

1883
 BENI
 NARAIN
 v.
 ACHRAJ
 NATH.

the right of one Achraj Nath to collect rents, as lessee of one Bachhi, in six undivided villages. These six villages belonged to three persons jointly,—Bachhi, Beni Narain, and a third person not a party to the case. Beni Narain maintained that Bachhi was not in possession of her share, but that he was in possession of it. The Deputy Magistrate, Muhammad Amjad Ali, passed an order under s. 145 of the Criminal Procedure Code declaring Bachhi to be in possession of her third in each village. The Magistrate of the district observed:—“The effect of this order appears to me to be uncertain. If the third had been partitioned off, and the whole of the rents of the plot of land so partitioned off were payable to a single person, the effect (whether or not the order was legal) would be certain. But the villages appear to be undivided, and a third can hardly be regarded as ‘tangible immoveable property.’”

TYRRELL, J.—Assuming the facts as stated by the Magistrate of the district, the provisions of Chapter XII of Act X of 1882 have no reference to the matters about which Beni Narain has a controversy with the lessee of his aunt Bachhi. Nor does there seem to be such sufficient evidence of the present and imminent danger of a breach of the peace as would justify the interference of the Deputy Magistrate under s. 145 *id.* The Deputy Magistrate misunderstands and has applied the provisions of s. 147 *id.* His proceedings are cancelled.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

1883
 June 14.

HAI RAM, AND OTHERS (DEFENDANTS) v. DURGA PRASAD AND OTHERS (PLAINTIFFS).*

Trust—Transfer of trust property—Purchaser without notice.

B, having been sentenced to transportation for life, presented a petition in the Revenue Court in which, stating that owned a certain zamindari estate, that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue registers and that of *P* be recorded in its stead. *P* sold the property, for consideration, his vendee purchasing without notice of any trust, and it was subsequently put up for sale in execution of a decree against *P*'s vendee and was purchased without notice of any trust.

* First Appeal, No. 100 of 1881, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 1st June 1881.

Held that the transfer of the property by *B* to *P* was in the nature of a trust.

Held also that the property could not be followed into the hands of the purchaser at the execution-sale.

Durga Prasad v. Asa Ram (1) observed on.

THIS was a suit to recover possession of a $16\frac{1}{4}$ biswas zamindari share in a village called Samore. The plaintiff Durga Prasad alleged that he and his father and grand-father had some forty years before been sentenced to transportation for life, at which time his father had made over the whole of their joint ancestral property, including the property in suit, to one Bhawani Prasad, in trust that he should manage it, and allow the wives of the father and grand-father to enjoy the profits thereof during their lives. The plaintiff further alleged that his father and grand-father had died in imprisonment, but that he himself was released on the 12th December 1876; and that he then found that Bhawani Prasad and his adopted son Kannu Lal had dishonestly transferred the property by sale to Raghunath Das and Baldeo Das, through whom the property came into the possession of the defendants Hait Ram and Chhaj Mal Das by sale in execution of decree. The suit was brought against the legal representatives of Raghunath Das and Baldeo Das, and Hait Ram and Chhaj Mal Das. The Court of first instance gave the plaintiff a decree. The defendants appealed to the High Court, mainly on the grounds that no trust had been created as between the plaintiff's father and Bhawani Prasad, and that the transaction was in the nature of an absolute transfer of the property to Bhawani Prasad. The remaining facts of this case are fully set out in the judgment of Stuart, C.J.

Mr. Conlan, Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath* for the appellants (defendants).

Mr. *Aminuddin* for the respondents (plaintiffs).

The Court (STUART, C.J., and STRAIGHT, J.) delivered the following judgments:—

STUART, C.J.—This is an appeal from a decree by the Subordinate Judge of Mainpuri, in a suit in which one Durga Prasad

(1) I. L. R., 2 All., 361.

1883

HAIT RAM
v.
DURGA
PRASAD.

1883

HAI T RAM

v.

