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case the plaintiff is not in possession but seeks possession, and he must succeed upon the strength of his own title. Furthermore, there is this great distinction between the two cases. In the case relied upon the property had been sold in execution of a simple money decree which had been obtained during the life-time of the judgement-debtor. In the present case only a decree *nisi* (as it was then called) had been obtained during the life-time of Musammat Rukmin. It was not until after her death, and in the absence of her heirs, except one, that the order absolute was obtained. It seems to us therefore that there was not in existence any decree under which the interest of the other heirs could be sold. We think therefore that the decision of the learned Judge of this Court was correct and should be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Piggott and Mr. Justice Lindsay.

JAMNA DEI (DEFENDANT) *v.* LALA RAM AND OTHERS (PLAINTIFFS).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, articles* 120 *and* 132—*Hypothecation decree—Movable property—Movable property converted into immovable property—Substituted security—Mortgagee purchasing part of the mortgaged property—Merger.*

A hypothecation decree is movable property and the mortgage thereof is one of movable property which is governed by article 120, schedule I, to the Indian Limitation Act. But where movable property has become converted into immovable property, the mortgagee becomes entitled to the substituted security and also to the larger period of limitation prescribed by article 132 of the first schedule to the said Act.

It does not necessarily follow that because a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage thereby becomes *pro tanto* extinguished. Everything depends upon the terms of the sale, and unless it is stipulated that the mortgage is to be extinguished or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred, it cannot be held that the mortgage merges in the purchase. *Gous Mahomed* v. *Khawas Ali Khan* (1), and *Jiwan Ali Beg* v. *Basa Mal* (2), referred to.

THE facts of this case are follows :—

On the 29th of November, 1899, a decree was obtained by Daya Ram and others, the predecessors in title of the defendants,

* First Appeal No. 59 of 1915, from a decree of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 7th of December, 1914.

(1) (1896) I.L.R., 23 Calc., 450. (2) (1887) I.L.R., 9 All., 103.

on the basis of a mortgage executed in their favour on the 23rd of May, 1891. The decree so obtained was a decree for sale of certain mortgaged property, which was described as being a twenty biswa share in mauza Satta, This mauza, it is admitted was made up of two mahals, mahal Bhagwati Prasad and mahal Madan Gopal. After this decree had been passed, that is to say, on the 9th of September, 1901, the decree-holders purchased a half share in mahal Bhagwati Prasad in satisfaction of half of the decretal debt. At this stage these decree-holders borrowed a sum of Rs. 8,000 from the plaintiff in the present suit, one Pandit Lala Ram. In order to secure the money so borrowed, a mortgage-deed was executed by them in favour of Lala Ram on the 17th of December, 1901. As security for the money borrowed from Lala Ram the mortgagors hypothecated two items of property. One of these was the half share in mahal Bhagwati Prasad; the other item consisted of the outstanding interest of these decree-holders in the decree which had been obtained on the 29th of November, 1899. After this mortgage had been executed, that is to say, on the 4th of September, 1902, the decree-holder of the decree of the 29th of November, 1899, purchased a half share in the other mahal of mauza Satta, namely mahal Madan Gopal. The effect of this purchase was to entirely satisfy the decree which was in their favour. Later on, that is to say, on the 17th of October, 1902, these decree-holders sold a portion of this mahal Madan Gopal to the plaintiff mortgagee, Lala Ram. The consideration for this sale was the sum of Rs. 7,500. The suit out of which this appeal has arisen was brought by Lala Ram in order to enforce his claim under the mortgage executed in his favour on the 17th of December, 1901, and he sought to have the mortgage debt satisfied by sale not only of a half share in mahal Bhagwati Prasad but also of a half share in mahal Madan Gopal. Various defences were raised to the suit which it is not necessary to set out here in detail. The lower court has decreed the plaintiffs' claim in full.

The defendant appealed to the High Court on the ground that the plaintiffs' suit was barred by limitation, and, secondly, that the mortgage in favour of the plaintiff had to a certain extent become extinguished.

