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not entitled to go into the question as to whether the original mortgage was or was not fictitious.

According to the Full Bench ruling in *Madan Lal* v. *Kishan Singh* (1), the whole family, including the minors, were bound by the decree. But even assuming that it was open to the defendants appellants to re-open the question as to the validity of the original mortgage, and even assuming that the finding of the lower courts as to its nature is correct, the original mortgagors sued in 1907 to get rid of the danger to the family which their own fraudulent conduct had created. It is true that the mortgagee was equally fraudulent, but she was neverthless entitled to maintain her possession. *In pari delicto melior est positio defendentis.* If the court had decided the case on this principle, the suit would have been dismissed and it would have been *res judicata* between the parties that there was a mortgage legally enforcible against the defendants appellants for an amount, then approximately, Rs. 2,500. In order to minimize the liability of the family, the mortgagors were probably well advised to make the best terms they could and compromise the case. Even if there was no loan nor debt in the beginning, this decree created a debt for which there was good consideration, which the sons and grandsons are bound to discharge. We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

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*May*, 23.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.*

BHAGWANT SINGH (PLAINTIFF) *v.* BHOLI SINGH (DEFENDANT)*

*Act No. IX of* 1908 *(Indian Limitation Act), schedule I, articles* 138 *and* 144—*Execution of decree—Successive purchasers of same property—Suit by subsequent purchaser to recover from earlier purchaser—Limitation.*

Article 138 of the Limitation Act only applies to suits in which the auction purchaser is the plaintiff and the judgement-debtor, or some one claiming through him, is the defendant.

*Ram Lakhan Rai* v. *Gajadhar Rai* (2) and *Khiroda Kanta Roy* v. *Krishna Das Laha* (3) referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single judge of the Court. The facts of the

* Appeal No. 81 of 1912 under section 10 of the Letters Patent.

(1) (1912) I. L. R., 34 All., 572. (2) (1910) I. L. R., 33 All., 224.

(3) (1910) 12 C. L. J., 378.

case are stated in the judgement under appeal, which was as follows :—

"This was a suit for recovery of possession over certain immovable property, and the only question for determination before me is one of limitation. In stating this question, I think it reasonable to accept everything which the courts below have found against the conduct of the defendant upon the facts of the case. It appears that the defendant, holding three distinct mortgages on the property in suit, brought three distinct suits, one upon each mortgage. He obtained decrees and put the property up for sale three times, once upon each decree. He purchased himself at auction under two of his decrees on the 21st of February, 1898, and obtained formal possession on the 7th of September, 1898, and again on the 30th of January, 1899. In the mean time the same property had been put up for sale a third time on the 21st of April, 1898. The defendant appeared at that auction sale, said nothing about his previous purchase, but actually bid for the property as if it still belonged to his judgement-debtor. He was out-bid by the plaintiff, who thus became auction-purchaser at this third sale held on the 21st of April, 1898. This sale was confirmed by the court on 30th of May, 1898, and the plaintiff obtained formal delivery of possession on the 15th of May, 1899. It must be remembered, therefore, that his judgement-debtor was still in possession at the date of the auction sale, but the decree-holder (the present defendant), as auction purchaser under his first two decrees, had himself obtained formal delivery of possession before the plaintiff did so. The present suit was brought on the first of June, 1910, and I have to determine which is the article of the first schedule to the Indian Limitation Act (Act IX of 1908), by which that suit is governed. The suit as brought is one to which article 142 of the said schedule would apply, provided the plaintiff succeeded in establishing the necessary facts. What the plaintiff says is that he obtained actual and not merely formal possession on the 15th of May, 1899, but lost that possession some time in the month of July, 1899, owing to an adverse decision of the Revenue Courts. If these facts were established, the suit would be one for possession of immovable property when the plaintiff while in possession of the property, had been dispossessed; article 142 of the Indian Limitation Act would apply; the date of the origin of the cause of auction would be the month of July, 1899, and the suit would be within time. In such a suit, however, the burden of proof is on the plaintiff to satisfy the court that he was actually in possession within limitation. There is no finding in favour of the plaintiff by either of the courts below on this point, nor has either of them applied article 142 of the schedule, nor has either of them calculated the origin of the cause of action from the month of July, 1899. Both the courts below have held that the plaintiff has a cause of action dating from the 15th of May, 1899, the date on which formal delivery of possession to him took place under orders of the court. The learned Munsif himself does not expressly state what article of the limitation Act he proposes to apply; but the learned Subordinate Judge on first appeal has expressly applied article 144. This article cannot be applied unless the court is prepared to find that the suit is one for possession of immovable property not especially provided for under

