

with him and that (as often happens in this Court) Lala Phul Chand delivered the judgment and signed it. The more proper course would have been for him to hand the judgment over to his colleague and to have got the colleague to sign it. To prevent any difficulty on this score the appellate court made an incidental order which it considered just and proper. It sent the case back that the judgment might be signed by the colleague. I can see nothing wrong in this order. If there was no colleague present, or if that colleague dissented from the judgment, he will refuse to sign it, or Lala Phul Chand will return the proceeding saying that there was no colleague with him at the time when he delivered the judgment. It will be time then for the appellate court to consider what will be the proper order to be passed in the case. Let the proceedings be returned to the appellate court.

Proceedings returned.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUKAT LAL (PLAINTIFF) v. GOPAL SARUP (DEFENDANT).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 2—Execution of decree—Sale in execution—Tender of decretal amount by judgment-debtor—Refusal of sale officer to accept tender—Suit for damages—Limitation.

The plaintiff sued for damages against a Court Amin under the following circumstances. The plaintiff alleged that in execution of a simple money decree certain immovable property belonging to him had been advertised for sale. On the day fixed for the sale, and before it had commenced, the plaintiff tendered the decretal amount to the defendant, who was the officer deputed to conduct the sale. The defendant, however, wrongfully refused to accept the money offered to him and went on with the sale, and the plaintiff was subsequently obliged to get the sale set aside under order XXI, rule 89, of the Code of Civil Procedure. The suit was instituted some nineteen months after the alleged cause of action, assuming that to be the refusal of the Amin to accept the money tendered, or his continuing the sale after the tender had been made, had arisen.

Held that the suit was barred by limitation under article 2 of the first schedule to the Indian Limitation Act, 1908. *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay* (1) referred to.

* First Appeal No. 233 of 1916, from a decree of L. Johnston, District Judge of Meerut, dated the 24th of May, 1916.

(1) (1901) I. L. R., 25 Bom., 387.

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THIS was a suit for damages instituted under the following circumstances.

The plaintiff alleged in his plaint that in execution of a simple money-decree against him his immovable property had been attached and advertised for sale. On the date of the sale, the defendant, who was the Court Amin, came to the village to conduct the sale. Before the sale had commenced, the plaintiff tendered full amount mentioned in the proclamation of sale to the defendant, but the latter, acting in collusion with the decree holder, dishonestly and with a view to cause loss to the plaintiff, did not accept the tender and sold the property at a very low value. The sale was subsequently set aside on the plaintiff's application under order XXI, rule 89, of the Code of Civil Procedure. The action of the defendant was wholly illegal, irregular and fraudulent, and had resulted in damage to the plaintiff. The defendant pleaded, *inter alia*, that the suit, having been instituted more than three months after the date of the sale was barred by limitation under article 2 of the first schedule to the Indian Limitation Act, 1908. The lower court sustained this plea and dismissed the suit without trying it on the merits. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant :—

On the facts alleged in the plaint article 2 did not apply and the suit would be governed by article 36, and was within time. Article 2 was only intended to protect persons or public authorities acting *bonâ fide* in pursuance of the powers conferred under a statute. But where a man knows that what he is doing is wholly unwarranted by the law and indeed opposed to its provisions, and he acts maliciously and dishonestly in defiance of the law, he cannot claim the privilege of the shorter period of limitation provided for by article 2. He can only do so when he acting in good faith commits an illegality either by mistake or inadvertence or even negligence. Reference was made to *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay* (1), *Selmes v. Judge* (2), *Wali-Ullah v. Raj Bahadur* (3) and *Halsbury's Laws of England*, Vol. XXIII, 343.

(1) (1901) I. L. R., 26 B.m., 337. (2) (1871) L. R., 6 Q. B. D., 724.

(3) (1913) 16 Oudh Cases, 211 ; 21 Indian Cases, 426.

Defendant was really guilty of a mal-feasance in maliciously and illegally selling the plaintiff's property. That has caused the latter damage. Article 2 does not apply to a case of mal-feasance. Article 36 really applies.

