

APPELLATE CIVIL.

1902
July 21.*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Blair.*RAM LAL (DEPENDANT) v. MASUM ALI KHAN AND ANOTHER
(PLAINTIFFS).**Mortgage by decree-holder out of possession—Decree for possession barred by limitation—Title of mortgagee—Adverse possession—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule ii, article 147.*

M holding a decree for possession of immovable property against *L K* and *M K*, but not having obtained possession, mortgaged the property to which he was entitled under his decree to *R L*. *R L* sued on his mortgage, but without impleading *L K* and *M K*, who were in possession adversely to *M*, and got a decree for sale. *M* meanwhile allowed his decree for possession to become barred by limitation. *L K* and *M K* mortgaged the property in question to *C L* and *Z L*, and in execution of a decree on their mortgage, the property was sold by auction and purchased by *A* and *S*.

Held that the consequence of *M* not having executed his decree for possession was that *L K* and *M K* gained a good title by adverse possession as against *R L*, who therefore was not in a position to bring to sale the property, which had passed to the auction purchasers. *Amir-un-nissa Begum v. Umar Khan* (1) and *Sheoumber Sahoo v. Bhowansdeen Kulwar* (2), referred to.

THE facts of this case are fully stated in the Judgment of the Court.

Dr. *Satish Chandra Banerji* (for whom *Babu Lalit Mohan Banerji*), for the appellant.

Messrs. *Abdul Majid* and *Muhammad Raooif*, for the respondents.

STANLEY, C.J. and BLAIR, J.—It is necessary in this appeal to state shortly the facts which have led up to the present litigation. One Allahyar Khan was the owner of a 4 biswa 9 biswansi share of a village called Mirzapur Basant. He mortgaged it to one Salamat Rai prior to 1873. In 1873 Lal Khan and Man Khan purchased a 2½ biswa share of the property from the mortgagor, Allahyar Khan. Salamat Rai then, in the year 1876, sued in respect of his mortgage for a sale of the property, and obtained a decree, and in execution of that decree the property was sold, and was purchased by Munnī Lal at the auction

* Second Appeal No. 1130 of 1900, from a decree of Babu Sheo Prasad, Officiating Subordinate Judge of Shahjahanpur, dated the 4th of August, 1900, confirming a decree of Babu Deoki Nandan Lal Sahai, Munsif of Budaun West, dated the 26th March, 1900.

(1) (1872) 8 B. L. R., 540. (2) (1870) 2 N.-W. P., H. C. Rep., 223.

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sale. Munni Lal got actual possession of only 1 biswa and 19 biswansis, and formal possession of the residue of the property purchased. On the 19th of January, 1888, Munni Lal sued Lal Khan and Man Khan for possession of the $2\frac{1}{2}$ biswas which they had purchased in 1878 from Allahyar Khan. A decree was passed on the 16th June, 1888, for possession of 1 biswa of the property, and in respect of the remaining $1\frac{1}{2}$ biswas claimed the suit was dismissed. In the following year, namely, on the 80th of January, 1889, Munni Lal mortgaged to Ram Lal, the defendant appellant, 2 biswas and 19 biswansis of the property. Ram Lal instituted a suit on foot of his mortgage for a sale of the mortgaged property in 1895, and obtained a decree for sale. He did not in that suit implead either Lal Khan or Man Khan. In the same year, but after the date of Ram Lal's decree, Lal Khan and Man Khan mortgaged the $2\frac{1}{2}$ biswas, which had been purchased by them in 1873, to Chunni Lal and Zauki Lal, and these last-named parties instituted a suit for sale on foot of their mortgage, and obtained a decree for such sale, and at the sale held in execution of the decree the plaintiffs, on the 20th of February, 1897, purchased the $2\frac{1}{2}$ biswas which had belonged to Lal Khan and Man Khan. In execution of his decree in 1895, Ram Lal sold 1 biswa 19 biswansis; but the sum realized being insufficient to satisfy his claim, he applied for the sale of the remaining 1 biswa. The application was granted, and 1 biswa was advertised for sale. Thereupon the plaintiffs instituted the present suit for the purpose of obtaining a declaration that the 1 biswa sought to be sold by Ram Lal was not liable to be sold in execution of his decree. Both the lower Courts decreed the plaintiff's claim on the ground that the decree obtained by Munni Lal in 1888 not having been executed, the right of Munni Lal and of his mortgagee, the appellant Ram Lal, became time-barred.

It has been contended before us by the learned vakil for the appellant, who seeks to set aside the decrees of the lower Courts, that, having regard to the fact that a decree for possession was passed against Lal Khan and Man Khan, the predecessors in title of the respondents, in respect of the 1 biswa in dispute, the respondents could not set up the plea of adverse possession, and

that it was not material in considering this question that that decree was never followed up by execution. The learned vakil further contended that inasmuch as Munni Lal had obtained this decree, and had mortgaged in 1889 his interest to Ram Lal, Ram Lal was entitled to the benefit of article 147 of the Indian Limitation Act, and could maintain a suit for foreclosure or sale of the mortgaged property within a period of 60 years from the time when the mortgage debt became due. We are unable to agree in this contention. It appears to us that the possession of Lal Khan and Man Khan, which commenced from the year 1873, continued adverse to Munni Lal and his successors in title notwithstanding the unexecuted decree of the 6th June 1888. No proceedings in execution having been taken under it, this decree in fact became a dead letter, and did not give a new starting-point of limitation to Munni Lal or to his successors in title. This was so decided in the case of *Amir-un-nissa Begum v. Umar Khan* (1). In that case a party obtained a decree for possession of land in 1859, but failed to take any proceedings in execution, and the defendant continued in possession. The plaintiff's interests in the decree were purchased by a third party in 1869, and the purchaser forcibly dispossessed the defendant, who had been 12 years in possession of the property. The defendant then brought a suit against the purchaser to recover possession, and it was held that the execution of the decree of 1859 being barred, the defendant—the plaintiff in that suit—having been 12 years in possession, was entitled to recover possession from the plaintiff in the original suit. Markby, J., in delivering the judgment of the Court, observed:—"But as under section 20, Act XIV of 1859, that decree cannot now be executed, and has in fact become absolutely null, and as the plaintiff did, notwithstanding the decree, remain in possession, wholly undisturbed, and further as there is no suggestion that the title of the defendant was in any way whatever acknowledged by the plaintiff, the allegation being that the defendant actually obtained possession under the decree, which allegation is found to be false, I think the plaintiff must be considered as having acquired a good title by his 12 years' possession."

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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 *Sheowmber Sahoo v. Bhowanēdeen 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. *Toḍ v. Lakṣmidas Purshotandas* (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.^oP., H. C. Rep., 223. (2) (1892) I. L. R., 16 Bom., 441.