in the "Talayawali" land. The suit was resisted

* Second Appeal, No. 223 of 1890, from a decree of T. R. Redfern, Esq., District Judge of Bareilly, dated the 27th November 1889, confirming a decree of Maulvi Abdul Qaiyum, Khan, Subordinate Judge of Bareilly, dated the 12th June 1889.

(1) I. L. R., 8 Cal., 819.