Pandit *Kailas Nath Katju*, for the respondent, was not called upon.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit in which the plaintiff claimed damages against the defendant on certain allegations which are set forth in the plaint. They are as follows :—There was a decree out against the plaintiff for a small sum of Rs. 205-13-0. The defendant was the Court Amin whose duty it was to sell the plaintiff's property in execution of the decree. The plaintiff alleges that on the day of the sale he tendered the amount of the decree to the defendant, whose duty it was under order XXI, rule 69, to receive the money and not proceed with the sale. The plaintiff goes on to allege that the defendant, being a friend of the decree-holder, refused to accept the money and proceeded with the sale, the result being that the plaintiff had to deposit the full purchase money which the auction purchaser had bid for the property together with 5 per cent. as a condition precedent to getting the sale set aside. The defendant denied that the plaintiff had tendered him the money (and it does seem a little strange that the plaintiff would have allowed the property, which he alleges to be worth about Rs. 5,000, to be attached and advertised for sale sooner than discharge a decree for a trivial sum). However, these questions have not been gone into in the court below. The learned District Judge, instead of allowing the case to be tried by the Munsif, took it on his own file because the conduct of a court official was being challenged by the suit. We think his action in this respect was quite correct. The learned Judge held that the suit was barred by article 2 of the first schedule to the Limitation Act. That article provides a period of limitation of ninety days for suits brought for "compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India." In the present case if the act of the defendant complained of be the alleged refusal to accept the money due on foot of the decree, the suit is based on the allegation that the defendant

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omitted to do an act which it was his duty to do under one of the provisions of the Code of Civil Procedure, namely, to receive the decretal money before sale. If on the other hand the act complained of be the proceeding to sell the property, again there can be no doubt that the complaint is that the defendant did an act purporting to be under the Code, but improperly, namely, to sell the property after the decretal amount had been tendered. The learned District Judge dismissed the plaintiff's suit as barred by article 2 of the Limitation Act (it being admitted that the suit was not brought within ninety days of the alleged act of the defendant). As a matter of fact the suit was not instituted until after the expiration of about nineteen months of the act complained of. In appeal to this Court it has been argued that article 2 does not apply to any case where the act alleged is a wilful act, and that the article only applies where the defendant in doing or omitting to do the act *bonâ fide* believed that he was acting correctly and in accordance with law; and it is accordingly contended that the court below ought to have determined whether or not the defendant wilfully refused to receive the decretal money from the plaintiff and if it found that he did, it ought to have given a decree against him notwithstanding the suit had been instituted after the expiration of ninety days. In support of this contention a number of authorities have been cited. For the most part they are cases in which the defendant claimed the protection of provisions in various enactments requiring notice of action. In one case, no doubt, the question whether or not article 2 of the Limitation Act applied did arise, namely, in the case of *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay* (1), but it seems to us that the learned Judges who decided that case held that the article of the Limitation Act did not apply by applying the reasoning which formed the basis of the decision in some cases that the defendant could not plead the want of notice of action. It seems to us that the reasons which have been given in several cases for holding that the defendant could not plead want of notice of action do not necessarily apply to a plea of limitation. In the present case the whole foundation of the plaintiff's claim is the alleged omission

by the defendant to perform a duty imposed by the Code. The policy of the law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible. The issue of fact in the present case would have been whether the plaintiff tendered and the defendant refused to receive the decretal amount. A moment's reflection will show how unsatisfactory it would be that such a matter should be investigated two or three years after the sale. It may not be unreasonable where a defendant pleads as a defence to an alleged illegal act that the act was done in pursuance of a legislative enactment which requires notice of action before the institution of suit, that the defendant should show that he acted *bona fide* and in the belief that his action was justified. But such reasoning is not equally applicable to a plea of limitation. We think that the view taken by the learned District Judge was correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BHOLA NATH TIWARI AND OTHERS (DEFENDANTS) v. SURAJ BALI RAI AND OTHERS (PLAINTIFFS).*

1918
November, 30.

Act (Local) No. II of 1901 (Agra Tenancy Act), section 16—Landlord and tenant—Agreement by landlord to treat tenant as an occupancy tenant—Estoppel.

Held that it is not illegal for a landlord to enter into an agreement with a tenant that the tenant shall have the right not to be ejected so long as he pays the rent and observes the conditions of his tenancy.

THE facts of this case were as follows :—

The plaintiffs sued to eject the defendants from certain land, situate in *Khatwat Khata* No. 1, in which, beside the parties to the suit, there were a number of other co-sharers. The plaintiffs, however, alone collected their portion of the rent from the defendants. The plaintiffs were the successors in interest of one *Shri Bhagwat*, who was one of the co-sharers in the *khata*, and

*Second Appeal No. 1797 of 1916, from a decree of E. Bennet, District Judge of Gorakhpur, dated the 10th of August, 1916, reversing a decree of Ram Gopal Misra, Assistant Collector, First class, of Gorakhpur, dated the 26th of April, 1916.