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JAMNA DEI v. LALA RAM.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the appellant.

Pandit *Shiam Krishna Dar* and the Hon'ble Munshi *Narayan Prasad Ashthana*, for the respondents.

PIGGOTT and LINDSAY, JJ :—The facts of this case so far as it is necessary to set them out for the purpose of determining the two questions which are before us in appeal may be stated briefly as follows :—

On the 29th of November, 1899, a decree was obtained by Daya Ram and others on the basis of a mortgage executed in their favour on the 23rd of May, 1891. Daya Ram and others are now represented by the defendants in the present suit. The decree so obtained was a decree for sale of certain mortgaged property which was described as being a twenty biswa share in mauza Satta. This mauza, it is admitted, was made up of two mahals, mahal Bhagwati Prasad and mahal Madan Gopal. After this decree had been passed, that is to say, on the 9th of September, 1901, the decree-holders purchased a half share in mahal Bhagwati Prasad in satisfaction of half of the decretal debt. At this stage these decree-holders borrowed a sum of Rs. 8,000 from the plaintiff in the present suit, one Pandit Lala Ram. In order to secure the money so borrowed, a mortgage-deed was executed by them in favour of Lala Ram on the 17th of December, 1901. As security for the money borrowed from Lala Ram the mortgagors hypothecated two items of property. One of these was the half share in mahal Bhagwati Prasad which has been mentioned above. The other item consisted of the outstanding interest of these decree-holders in the decree which had been obtained on the 29th of November, 1899. After this mortgage had been executed, that is to say, on the 4th of September, 1902, the decree-holders of the decree of the 29th of November, 1899, purchased a half share in the other mahal of mauza Satta, namely mahal Madan Gopal. The effect of this purchase was to satisfy entirely thedecree which was in their favour. Later on, that is to say, on the 17th of October, 1902, these decree-holders sold a portion of this mahal Madan Gopal to the plaintiff-mortgagee Lala Ram. The consideration for this sale was the sum of Rs. 7,500. The suit out of which this appeal has arisen was brought by Lala Ram

in order to enforce his claim under the mortgage executed in his favour on the 17th of December, 1901, and he sought to have the mortgage debt satisfied by sale not only of a half share in mahal Bhagwati Prasad but also of a half share in mahal Madan Gopal. Various defences were raised to the suit which it is not necessary to set out here in detail. The lower court has decreed the plaintiff's claim in full. Here we have been asked to determine two questions, viz., one of limitation and another in connection with the plea raised by the defend nts to the effect that the plaintiffs' mortgage had to a certain extent become extinguished.

To deal first with the question of limitation, it arises in this way. The case for the appellant is that the mortgage made in favour of the plaintiff on the 17th of December, 1901, was a mortgage both of movable and immovable property. It is contended that the hypothecation of the decree which had been obtained by the mortgagors in the year 1899 was a hypothecation of movable property. The argument therefore is that any suit brought to enforce the charge against this portion of the property is governed by article 120 of schedule I of the Limitation Act, that is to say, the period for a suit against movable property is six years. The point was raised in the court of the Subordinate Judge, and his view was that for the purposes of hypothecation the decree mortgaged to the plaintiff being a mortgage decree, it ought to be treated as immovable property, and therefore article 132 of schedule I of the Limitation Act applied, and he gave the plaintiff a period of twelve years within which to bring his suit. He remarks in his judgement that it is true that there are rulings in which it has been held that "for the purposes of registration, sale in execution of decree, and jurisdiction a hypothecation decree is considered movable property." But he observes that he has been unable to find a ruling as to whether for the purposes of hypothecation a hypothecation decree of this kind was movable property or not. We have no doubt whatever that on the authorities a decree such as these mortgagors obtained on the 29th of November, 1899, is to be treated as movable property, and we may refer in this connection to the ruling of the Calcutta High Court in *Gous Mahomed* v. *Khawas Ali Khan* (1) and the Full Bench

(1) (1896) I. L. R., 23 Calc., 450.

