

an investigation under Chapter XIV of the Criminal Procedure Code. The charge, set out above, states that this statement before the head constable was made in the course of an inquiry in a case of arson of *The Empress v. Rambandhu Ghose and others*. A case of arson is certainly a cognizable case; but that Anadinath Bundopadhyaya was making an inquiry under Chapter XIV, when the statement in question was made, and that the case in which that inquiry was being made was a case of arson, is not at all clearly established by the evidence recorded in the case. All that the witnesses who speak upon that point say, is that an inquiry was being made in the case of *Buloram Roy v. Rambandhu Ghose* about the burning of a house. This evidence is not in our opinion sufficient to show that the inquiry was being made into a cognizable case, *viz.* arson. We are, therefore, of opinion that the verdict of the jury was right. We therefore acquit the accused of the charge framed against him and direct his release from custody.

H. T. H.

Acquittal upheld.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

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January 14.

GOUR SUNDAR LAHIRI (DEFENDANT) v. HAFIZ MAHOMED ALI KHAN (PLAINTIFF).*

Civil Procedure Code, 1882, s. 244—Representative of judgment-debtor—Purchaser at execution sale—Private Purchase—Limitation Act, 1877, Art. 179—Application not in accordance with law—Application for execution by Benamidar—Purchase pendente lite.

The defendants Nos. 2, 3 and 4 were, together with one M, the owners of certain immoveable property, including two mehals, Olipore and Ekdhals, subject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending one K D took out execution of a money decree which he had obtained in 1871, against defendant No. 3, and put up for sale the mehal Olipore which was purchased by the father

* Appeals from Original Decrees, Nos. 103 and 104 of 1887, against the decrees of Baboo Hemango Chunder Bose, Subordinate Judge of Mymensingh, dated the 26th of February 1887.

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of the plaintiff *A*, who eventually obtained possession of it through the Court. The plaintiff *B* purchased privately the mehal Ekdhala from the mortgagors and from *M*, some time after the date of the decree on the mortgage. That decree was in course of execution when the mortgagee died and his estate came into the hands of the Administrator-General, who, on 13th August 1878, sold the decree to *G*, defendant No. 1. After this sale several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice to the defendants under s. 232 of the Civil Procedure Code, *G*'s name was substituted as decree-holder, and execution was taken out against the mortgaged property including Olipore and Ekdhala. The plaintiffs each claimed the mehal they had respectively purchased, but their claims were disallowed.

In suits brought by the plaintiffs for a declaration of their right to hold the properties free of the mortgage, the Court found that *G* was only a *benamidar* so far as his purchase of the mortgage decree was concerned. *Held*, the plaintiff *A*, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors, the mortgagors, within the meaning of s. 244 of the Civil Procedure Code; but the case was different with respect to plaintiff *B*, who claimed by private purchase, and must be considered the representative of the judgment-debtors within the meaning of that section.

Dinendronath Sannyal v. Raj Coomar Ghose (1), *Anundmoyee Dossge v. Dhonendro Chunder Mookerjee* (2), and *Lalla Prabhulul v. Mylne* (3), referred to.

Held, also, that *G* being merely a *benamidar*, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code, were not applications made in accordance with law, within the terms of Art. 179 of the Limitation Act, 1877, so as to prevent the operation of the law of limitation. Execution of the mortgage decree was, therefore, barred.

Abdul Kureem v. Chukhun (4), *Danonath Chuckerbutty v. Lallit Coomar Gangapadhya* (5), and *Mis. Ap. 453 of 1885* (6) followed.

Purna Chandra Roy v. Abhaya Chundra Roy (7) and *Nadir Hossein v. Pearoo Thovildarinee* (8) dissented from.

The mortgage decree having become inoperative, the plaintiff *A*, though a purchaser *pendente lite*, was no longer bound by it, and the defendant therefore was not entitled to enforce the mortgage as against him.

(1) L. R. 8 I. A., 65; I. L. R., 7 Calo., 107.

(2) 14 Moore's I. A., 101; 8 B. L. R., 122.