DURGA
PRASAD.

seeks to recover a zamindari share in mauza Samore. There were associated with him two female plaintiffs, Durga Prasad himself being the real plaintiff. The claim of Durga Prasad as made in his plaint was, that upwards of forty years ago his father Balkishen and himself were convicted of murder and sentenced to transportation for life; that after their conviction, Balkishen made over his property by a written transfer, in the form of a petition, to the Revenue Court, to Bhawani Prasad, who was his own brother, in trust; that Balkishen, the plaintiff's father, died long ago while undergoing his sentence, but that the plaintiff Durga Prasad was released by a free pardon on the 12th December 1876, when a general amnesty was proclaimed on the occasion of the visit in that year of the Prince of Wales to this country; that on his return the plaintiff came to Farukhabad in November 1878, and then became aware of what Bhawani Prasad and his adopted son, one Kannu Lal, had been doing with his property, and he complains, especially, that they, Bhawani Prasad and Kannu Lal, did, in 1850, dishonestly transfer the property in suit to two persons, Raghunath Das and Baldeo Das, from whom it was acquired by Munshi Hait Ram and Chhaj Mal Das as auction-purchasers in 1872. The defendants all file written statements, in which they deny the trust set up by the plaintiff, pointing out that the convicts, both father and son, had been transported for life, and that the return of Durga Prasad was a mere accident, owing to the amnesty declared on the occasion of the Prince of Wales' visit to India, and never contemplated or intended when the transfer to Bhawani was made; that the transfer of the property to Bhawani was absolute, and could not, under the circumstances, be anything less; and that he had throughout acted in perfect good faith, and that one of the uses he had made of the possession of the property was to defray the marriage expenses of the plaintiff's own daughter.

The Subordinate judge, however, held that a trust had been proved as against Bhawani, and he therefore decreed the plaintiff's claim against Kannu Lal, his adoptive father Bhawani Prasad having in the meantime died, and also against Munshi Hait Ram and Chhaj Mal Das, the auction-purchasers.

From the judgment and decree of the Subordinate Judge an appeal was preferred to this Court, and it came on for hearing before Mr. Justice Mahmood, who has since left the Court, and myself, and after considering the evidence we remanded it for trial of the issue, "what was the nature of the transfer said to have been made by Bhawani Prasad and Kannu Lal in favour of Baldeo Das and Raghunath Das, and whether such transfer had been made for valuable consideration," and the case has now come back on the Subordinate Judge's return to our remand, and is now to be disposed of by the present Bench, consisting of Straight, J., and myself.

1883

 HAIT RAM
 v.
 DURGA
 PRASAD.

The Subordinate Judge finds on the evidence taken by him that the sale-deed by Bhawani and Kannu to Raghunath Das and Baldeo Das had been made *bona fide* and for good consideration, naming Rs. 1,000 as the price given. It is satisfactory to know this, and the only material question that remains is whether, if Bhawani Prasad held the property in trust for Balkishen and Durga Prasad, the sale by him and his adopted son to Raghunath Das and Baldeo Das was made with notice to these persons of such trust, the property having been ultimately purchased by the defendants Hait Ram and Chhaj Mal Das.

The transfer or conveyance in favour of Bhawani is, as I have stated, recorded in a petition filed by Balkishen in the Revenue Court, and is in these terms:—"I exclusively own a 15-biswas zamindari share in mauza Samore.....it having been purchased by me. I have now been sentenced to transportation for life owing to the enmity of the enemies. As it is necessary to make arrangements for the payment of the revenue and the management of the said mauza, I of my own free will request that my name may be expunged from the public records, and that of my real brother Bhawani Prasad entered in lieu of mine." Now it cannot, I think, be maintained that such a transfer as this is not of a fiduciary character. It recites the fact of Balkishen having been sentenced to transportation for life and the necessity for making arrangements for the payment of the revenue and the management of the property, and it declares that he, Balkishen, of his own free will, requests that his name may be expunged from

1883
 HAIT RAM
 v.
 DURGA
 PRASAD.

the revenue records, and that of Bhawani substituted. Balkishen, however, the maker of the transfer, was leaving his village for life with no possible expectation of ever returning, and Bhawani Prasad, his transferee, was his own brother, and while a trust is not very unequivocally declared, the intention may have been to leave the property in Bhawani Prasad's hands, to be used by him according to his discretion, and that such discretion was not intended to be fettered; and as for Balkishen's son, the plaintiff, he was precisely in the same position as his father, with no hope whatever of returning to his village, and it was, as I have already said, the mere accident of the Prince of Wales' declaration of amnesty that enabled him to return. Thus it might be argued that it was Balkishen's intention that his brother Bhawani Prasad should hold the property without any fiduciary responsibility.

If there was no trust, the question of notice would not of course arise; but if we hold, as I think we may reasonably, that the transfer to Bhawani was really in the nature of a trust, and put him in a position of fiduciary liability, I am quite clear that the evidence to which our attention was directed at the hearing does not prove notice to Bhawani's original vendees of such a trust; that in dealing with Raghunath Das and Baldeo Das Bhawani held himself out to these persons as absolute owner; and that there was nothing even to put them on the inquiry as to whether Bhawani Prasad held the property in trust or not. Therefore in any event the transfer by Bhawani Prasad to Raghunath Das and Baldeo Das was a good and valid conveyance to these persons.