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ruling of this Court in *Jiwan Ali Beg* v. *Basa Mal* (1). We must hold therefore that the decree which was hypothecated under this document executed in the plaintiff's favour on the 17th of December, 1901, was movable and not immovable property. However, this does not settle the question which we have to deal with. We have already mentioned that after this mortgage was executed in favour of the plaintiff the decree became satisfied by the purchase made by the decree-holders of a half share in mahal Madan Gopal. It follows, therefore, that we must treat this case as being one in which one security has been substituted for another. The movable property which was hypothecated to the plaintiff under the deed of December, 1901, is now represented and has been represented since the 4th of September, 1902, by the immovable property consisting of a half share in mahal Madan Gopal. It is impossible to doubt that the mortgagee is entitled to the benefit of this substituted security, and, this being so, we have to consider why it is urged that a shorter period of limitation than that laid down in article 132, schedule I, of the Limitation Act should be held to apply to the present case. It is quite true, as has been argued on behalf of the appellant, that limitation for a suit based upon a hypothecation of movable poperty is governed by article 120, schedule I, of the Limitation Act, but it seems to us that since it has been found that the movable property which was mortgaged or charged in the first instance has been converted into immovable property, the mortgagee is entitled not only to the benefit of the new security but also to the benefit of the larger period of limitation. In dealing with the question of limitation we have to take the facts as they stand at the date on which the suit was brought. There cannot be any doubt that by operation of law the property into which the property originally mortgaged has become converted is a security for the plaintiff's money. The only remedy which was left to the plaintiff therefore on the date on which the suit was brought was to bring a suit for recovery of money which was charged upon immovable property. We are of opinion therefore that the argument that this portion of the plaintiff's claim is barred by limitation cannot be supported. We think that the proper article to apply is article 132 of

(1) (1887) I. L. R., 9 All., 108.

schedule I of the Limitation Act. We therefore hold that the suit was within time.

The second question to be dealt with is raised in the second and third grounds of the memorandum of appeal. We have already mentioned that after this mortgage in suit had been executed, the mortgagors, on the 17th of October, 1902, executed a sale-deed in favour of the plaintiff Lala Ram. A translation of this document will be found at page 32 of the appellant's paper book. The property which was sold under this deed consisted of a two-thirds share of a half of holding No. 1 situated in mahal Madan Gopal, and a two-thirds share in various items of *sir* and *khudkasht* land and also a similar share in a shop and the site of a house. The deed of sale sets out that the vendors are under the necessity of paying various sums of money to various creditors, including Lala Ram himself. It further recites that they require a sum of money for their own purposes. The document purports to transfer the entire property specified therein to Lala Ram for the sum of Rs. 7,500, the details of which are to be found at the bottom of the deed. In the body of the deed there is a recital to the effect that "up to the time of sale the property sold is not subject to any hypothecation or hypothecated by way of security to any one." There is a covenant in favour of the vendee to the effect that if it is found that there is any hypothecation over this property and the purchaser has to discharge the amount of the incumbrance, the vendors are to be liable to him for that sum. One of the items of consideration specified at the bottom of this sale-deed is Rs. 2,727-1-0. With respect to this sum the entry in the deed is to the effect that credit for this amount is being allowed to the vendors in respect of a debt due by them under a mortgage bond of the 17th of December, 1901, for Rs. 8,000, which they executed in favour of the vendee. Now it is argued that as the plaintiff, who at the time of taking this sale deed had a charge upon mahal Madan Gopal, took a conveyance of a two-thirds share of the mahal it ought to be held that the mortgage *qua* a two-thirds share in this mahal has become extinguished, and in this connection stress is also laid upon the words which have already been mentioned, namely, the recital to the effect that the property was sold free of any hypothecation. It is quite true that there was no formal