(3) I. L. R., 14 Calc., 401.

(4) 5 C. L. R., 253.

(5) I. L. R., 9 Calc., 633; 12 C. L. R., 145.

(6) Unreported.

(7) 4 B. L. R., App. 40.

(8) 14 B. L. R., 425.

Appeal 103.—In this case Hem Chunder Chowdhry, the plaintiff, claimed through Kali Chunder Chowdhry, the purchaser at a sale in execution of a decree against Kashi Chunder Bhaduri, defendant No. 3. The defendants Nos. 2 and 3, Juggut Chunder Bhaduri and Kashi Chunder Bhaduri, were brothers, and together with another brother, Mohesh Chunder Bhaduri, not a party to the suit, and defendant No. 4, the widow of another brother, formed a joint family, and Mohesh Chunder acted as their am-mooktear or general agent. The Bhaduris owned, among other lauded properties, two mehals, called, respectively, Olipore and Ekdhala. On the 25th September 1871, one Kripamoyee Debia obtained a money decree against Kashi Chunder Bhaduri, defendant No. 3, in execution of which the mehal Olipore was put up for sale on the 21st June 1875, and purchased for Rs. 10,000, by Kali Chunder Chowdhry, the father of the plaintiff, who, on 26th September 1877, obtained possession of the property through the Court.

This purchase was made in the course of a suit in which, on the 30th July 1875, one Manson obtained a decree against the Bhaduris on a mortgage which included the mehals Olipore and Ekdhala. This mortgage decree was in course of execution when Manson died and his estate came into the hands of the Administrator-General, who, on 13th August 1878 (corresponding to the 29th Srabun 1285), sold the decree to Gour Sundar Lahiri, defendant No. 1, who was the brother-in-law of the defendants Nos. 2 to 4 and of Mohesh Chunder Bhaduri. After this sale several applications were made to execute the decree and for substitution of the name of the assignee, Gour Sundar Lahiri, for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of the assignee, until 18th July 1885, when, after notice to the judgment-debtor under s. 232 of the Civil Procedure Code, that substitution was made, and execution was taken out against the mortgaged property including the mehal Olipore. The plaintiff claimed that mehal, but his claim was disallowed, and the property ordered to be sold. The plaintiff, therefore, brought this suit to have declared his right to hold that property free of the mortgage.

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Appeal 104.—In this case, besides the above facts, it is only necessary to state that the suit related to the mehal Ekdhala which had been purchased by the plaintiff, Hafiz Mahomed Ali Khan, by private sale, from the Bhaduri defendants, and from Mohesh Chunder Bhadmi, under deeds of sale dated 24th Falgoun 1284 (7th March 1878), and 5th Joisto 1285 (18th May 1878). This property had also been attached by Gour Sundar Lahiri under the mortgage decree, and the suit was brought after rejection of the plaintiffs' claim to that property, to have it declared that it was not liable to sale under that decree.

The issues raised, so far as they are material to this report, were to the following effect: Whether or not the suits will lie; whether or not the mortgage decree sought to be executed was barred by limitation; whether or not the plaintiff in appeal 103 purchased with notice of the mortgage; whether or not the purchase of the mortgage decree by the defendant No. 1 was *benami* for defendants Nos. 2 to 4 and collusive; and whether or not that decree bound the plaintiffs.

The Subordinate Judge gave the plaintiff a decree in each suit.

The defendant appealed to the High Court.

Mr. H. Bell, Mr. B. Chuckerbutty and Baboo Grijā Sunkur Mozumdar for the appellant.

Mr. Evans, Baboo Srinath Das and Baboo Jogesh Chunder Roy for the respondents.