The Subordinate Judge refers in his judgment to a decision of this Court in *Durga Prasad v. Asa Ram* (1), the latter party being the same person who is plaintiff in the present suit and suing for a declaration of trust against the same Bhawani. I am not prepared to accept the view of the law of trusts laid down in that case; but that was a second appeal, the Division Bench being bound by the findings of the District Judge. It is, however, to be observed that that case differed considerably from the present, the property in suit was different, being a moiety of a shop, and there were no questions raised in it respecting notice of the trust, and the trust

(1) I. L. R., 2 All., 361.

itself does not appear to have been proved by a written instrument, as in the present case, but by the evidence of witnesses from which it was contended a trust might be referred. The purpose of the trust there, too, was considered to have been clearly shown, viz., to pay the rent of the shop to the two widows, one after the other, and the rents appear to have been so paid to these widows up to their respective deaths, after which Bhawani held the moiety of the shop in his own right. On such facts and evidence this Court held that a trust had been made, and they gave judgment in favour of Durga Prasad. Here, however, as I have pointed out, there are elements to be considered which take the present case out of the ruling of the other, even if it be held to be right, the principal of these being the absence of any question as to notice of the trust to Bhawani's vendees.

1883
 HAIT RAM
 v.
 DURGA
 PRASAD.

The auction-purchaser's title in the present case being perfectly good by reason of the want of notice by Bhawani to the defendants vendors, who were the auction-purchasers' immediate vendees, the present appeal must be allowed, and the suit dismissed with costs.

STRAIGHT, J.—Looking to all the circumstances attending the transfer to Bhawani Prasad, it seems to me altogether inconsistent with those circumstances to infer that Balkishen ever intended to surrender his beneficial interest to the property transferred. It therefore seems to me only reasonable to say that Bhawani Prasad held that property for the benefit of the transferor; in other words, that the transaction created an obligation in the nature of a trust.

Whether this be a correct view or not, however, I concur with the learned Chief Justice that there is no evidence to show that the appellants, auction-purchasers, bought with notice of any trust or obligation creating a trust, and that consequently the property cannot be followed into their hands. With regard to the case of *Durga Prasad v. Asa Ram* (1), the learned Chief Justice rightly observes that it was a very different one from the present. There the question was purely that of limitation, though I wish to say, so far as my own judgment in it is concerned, that I regret I

(1) I. L. R., 2 All., 361.

1883 omitted to qualify my remarks by observing that they should be confined to the particular case as to which they were made.

HAIR RAM
v.
DURGA PRASAD.

I concur with the Chief Justice that this appeal must be decreed with costs in both Courts, and that the suit should stand dismissed.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

NATHU (PLAINTIFF) v. BADRI DAS AND OTHERS (DEFENDANTS).*

1883
June 22.

Suit to set aside execution-sale—Suit for possession of immoveable property—Act XV of 1877 (Limitation Act), sch. ii., No. 12.

The plaintiff, alleging that certain immoveable property belonging to him had been sold in execution of a decree as the property of another, sued the purchaser to have the sale set aside, and to recover possession of the property. *Held* that the suit was one for possession of immoveable property to which the period of limitation of twelve years was applicable.

THE plaintiff in this suit stated in his plaint that his father had died, leaving a house, which came into his and his mother's possession; that the defendant Badri Das caused the house to be put up for sale in execution of a decree which he held against one Chheda, and purchased it himself, and appropriated the materials of the house; that the plaintiff's mother was dead, and he was her heir; that the house had not belonged to Chheda; and that the plaintiff was a minor when the house was sold. On these allegations the plaintiff sued Badri Das and his transferee to have the sale set aside, and recover possession of the site of the house, and the value of the materials of the house. The lower Courts held that the suit was governed by the limitation provided by No. 12, sch. ii. of the Limitation Act, 1877, and finding that the plaintiff had not brought the suit within one year from the date he attained his age of majority, dismissed it.

In second appeal the plaintiff contended that the suit was one for possession of immoveable property, and the period of limitation applicable to it was therefore twelve years.

* Second Appeal, No. 147 of 1883, from a decree of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 29th September 1882, affirming a decree of Maulvi Azizuddin, Munsif of Pilibhit, dated the 7th July 1882.