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As regards the contention advanced on behalf of the appellant, that the appellant is entitled to the benefit of article 147 of the Limitation Act, it was held in the case of *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar* (1) that the mortgagee is bound to come in within 12 years to vindicate his title to land as against a third party in adverse possession who does not claim under the mortgagor. Here the respondents do not claim under the mortgagor; and though it is clear that as against the mortgagor or his successors in title the appellant would have been entitled to bring his suit for foreclosure or sale within the period mentioned in article 147, he has not the benefit of that section against a person who sets up an adverse title.

For these reasons we think that the view taken by the learned Judges of the lower Courts was correct, and that the appeal is not maintainable. It was contended on behalf of the respondents that the appellant's claim was also barred under the provisions of section 244 of the Code of Civil Procedure, but we do not think it necessary to decide this question, as we are satisfied that the appeal must fail on the ground which we have dealt with. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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July 23.

Before Mr. Justice Banerji and Mr. Justice Aikman.

AJUDHIA PRASAD AND OTHERS (DEFENDANTS) *v.* LALMAN AND OTHERS (PLAINTIFFS).*

Contract—"Badni" transaction—Wagering contract—Burden of proof—Act No. IX of 1872 (Indian Contract Act), section 30.

Contracts are not wagering contracts unless it be the intention of both the contracting parties at the time of entering into the contracts, under no circumstances to call for or give delivery, from, or to, each other. *Tod* v. *Lakhmidas Purshotamdas* (2) followed.

THE plaintiffs in this case came into Court alleging that they were the owners of a firm styled Gursahai Mal Badri Das, whilst the defendants were owners of a firm styled Kunji Lal Sikhar Chand. According to the plaintiffs the two firms, on the 14th of July, 1893, entered into a partnership for the

* First Appeal No. 71 of 1899 from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Jhansi, dated the 30th of March, 1899.

(1) (1870) 2 N.-W. P., H. C. Rep., 223. (2) (1892) I. L. R., 16 Bom., 441.

purchase and sale of silver, the said purchases and sales to be made both for cash and by way of *badni*, that is to say, transactions of a speculative nature for the sale of silver not in the hands of the seller at the time of the contract of sale. The plaintiffs further alleged that the partnership continued until the 22nd of June, 1894, and resulted in loss of Rs. 18,190-8-6, which sum they, the plaintiffs, had paid, but for half of which the defendants were liable. They accordingly claimed against the defendants Rs. 9,085-4-3 and interest, in all Rs. 11,836-15-9.

The principal pleas put forward by the defendants were (i) that the defendants other than Ajudhia Prasad were not partners of the plaintiffs, and that the transaction was one into which Ajudhia Prasad entered on his own account; (ii) that the transaction in respect of which the loss was said to have been incurred was of a wagering nature, and the plaintiffs were therefore not entitled to recover; and (iii) that the plaintiffs went beyond the scope of the partnership business in entering into the transactions in respect of which losses were alleged to have been incurred.

The Court of first instance (Subordinate Judge of Jhansi) found that the partnership alleged had been entered into, the managing members of either firm acting for his firm in the matter. It found that the contracts in question were not wagering contracts nor outside the scope of the partnership business, and that the plaintiffs had suffered loss which the defendants were bound to recoup to the extent of one-half. The plaintiffs' claim was accordingly decreed with some slight deduction as a matter of account.

From this decree the defendants appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal*, and Pandit *Moti Lal Nehru*, for the appellants.

Babu *Durga Charan Banerji*, for the respondents.

BANERJI and AIKMAN, JJ.—The plaintiffs are the owners of the firm styled Gursahai Mal Badri Das, the defendants of a firm called Kunji Lal Sikhar Chand. The plaintiffs state that the two firms entered into a partnership on the 14th of

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July, 1893, for the purchase and sale of silver, and that those purchases and sales were to be made for cash and by way of *badni*, which we understand to be transactions of a speculative nature for the sale of silver not in the hands of the seller at the time of the contract of sale. It is further alleged that the partnership continued till the 22nd of June, 1894, and resulted in a loss of Rs. 18,190-8-6; that the defendants' share in the partnership transaction was one-half; and that the defendants are consequently liable for a half of the said amount, together with interest which they had agreed to pay. The plaintiffs accordingly brought the present claim to recover from the defendants Rs. 11,836-15-9 on account of principal and interest. Various pleas were put forward in answer to the claim; but the only pleas with which we are concerned in the present appeal are three: (i) that the defendants, other than Ajudhia Prasad, were not the partners of the plaintiffs, and that the transaction was one into which Ajudhia Prasad entered on his own account; (ii) that the transaction in respect of which the loss is said to have been incurred was of a wagering nature, and the plaintiffs are consequently not entitled to recover; and (iii) that the plaintiffs went beyond the scope of the partnership business in entering into the transactions in respect of which losses are alleged to have been incurred. The Court below granted a decree to the plaintiffs for the bulk of their claim. The defendants have preferred this appeal, and in the argument before us they have raised the pleas set forth above.