The cases cited and arguments appear sufficiently in the judgment of the Court (PRINSEP and GHOSE, JJ.) which was as follows:—

These two cases were tried together by the lower Court and also by us in appeal by consent of parties, because in some respects the same facts arise in both of them. In both cases the plaintiffs, as purchasers from mortgagors, seek to avoid the effect of the same mortgage decree as affecting their properties. The plaintiffs in each case hold separate properties; but the main points raised in the cases and the circumstances upon which their titles depend are in some respects similar. The mortgage decree was obtained on the 30th July 1875 by one Manson. While that suit was

pending and before the decree was delivered, the share of one of the three mortgagors in a portion of the mortgaged property was attached in execution of a money decree, and on the 21st July 1875, was, in execution of that decree, sold to Kali Chunder Chowdhry, the father of the plaintiff in appeal No. 103. Possession was given to that purchaser, on the 26th September 1877, through the Court. The plaintiff, in the other case, bought privately some of the mortgaged properties from the three mortgagors and also from Mohesh, another member of the family, after the mortgage decree had been delivered. The positions of the two purchasers are, therefore, different both in respect to the nature of the purchases and the time during which they were made.

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On the 13th August 1878 (that is, 29th Srabun 1285), the mortgagee having died and his estate being in the hands of the Administrator-General, the decree was sold by that officer to Gour Sundar Lahiri, defendant No. 1 in both these cases. Whether Gour Sundar Lahiri was the real purchaser or a purchaser representing others is one of the principal points for our decision in these cases. When the mortgage decree was sold, it would seem that it was then under execution. After this sale, several applications were made to execute this decree after substitution of the name of the assignee for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree or any order made for substitution of the name of the assignee. On the 18th July 1885, after notice to the judgment-debtors, the name of Gour Sundar Lahiri was substituted for that of the original decree-holder, and proceedings in execution commenced by attachment of some of the mortgaged properties. Claims were thereupon made by the two plaintiffs in the suits before us, but their objections were disallowed on the 3rd February 1886, the Subordinate Judge holding that the purchases made conferred titles subject to the mortgage, and were, therefore, inadmissible under s. 278, the claimants having only the right to redeem the mortgage by paying the amount due to the mortgagee. The two suits now before us were accordingly brought by these parties, the plaintiffs asking for decrees declaring their right to hold the properties

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purchased by them free of the mortgage for various reasons, which will be presently considered, or for any other relief which the Court might think proper and just.

The Subordinate Judge has given both plaintiffs a decree.

In appeal, it is first contended that the plaintiffs have no right to sue by reason of s. 244 of the Code of Civil Procedure, inasmuch as they were representatives of the original judgment-debtor. The position of the two plaintiffs is entirely different so far as they are affected by the operation of this section. The plaintiff Hem Chunder Chowdhry (in appeal 103) is a purchaser in execution of a money decree against the mortgagors. He is, consequently, not a voluntary purchaser, and, as has been held by their Lordships of the Judicial Committee of the Privy Council, his title is not one of privity with the mortgagors, but in some respects adverse to them. We think, therefore, that he cannot be considered as a representative of the judgment-debtors, mortgagors, within the terms of s. 244. The cases to which we refer are *Ditendronath Sannyal v. Raj Coomar Ghose* (1), *Anundmoyee Dossee v. Dhonendro Chunder Mookerjee* (2); and we may also refer to the case of *Lalla Prabhulal v. Mylne* (3). Mr. Bell, for the appellants, however, contends that, inasmuch as the plaintiffs purchased *pendente lite*, and are therefore bound by the mortgage decree, they are similarly bound, without being formally placed on the record or receiving any notice of the proceedings taken in execution, in all proceedings up to the satisfaction of the decree. He particularly refers to the order of the 18th July 1885, under which the name of the purchaser of the mortgage decree, Gour Sundar Lahiri, was placed on the record under s. 232 as assignee of the decree. It is contended that a notice under s. 232 to the judgment-debtors is binding on a purchaser *pendente lite*, and that, consequently, the order so passed precludes the plaintiff from bringing a suit to contest the validity of that mortgage. It has already been stated why we consider that in appeal No. 103 the plaintiff is not the representative

(1) L. R., 8 I. A., 65; I. L. R., 7 Calc., 107.

(2) 14 Moore's I. A., 101; 8 B. L. R., 122.