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any of the other articles of the schedule in question. This seems to me clearly impossible, because the suit as framed is one to which article 142 would apply; and it discloses facts which would make article 138 of the schedule applicable. The courts below have held that article 138 of the schedule is excluded by the principle of the ruling of this court in *Narain Das* v. *Lalta Prasad* (1). That ruling obviously does not exclude article 138, because the particular case then before the Court was decided without any determination of the question whether article 138 or article 144 would have applied to the facts then before the Court. By implication it seems to me that this ruling is entirely against the plaintiff; but I will refer to this point again presently. There are other authorities for holding that article 138 of the schedule would apply to the present suit, as for instance, cases reported in I. L. R., 35 Bom., 452, and in I. L. R., 17 Mad., 89. I come back, therefore, to what seems to me the one question really arguable, namely, whether or not the courts below should have found in favour of the plaintiff on the ground that he has made out a sufficient case for applying the article of Limitation Act on which his suit was actually based, namely, article 142. I do not think the case for the plaintiff can be put any higher than this, namely, that the court should accept his certificate of formal delivery of possession on the 15th of May, 1899, as *primâ facie* sufficient proof that he obtained actual possession on that date. If this proposition can be affirmed, then it would not be necessary for the plaintiff to prove that he actually lost possession in the month of July following, or on any specific date; he could claim to have made out a good title, plus possession within twelve years of the date of the suit. Now it is on this very point that the ruling in Weekly Notes, 1899, already referred to, seems to me against the plaintiff. Applying the principle involved in that ruling to the facts of the present case, I hold that if the judgement-debtor had been in actual possession on the 15th of May, 1899, then the court would have been bound to accept the plaintiff's certificate as sufficient proof that the judgement-debtor was actually ousted from possession on that date, and that possession passed to the plaintiff. The case is otherwise when the judgement-debtor was not in possession on the 15th of May, 1899, but another person was in possession as auction-purchaser under a previous sale. As against such auction-purchaser, formal delivery of possession to the present plaintiff is not proof that he was actually ousted. Something has been said before me in argument as to the dishonesty of defendants' proceedings, and as to the question of estoppel. The considerations are quite irrelevant to the question of limitation. If the plaintiff had come into court within twelve years of the date of the confirmation of his auction sale, it may be that the courts below are perfectly right in holding that no sort of defence on the merits would have been open to the defendant, in view of his proceedings, and particularly in view of the fact that he was a bidder at the auction sale of the 21st of April, 1898. The whole point of the law of limitation is, however, that a defendant cannot be put to the defence of his title at all unless the plaintiff claims from the courts the relief to which he is entitled within what the Legislature has laid down to be a suitable time with reference to the facts of each particular case. I hold that the suit as framed is barred by article 142 of the

(1) Weekly Notes, 1899, p. 56.

first schedule to the Indian Limitation Act, because the plaintiff has failed to prove the ingredients necessary to bring his suit under the operation of that article. I hold that the facts disclosed are such that the suit would have been maintainable under article 138 of the same schedule if it had been filed two days earlier, but that it is barred under that article, because it was brought more than twelve years from the date of the confirmation of the auction sale. I hold that article 144 of the same schedule cannot be applied at all, because from any point of view the suit is one provided for by another article in the same schedule. I, therefore, accept this appeal, and setting aside the decrees of both the courts below, dismiss the suit with costs throughout."

Pandit *Uma Shankar Bajpai*, for the appellant.

Babu *Damodar Das*, for the respondent.

RICHARDS, C. J., and BANERJI, J.—The facts out of which this appeal arises are a little peculiar. It appears that the defendant obtained three mortgage decrees on foot of three separate mortgages against the property which the plaintiff now seeks to recover. There were three separate sales. The defendant himself purchased at two of the sales. He bid at the third sale, but he was out-bid by the plaintiff, and the plaintiff was accordingly declared the auction-purchaser. The sale to the defendant was on the 21st of February, 1898; that to the plaintiff was on the 21st of April, 1898. The defendant obtained either formal or actual possession on the 7th of November, 1898. The sale to the plaintiff was confirmed on the 30th of May, 1899. The present suit was not instituted until the 1st of June, 1910. In any view of the case, the plaintiff slept on his rights for nearly twelve years. The only question which had to be decided was one of limitation. It has been urged with great force in the present Letters Patent Appeal that article 144 of the Limitation Act is the article which should regulate the present suit. The learned Judge of this Court, in his decision against which the present Letters Patent Appeal has been preferred, held that article 138 applied. It is quite true that the plaintiff's suit is based on an auction-purchase in execution of a decree; it is also true that at the date of the sale to the plaintiff the judgement-debtor was in possession. At first sight it would appear as if article 138 applied. We are, however, inclined to think that article 138 only applies to suits in which the auction-purchaser is plaintiff, and the judgement-debtor, or some person claiming through