As regards the first point, the learned Subordinate Judge has found that the defendants are members of a joint Hindu family, and that the evidence adduced by the plaintiffs satisfactorily proves that the alleged contract was entered by the plaintiffs' firm and the firm of the defendants. It was for the appellants to show that this finding of the learned Subordinate Judge was incorrect. They have not laid before us any evidence which would justify our coming to a different conclusion from that at which the lower Court has arrived. The only pieces of evidence to which reference was made in the argument are the statement of a witness, Panna Lal, and an agreement of reference to arbitration, dated the 21st of July, 1894. We are unable

to hold that the evidence of Panna Lal is of such a character that we should be justified in discarding on the basis of it the whole of the evidence adduced on the other side and the finding of the Court below. It is true that the agreement referred to was entered into by Lalman, plaintiff, on the one side, and Ajudhia Prasad, defendant, on the other. It is also true that in that agreement no reference is made to the partnership firms. But these circumstances, in our opinion, do not necessarily lead to the conclusion that the partnership with the plaintiffs was entered into by Ajudhia Prasad alone. The agreement of reference to arbitration appears to have been executed by the managing members of each firm.

As regards the second point, it appears from the report of the Commissioners appointed by the Court below, that out of the amount of losses alleged by the plaintiffs, the sum of Rs. 2,223-7-3 represents loss on actual sales and purchases of silver. As to this the defendants cannot dispute the plaintiffs' claim. As regards the balance, it is alleged by the defendants that the transactions which resulted in loss were wagering contracts. If the transactions were of the nature of wagering contracts, the defendants would not be liable for the loss which resulted from them. We are of opinion that the Court below has rightly held that the burden of proving that the transactions in question were of a wagering nature was on the defendants. Now in order to make this out, what had the defendants to prove? Every *badni* transaction is not necessarily a transaction of a wagering nature any more than any other speculative transaction into which parties may enter. It was held in *Tod* v. *Lakhmidas Purshotamdas* (1) that a contract is not a wagering contract unless it be the intention of both the contracting parties at the time of entering into the contract under no circumstances to call for or give delivery from or to each other. This view was affirmed in later cases by that Court and by the Madras High Court, and we see no reason to hold a contrary opinion. It was therefore the duty of the defendants in this case to establish that the contracts which resulted in loss, were contracts in which the intention of the parties thereto, at the time when they entered into them, was

(1) (1892) I. L. R., 16 Bom., 441.

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that under no circumstances was the one party to call for and the other to give delivery of the silver to which the contracts related. The defendants have, in our opinion, failed to discharge the *onus* which lay on them, and on this point we fully agree with the finding of the Court below.

As to the third plea—that *badni* transactions were not within the scope of the business of the partnership between the parties—the learned Subordinate Judge finds against the defendants. He says that the evidence proves that the partnership related both to cash and *badni*. We have not been referred to any evidence from which we may conclude that this finding of the Court below is not justified. The result is that this appeal must fail, and we dismiss it with costs.

Appeal dismissed.

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July 23.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Blair.

SHAIDA HUSAIN (PLAINTIFF) *v.* HUB HUSAIN AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 108 — *Decree* ex parte — *Decree set aside as against one only of the joint judgment-debtors—Fresh decree ultimately passed at variance with the decree standing against the other judgment-debtor—Application for order absolute for sale under section* 89 *of Act No. IV of* 1882—*Practice.*

A mortgagee sued his mortgagors (three in number) for sale of the mortgaged property, and obtained a decree for payment of Rs. 2,270, or in default, for sale. One of the judgment-debtors, as against whom the decree was *ex parte*, applied under section 108 of the Code of Civil Procedure, and got the decree set aside as against himself. Subsequently, whilst the decree against the other two mortgagors became final, the third mortgagor succeeded in proving that the amount of the mortgage-debt was only Rs. 1,556-15-0, and a decree was passed against him accordingly. On application by the decree-holder for an order absolute for sale, the Court, under these circumstances, directed that an order absolute under section 89 of the Transfer of Property Act should issue for the sale of all the mortgaged property, but that the property belonging exclusively to that judgment-debtor who had successfully objected, should not be sold, unless and until the mortgaged property belonging to the others had been sold, and had failed to realize a sum sufficient to satisfy the smaller decree.

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* Second Appeal No. 1196 of 1900, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 7th of June, 1900, reversing a decree of Babu Nihal Chander, Subordinate Judge of Shahjahanpur, dated the 22nd of July, 1899.