(3) I. L. R., 14 Calc., 401.

of the judgment-debtor within the terms of s. 244. In this particular instance, there are, however, other reasons which, in our opinion, prevent us from holding that he as well as the plaintiff in the other case was bound by the terms of that order.

The proceeding in execution then before the Courts cannot, in our opinion, be regarded as a *bond fide* proceeding. Gour Sundar Lahiri was, in our opinion, not the real purchaser of the mortgage decree, but was only a name representing others, *viz.*, the judgment-debtors, and possibly Mohesh Bhaduri, their brother. Whether the transaction was one including only the judgment-debtors or also Mohesh Bhaduri is not material for the purposes of deciding this matter. It is sufficient to say, for reasons which will be presently given, that we consider that the purchase by Gour Sundar Lahiri was not a transaction for his own benefit, but for the benefit of the judgment-debtors. In this view, the application of Gour Sundar Lahiri—that his name should be substituted for that of the decree-holder as assignee of the decree under s. 232, and asking the Court to pass an order for such substitution—was a sham. It amounted to the judgment-debtors asking the Court for service of a notice on themselves. If the real position of the parties had been made known to the Subordinate Judge, there can be no doubt that he would have refused to recognize such an assignment or to issue the notice required by s. 232. We, accordingly, hold that the plaintiffs are not precluded in these suits from questioning the validity of the order passed under s. 232.

It now becomes necessary to consider, first, the evidence regarding the character of the purchase made by Gour Sundar Lahiri of the mortgage decree, and next, how far the execution of that decree as against the plaintiff is barred by limitation. The evidence of Gour Sundar himself is most important as showing the nature of his purchase. He is, no doubt, a man of insignificant means, but it is not improbable that he had sufficient money, but not much more than sufficient, to have bought this decree. He is a relation of the judgment-debtors, and admits that he is perfectly ignorant of the nature of his purchase; that he has taken no steps to make himself acquainted with what he purchased; that he delayed several years to take any real steps to reap any

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benefit from his purchase; and, lastly, that even now he is not prepared to execute his decree against the mortgagors. He also admits that he has taken very little interest in defending these suits. All these, we are asked to believe, are the acts of one who, even if he could have found means to purchase a mortgage decree, undoubtedly would have left to himself very little other money after such a purchase. We have next the evidence of mookhtears who were consulted in matters connected with this purchase and with proceedings taken in execution of the decree after the purchase. The principal person employed, Janoki Nath Bose, distinctly declares that he never acted for or was consulted by Gour Sundar Lahiri; that the persons with whom he was in communication throughout were the mortgagors or some one of them, or Mohesh, their brother, acting on their behalf. There has been much argument addressed to us regarding the order of the Subordinate Judge, admitting, as evidence in this case, certain letters purporting to have been written by Mohesh Bhaduri to this witness. Independently of those letters, we think there is ample evidence to show that Gour Sundar Lahiri was not the actual purchaser of the mortgage decree, and that the Bhaduris, either the mortgagors or the mortgagors with Mohesh, their brother, were the actual purchasers and were the only persons interested in the purchase. There is also evidence, independently of these letters, to show that Mohesh, a member of the family of the mortgagors, has acted on behalf of the other members, the mortgagors, in all these transactions. Upon this ground we think that the letters would be admissible as evidence. But independently of the evidence of these letters, as has been already stated, there is ample evidence on the record to show that Mohesh acted on behalf of the mortgagors, and that Gour Sundar was in no way concerned in the purchase except in regard to the use of his name in the proceedings in execution. For these reasons we hold that the purchase by Gour Sundar Lahiri was a matter of fact a *benami* purchase. That being so, the applications made in his name, in August and December 1880, were not applications made in accordance with the law within the terms of Art. 179, Sch. II of the Limitation Act of 1877. We follow the opinion expressed in regard to this section by