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him, is defendant. [See *Ram Lakhan Rai* v. *Gajadhar Rai* (1) and also *Khiroda Kanta Roy* v. *Krishna Das Laha* (2).] The respondent meets this argument by saying that even assuming that article 144 is the article which applies to the circumstances of the present case, it has been found that he claims through the judgement-debtor and that therefore he is entitled to add to his own possession the possession of the judgement-debtor from the 30th of May, 1898. It is clear that if the defendant is so entitled to add this period, the claim would be time-barred. It is true the defendant claims through the judgement-debtor. He was an auction-purchaser of the judgement-debtor's interest and is in possession as such. It is, however, contended on behalf of the plaintiff, that having regard to the fact that the defendant allowed the property to be put up to sale a third time and bid at the sale himself, he ought not to be allowed to say that he claims through the judgement-debtor. Both the court of first instance and the lower appellate court placed considerable weight on the fact that the defendant bid at the auction sale at which the plaintiff was declared the purchaser. But no issue was framed as to whether or not the defendant is estopped from setting up the case that he claims through the judgement-debtor. It has not been explained how it was that the property came to be put up to sale on foot of each of the decrees, nor has it been shown how far the defendant was responsible for the property being so put up. All the decrees appear to have been put into execution about the same time, and it may have been that the court executing the decree was as much, or more, to blame than the defendant, in allowing the same property to be sold three times. Furthermore, it has not been found that the plaintiff was ignorant of the fact that two months before his purchase the property had been already sold and purchased by the defendant. If he knew all these facts it could hardly be said that he was misled by the fact that the defendant bid at the last auction sale. We think that before finally disposing of the appeal we should have a clear finding on this issue of estoppel. We therefore refer, under order XLI, rule 25, the following issue:—

(1) (1910) I. L. R., 33 All., 224. (2) (1910) 12 C. L. J., 378.

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"Did the defendant by his act intentionally cause the plaintiff to believe that he did not already purchase the property himself, and that the property could be sold and a good title given under the decree in execution of which the property was sold to the plaintiff?"

In considering this issue the court will bear in mind the importance of the knowledge of the plaintiff of what had previously occurred. The court will take such additional evidence as the parties may adduce, relevent to the above issue. On receipt of the finding ten days will be allowed for filing objections.

On return of the finding the appeal was dismissed.

*Appeal dismissed.*

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*May*, 21.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Lyle.*

MEGH RAJ AND ANOTHER (DEFENDANTS) *v.* MATHURA DAS AND OTHERS (PLAINTIFFS) AND SHIB SINGH AND OTHERS (DEFENDANTS.)*

*Act No. IX of* 1908 *(Indian Limitation Act), section* 19—*Limitation—Acknowledgment—Requisites for valid acknowledgment.*

*Held* that an acknowledgment of a debt to be a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act, 1908, need not be addressed to the creditor, but may be made to some other person, as, e.g., by means of a deposition in court.

*Held* also that a statement in the form "the whole of Janki Prasad's mortgage money is owing," there being in existence at the time two mortgages held by Janki Prasad, must be taken to apply to both, in the absence of evidence indicating a different signification. *Maniram Seth* v. *Seth Rupchand* (1) and *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeo Kay* (2) referred to.

THIS was a suit on a mortgage bond, dated the 24th of January, 1892. It was executed by Shib Singh and Ajit Singh, two brothers, in favour of Janki Prasad, who was a member of a joint Hindu family. The bond was executed for Rs. 1,200. Defendants 12 to 14 were subsequent transferees of the property. The suit was instituted on the 9th of July, 1910, against the executants and their sons and grandsons. But the subsequent transferees were not impleaded till the 14th of July, 1911, the application for bringing them on the record having been put in on some day in the preceding February. The transferees pleaded that the suit was barred against them, they having been impleaded long after the period

*First Appeal No. 83 of 1912 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 28th of November, 1911.

(1) (1906) I.L.R., 33 Calc., 1047. (2) (1887) I.L.R., 14 Calc., 801.