

31st May, 1876, by a public advertisement, called upon all creditors of Lala Mul Chand to register their claims at the office of the acting trustee in Allahabad before the 12th June, 1876, and notified that after that date no claims would be admitted.' The learned Judge did not consider the trustees justified in refusing to entertain any claims not preferred within twelve days; on the contrary he held them bound to entertain all claims preferred to them at any time during the pendency of the trust. He then shows that under the terms of the trust the trustees might distribute the assets equally within three months after the date of the trust, and if all the creditors did not prefer their claims within three months after notice of the trust, then the trustees would not be liable to the said creditors for having distributed the assets of the trust within the prescribed period. The trustees had not distributed the assets before the unregistered creditors had preferred their claims, which were not registered because they had not come in before the 12th June, 1876. The plaintiff appears to have acquiesced in the trust and to have sought registry before the distribution was made, and when he failed to obtain payment or a recognition of his claim from the trustees, they can hardly be considered blameless, and were therefore properly made parties. At the same time, if the decrees of the lower Courts are understood to make the trustees liable for costs, it must also be understood that they themselves are not personally liable, but that the trust estate is liable. We dismiss the appeal with costs, the costs of both parties being payable from the assets of the debtor in the hands of the trustees.

1881

 AJUDHIA
 NATH
 v.
 ANANT DAS

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Tyrrell.

SEVA RAM (PLAINTIFF) v. ALI BAKRSH (DEFENDANT).*

1881
 May 16

Estoppel—Auction-purchaser.

In 1871 *M*, the mortgagee of certain property, styling himself the owner of it, mortgaged it to *S*. In 1875 *M* became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against *M*, and *A* purchased it. *S* subsequently sued *M* and *A* to enforce the mortgage of such

* Second Appeal No. 1168 of 1880, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 1st August, 1880, reversing a decree of Maulvi Ain-ud-din, Munsif of Belari, dated the 21st April, 1880.

1881

SEVA RAM
 v.
 A BAKHSH.

property to him by *M*. Held that, inasmuch as, if *S* had at any time sued *M* to enforce such mortgage after he had become the owner of the mortgaged property, and before *A* had purchased it, *M* would have been estopped from denying the validity of such mortgage, and as there was nothing fraudulent in such mortgage, and *A* had purchased with a knowledge of the facts, after *M* had become the owner, *A* was estopped from denying the validity of such mortgage, and the mortgaged property was liable in his hands to *S*'s claim.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan, Munshi *Hanuman Prasad*, and Mr. *Simeon*, for the appellant.

Pandit *Bishambhar Nath* and Mir *Zakur Husain*, for the respondent.

The judgment of the High Court (SPANKIE, J., and TYRBELL, J.,) was delivered by

SPANKIE, J.—The facts of the case are not disputed. On the 8th January, 1868, *Habib-un-nissa* executed a deed of mortgage for Rs. 3,400 in favour of *Moti Ram*, *Sobha Ram*, and *Cheda Lal*. In 1871 *Moti Ram* executed a deed of mortgage of half the property covered by the first mortgage in favour of the plaintiff *Seva Ram*. On the 11th April, 1875, *Habib-un-nissa* sold the property included in the mortgage-deed of 1868 to *Moti Ram* and the others named therein. The plaintiff now sues to recover the money due to him by enforcement of the hypothecation of the mortgaged estate as against the mortgagors *Moti Ram* and *Kanahia Lal*, and *Ali Bakhsh*, auction-purchaser of the mortgaged estate in 1877 in execution of a decree against *Moti Ram*. The auction-purchaser contends that in 1871, when *Moti Ram* mortgaged the property to plaintiff, it was not his to mortgage, as he did not become owner of it until the 11th April, 1875; consequently the hypothecation could not be enforced against the estate, which was free from incumbrance when he (*Ali Bakhsh*) purchased it. There is no question as to the contents of the deed of the 3rd December, 1871. It hypothecates the two and a half biswas zamindari and malguzari property of *Moti Ram* as security for the payment of the money due on the bond. The Munsif decreed the claim, finding there had been full consideration given under the deed of the 3rd December, 1871, and