the learned Judges in the cases of *Abdul Kureem v. Chukhun* (1), and *Denonath Chuckerbutty v. Lallit Coomar Gangapadhya* (2), and also in an unreported case (Mis. App. 453 of 1885) decided by Wilson and Porter, JJ., on the 20th April 1885. We have been referred to two cases of an earlier date—*Purna Chandra Roy v. Abhoya Chandra Roy* (3) and *Nadir Hossein v. Pearoo Thovildarinee* (4) in which a contrary opinion was expressed. But we prefer to follow the rule more recently laid down by two Benches of this Court, which is in accordance with the opinion which we ourselves entertain. We, accordingly, hold that a *benami* purchaser is not competent to make an application under s. 232, and that, consequently, the applications made in August and December 1880 were not applications under the Code of Civil Procedure in accordance with law, so as to prevent the operation of the ordinary law of limitation. It is admitted that had it not been for these applications, the subsequent application for execution in 1885 would have been barred. The result, therefore, is that in respect of appeal No. 103, although the plaintiff bought in execution of a money decree *pendente lite*, while proceedings under the mortgage were being taken, and he is, therefore, bound by the decree subsequently passed, that decree has become inoperative by reason of the law of limitation, and therefore the defendant is not entitled to enforce the mortgage as against the plaintiff. The plaintiff will, consequently, receive a declaratory decree to that effect.

The other case stands on different grounds. The plaintiff purchased from the three mortgagors and Mohesh one of the properties previously mortgaged as mentioned in Sch. II of the mortgage decree, after that decree had been delivered. The conveyances are dated 12th March and 18th May 1878. He also advanced Rs. 10,000, on the 13th June of the same year, to the same four persons upon mortgage of another property comprised in that decree. He is, therefore, not only bound by the mortgage decree, but, by reason of his having purchased privately from the mortgagors, must be regarded as in privity

(1) 5 C. L. B., 253.

(3) 4 B. L. R., App., 40.

(2) I. L. R., 9 Cal., 633 ; 12 C. L. R., 145. (4) 14 B. L. R., 415.

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with them, and as their representative within the terms of s. 244. He would clearly not be entitled to bring a separate suit, such as he has now done, were there not circumstances in his case which, in our opinion, establish fraud so as to entitle him to relief, and place the case beyond the operation of s. 244. [Their Lordships then went into the circumstances alluded to, which are not material to this report, and concluded] :—

We agree, therefore, with the Subordinate Judge that the plaintiff is entitled to a decree declaring that the mortgage decree cannot be executed in respect to Ekdhala which has been purchased by him.

The appeals will, therefore, be both dismissed with costs.

J. V. W.

Appeals dismissed.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

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 February 4. HARI GOBIND ADHIKARI (PLAINTIFF) v. AKHOY KUMAR MOZUMDAR AND OTHERS, MINORS, BY THEIR MOTHER AND GUARDIAN CHANDRATARA, AND OTHERS (SOME OF THE DEFENDANTS).^o

Parties—Right of suit—Benamidar—Suit for declaration of title to, and for possession of, immoveable property—Disclaimer of real owner.

In a suit for a declaration of the plaintiff's right by purchase to, and for possession of, certain immoveable property, it was found on the evidence that the plaintiff was merely a *benamidar* for one of the defendants, and had no right to the property. That defendant in his evidence disclaimed any title to the property : *Held*, that the plaintiff had no right to sue, being a mere *benamidar*, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, was sufficient to enable the plaintiff to maintain the suit when instituted, or to entitle him to have the real owner added as a co-plaintiff.

Proximo Coomur Roy Chowdhry v. Gooroo Churn Sein (1) followed.

THE plaintiff in this case sued to obtain possession of a piece of land, and certain houses, orchards and tanks appertaining to it, to which he alleged he had acquired a title by purchase from one Radha Kanto Bhowmik, defendant No. 13.

^o Appeal from Appellate Decree, No. 73 of 1888, against the decree of D. Cameron, Esq., Judge of Tipperah, dated the 23rd of August 1887, affirming the decree of Baboo Nil Mudhub Bandopadhyaya, Subordinate Judge of Tipperah, dated the 24th of July 1886.