

1906

JAI KUMAR
v.
GAURI NATH.

For the foregoing reasons we think that the decision arrived at by the learned Subordinate Judge is not open to objection. We dismiss the appeal with costs including fees in this Court on the higher scale.

1906
June 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir George Knox.

JAGAN NATH AND ANOTHER (DEFENDANTS) v. MILAP CHAND
(PLAINTIFF).*

Limitation—Foreclosure decree—Possession formal and actual.

Where formal possession has been given under a final foreclosure decree, but the mortgagor has continued in actual possession, the remedy is by suit and not under section 244 of the Code of Civil Procedure. Consequently the law of limitation applicable is that governing suits, not execution proceedings. *Shama Charan Chatterji v. Madhub Chandra Mookerji* (1), *Hari Mohan Shaha v. Baburahi* (2) and *Mangli Prasad v. Devi Din* (3), referred to.

THE father of the plaintiff respondent had been put into possession of the land in suit under the final decree in a suit for foreclosure of a mortgage. Notwithstanding this the defendants appellants had retained possession of the land and had successfully resisted an application made to the Revenue Courts for the expunction of their names from the *kherwat*.

The plaintiffs now sue for possession.

The Court of first instance dismissed the suit on the ground that the question at issue, being governed by the provisions of section 244 of the Code of Civil Procedure, should be decided in execution under the foreclosure decrees, and the plaint, if treated as an application in execution, would be barred by limitation.

The lower appellate Court held that the decree had been executed in full when possession had been given; that no further question could arise upon that decree, and the refusal of the defendants to submit to the proceedings of the Court conferred no right to execute the decree a second time.

* Second Appeal No. 359 of 1905, from a decree of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 27th of February, 1905, reversing the decree of Babu Khirode Gopal Banerji, Munsif of Jhansi, dated the 23rd of December, 1904.

(1) (1884) I. L. R., 11 Calc., 93.

(2) (1897) I. L. R., 24 Calc., 715.

(3) (1897) I. L. R., 19 All., 499.

From this decree the defendants appealed.

Babu *Satya Chandra Mukerji* (for whom *Munshi Gobind Prasad*), for the appellants.

Mr. *Abdul Majid*, for the respondent.

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STANLEY, C. J. and KNOX, J.—The question raised in this appeal appears to us to be concluded by the authorities. In the case of *Shama Charan Chatterji v. Madhub Chandra Mookerji* (1), it was held that the delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant, who remains in occupation of the property, which may be enforced in a regular suit. The question was later on considered in the case of *Hari Mohan Shaha v. Baburahi* (2), and it was held in a suit for possession of land by an auction-purchaser, who had obtained symbolical possession, and the defendant objected that the suit was barred by limitation, it not having been brought within 12 years from the date of the auction purchase, that article 144 of the second schedule of the Limitation Act applied, and that as the suit was brought within 12 years from the date when the auction-purchaser obtained symbolical possession it was not barred by limitation. We think that these cases were rightly decided. In this Court in the case of *Mangli Prasad v. Debi Din* (3) our brother Banerji held, and rightly we think, that where possession of property purchased at auction sale in execution of a decree is formally given by the Court under section 318 or section 319 of the Code of Civil Procedure, although the actual possession may remain with the judgment-debtor, the date of the granting of such formal possession forms, as against the judgment-debtor, a fresh starting-point for limitation in a suit for possession of the property sold brought by the auction-purchaser or his representative. It appears to us that the delivery of formal possession, although the defendant continued in actual possession, effected a complete transfer of the property and furnished a good foundation for a suit when the defendant refused to deliver up actual possession. Section 244 has no application, inasmuch as the proceedings in execution ended with the delivery of formal possession, and that section therefore could not have been

(1) (1884) I. L. R., 11 Calc., 93.

(2) (1897) I. L. R., 24 Calc., 715.

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successfully invoked by the plaintiff. We therefore dismiss the appeal with costs.

An objection has been filed by the respondent under section 561 of the Code of Civil Procedure. It is not pressed and is dismissed with costs.

P. C.
1906
June 27.

PRIVY COUNCIL.

LEKHA SINGH AND ANOTHER (DEFENDANTS) v. CHAMPAT SINGH AND OTHERS (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioners of Oudh, Lucknow.]
Mortgage—Redemption—Terms of redemption—Covenant by mortgagors to pay interest at the rate of 2 per cent.—Construction.

On the construction of a covenant in a deed of mortgage between Hindus that the mortgagors would on redemption pay interest "at the rate of 2 per cent.," it was held by the Judicial Committee that the expression "2 per cent." meant "2 per cent. per mensem."

APPEAL from a judgment and decree (11th April, 1902) of the Court of the Judicial Commissioners of Oudh which varied a decree (30th January, 1900) of the District Judge of Sitapur by which a decree (14th September, 1898) of the Subordinate Judge of Sitapur was affirmed.

The appeal arose out of a suit brought by the respondents for redemption of a mortgage, dated 14th January, 1867, and the only question on the appeal was at what rate interest was to be allowed to the mortgagees on redemption.

By the mortgage, which was executed in favour of one Bhagwant Singh, now represented by the appellants, it was agreed that Rs. 3,019-10-11 was the amount due on a former mortgage in 1837, and a further sum of Rs. 500 was advanced to the mortgagors, making the total amount of consideration Rs. 3,519-10-11. The property mortgaged was the share (one-third) of the mortgagors in an estate called Tehar.

Among the conditions in the mortgage-deed was the stipulation :—

"That we mortgaged the said Tehar previously mortgaged estate for full 30 years, and when after 30 years we redeem it in