that Ali Bakhsh was fully aware of the real circumstances of the case, and had himself produced in Court the deed of sale of the 11th April, 1875, in favour of Moti Ram. The Judge in appeal has reversed the decision and decree of the Munsif, finding that Moti Ram did not mortgage his mortgage rights, and that he had no intention of doing so, but that he had actually mortgaged to plaintiff that in which he had no legal estate : his act must be judged by the terms he used to describe it in the mortgage-deed: the Judge also held that, after Moti Ram had acquired a proprietary interest in the estate, the plaintiff should have taken steps to compel him to execute a valid mortgage; as he had not done so, the transaction of the 3rd December, 1871, was invalid, and the auction-purchaser must be regarded as having bought the property unincumbered by the mortgage of 1871. There is an addition to the judgment, dated the day after it was delivered, headed "*post scriptum*," in which the lower appellate Court notes that both plaintiff and defendant had given consideration for their respective interests in Moti Ram's property : their equities were so far equal, but Seva Ram was prior in date, and he might claim to take precedence of the auction-purchaser ; but the auction-purchaser might reply that he would not have bought the property if he had known that plaintiff claimed to have a mortgage lien upon it, and that plaintiff should have given him notice. It is urged in appeal that, as Moti Ram had an interest in the property mortgaged to Seva Ram, and subsequently acquired full proprietary right in the property, it cannot be held free from appellant's lien : the Judge had misunderstood the appellant's mortgage-deed.

1881

 SEVA RA
 V.
 ALI BAKHSH

It appears to us that no suspicion of any fraud is attached to the transaction of the 3rd December, 1871, and indeed none is alleged by Ali Bakhsh the auction-purchaser. The lower appellate Court admits that full consideration was given by plaintiff. Moti Ram himself admitted the justice of the claim, and the first Court found that the auction-purchaser was quite aware of the real circumstances of the case, when he purchased the property in 1877, and that he had himself produced the deed showing the subsequent title of Moti Ram as owner. In his written statement Ali Bakhsh declares that he himself lent the money to Moti Ram

1881

SEVA RAM
v.
ALI BAKHSH.

for the purpose of buying the property, and he himself was the decree-holder against, as well as the purchaser of, the property of Moti Ram. It is certain that in his grounds of appeal to the Judge the auction-purchaser did not take exception to the Munsif's finding in this respect, *i.e.*, as to his knowledge of the real state of the case, when he purchased the property; and therefore the Judge's remark that Ali Bakhsh was a purchaser without notice has no force, even if want of notice could be pleaded in this instance, which is not the case. Moreover, the Judge cannot be said to find that Ali Bakhsh had no notice. There is no such finding in his judgment of the 3rd August. It is in the postscript of the 4th August assumed that Ali Bakhsh may not have known the true state of the case. The main question is, could Seva Ram have enforced the hypothecation against Moti Ram, at any time before the purchase of Ali Bakhsh, but after Moti Ram had acquired full proprietary interest? We think that he could have done so, and that Moti Ram would have been estopped from pleading anything contrary to the terms of the deed. As between the parties the recital in the deed could not be denied. It was clear, distinct, and definite; and if after Moti Ram had acquired the full legal estate, he had by private sale conveyed the same to Ali Bakhsh, the latter, claiming under him, would have been also estopped from setting up Moti Ram's conveyance to him as against Moti Ram's deed to Seva Ram, which expressly recites that the zamindari and the malguzari estate is mortgaged, and no reference whatever is made to the mortgage right. There being no fraud—it also being found that Ali Bakhsh was aware of the true state of the property—we hold that he, having purchased two years after Moti Ram had acquired the full proprietary estate, cannot by virtue of his auction-purchase claim to hold the property as if it was not subject to the plaintiff's mortgage. With this view of the case we decree the appeal, reverse the decision of the lower appellate Court, and restore the decree of the first Court with costs.

Appeal allowed.