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or written hypothecation of this property at the time of the sale to the plaintiff Lala Ram, but for the reasons we have already mentioned there can be no doubt that Lala Ram had a charge upon this property, the immovable property which had been substituted for the movable property which was originally hypothecated to him. It does not necessarily follow that because a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage thereby becomes *pro tanto* extinguished. Everything depends upon the terms of the sale, and unless it is stipulated that the mortgage is to be extinguished, or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred, it cannot be held that the mortgage merges in the purchase. It is to be noted that the language of the sale-deed is very clear. The vendors owed considerable sums of money to various persons under bonds executed at different times and under the terms of the sale-deed the purchaser was to discharge those various debts detailed at the foot of the sale-deed. The vendors at the time of registration received a sum of Rs. 1,300. It seems quite clear from the recital of the various items contained in this list of debts that the mortgagee had no intention of merging his mortgage security in his purchase to the extent of a two-thirds share. All that we find is that a portion of the purchase money, namely, Rs. 2,727-1-0 is to be applied by the mortgagee in reduction of the mortgage debt and not in exoneration of any portion of the mortgage security, and that is what the plaintiff himself deposed in the witness box. He has in the present suit given credit for Rs. 2,727-1-0, and the Subordinate Judge in these circumstances thought he was entitled to a decree for the balance. The defendants, even if it was open to them to do so, never put forward any evidence to show that there was any agreement that the mortgage should be extinguished to the extent of two-thirds in so far as it affected mahal Madan Gopal, nor did they show, as they might have done, that at the time this sale-deed was executed Rs. 2,727-1-0 represented the proportionate amount of the mortgage debt which was chargeable on a two-thirds share out of half of the mahal Madan Gopal. We must take it that under the terms of this sale-deed all that was intended was to reduce the amount of the mortgage debt

due to the plaintiff. This being so, we are unable to entertain the plea that the mortgage has become extinguished *qua* a two-thirds share out of half of mahal Madan Gopal. A reference is made in the third ground of appeal to the fact that after the plaintiff had purchased this property it was pre-empted and that the fact of its having been pre-empted did not make any difference. We agree with this proposition, but we have said enough to show that the appellant is not in a position to maintain the plea that any portion of this mortgage in suit has merged in the purchase made by the plaintiff. We think therefore that the decree of the lower court is right. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

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July, 11.

SUSHIL CHANDAR DAS (DEFENDANT) *v.* GAURI SHANKAR (PLAINTIFF.)*

Act No. IX of 1908 *(Indian Limitation Act) schedule I. article* 115—*Limitation —Principal and agent—Broker—Suit to recover commission.*

The relation between a broker and the persons for whom he acts is that of agent and principal. Unlike the factor, he is not entrusted with the custody and apparent ownership of the goods, but he is a mere negotiator to effect business and is paid for his services a commission on the sales resulting from his efforts. Where the contract is not in writing, its terms are to be inferred from the course of dealings between the parties.

Hence, where a broker, between whom and his employer the contract was that he would be paid his commission at certain rates upon the date of the delivery of goods, sued to recover commission due to him, it was *held*, that the suit was one for compensation under a contract for services rendered, which for purposes of limitation was governed by article 115 of schedule I to the Indian Limitation Act, and was not one for wages within the meaning of article 102 of the said Act. *Ganesh Krishn* v. *Madhavrav Ravji* (1), *Parbutty Nath Roy Chowdhry* v. *Mudho Paroe* (2), *Nobocoomar Mookhopadhya* v. *Siru Mullick* (3) and *Nistarini Debi* v. *Chandi Dasi Debi* (4) referred to.

THE fact of this case were as follows :—

The plaintiff sued for an account of commission due to him as broker for the defendant. The original contract, which was

* Second Appeal No. 299 of 1915 from a decree of Banke Bihari Lal, Additional Judge, of Cawnpore, dated the 5th of December, 1914, modifying a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 6th of August, 1914.

(1) (1881) I. L. R., 6 Bom., 75. (3) (1880) I. L. R., 6 Calc., 94.
(2) (1878) I. L. R., 3 Calc., 276. (4) (1910) 12 C. L. J., 423.