APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Beverley.

1892 *August* 5.

BASHI CHUNDER SEN (PLAINTIFF) *v.* ENAYET ALI AND ANOTHER (DEFENDANTS).*

Estoppel—Purchaser at execution sale—Representative—Mortgage by alleged benamidar—Evidence Act (I of 1872), s. 115.

E, being in possession of the documents of title, mortgaged land to the plaintiff. *E* and his father *A* borrowed money from one *R*, who obtained a decree against *A*, and purchased the land at the execution sale. In a suit for foreclosure of the plaintiff's mortgage against *E* and *R*, the lower Courts held that *A* was the true owner, but the lower Appellate Court did not decide whether the plaintiff's mortgage was a valid transaction.

Held, on second appeal, that *R* acquired the property adversely to *A* and not as his representative, and that there was no estoppel against him.

Dinendronath Sannial v. *Ramkumar Ghose* (1) and *Lala Parbhu Lal* v. *Mylne* (2) followed.

Held further, that it was not necessary to decide whether the plaintiff's mortgage was valid as against *A*, the plaintiff not having raised the question in the lower Courts, but that, assuming the mortgage to be valid, the onus did not lie upon *R* to prove that the mortgage was not binding upon *A*.

Bhugwan Doss v. *Upooch Singh* (3) observed upon.

ENAYET ALI, the defendant No. 1, on the 6th January 1876 borrowed from the plaintiff the sum of Rs. 150, and as security for the repayment of the money with interest mortgaged to him the landed property specified in the plaint. On the 22nd August 1878, the principal and interest remaining unpaid, Enayet Ali borrowed a further sum of Rs. 30, and executed another deed of conditional sale in favour of the plaintiff to secure the sum of Rs. 250 with interest. The documents of title relating to the land and the kabuliyat of the tenant were deposited with the plaintiff at the time of the execution of the first deed.

* Appeal from Appellate Decree No. 1399 of 1891, against the decree of Baboo Rabi Chundra Gangooly, Subordinate Judge of Dacca, dated the 16th of May 1891, affirming the decree of Baboo Ashutosh Banerjee, Munsiff of that district, dated the 31st of January 1890.

(1) I. L. R., 7 Calc., 107; L. R., 8 I. A., 65.
(2) I. L. R., 14 Calc., 401.
(3) 10 W. R., 185.

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On the 18th April 1876, Enayet Ali and his father Ahmad Ali borrowed money from the defendant No. 2, Rahat Baksh, and executed a hand-note in his favour. In 1877 Rahat Baksh obtained a decree against them, and on the 10th December 1878 purchased the property at the execution sale and obtained possession in due course. Previous to the sale Ahmad Ali claimed the property as *wakf*, and on the claim being disallowed in the execution proceedings, he afterwards brought a suit against Rahat Baksh which was dismissed.

The plaintiff being unable to recover the money due upon his mortgage filed, in the year 1880, a petition of foreclosure, under Regulation XVII of 1806, against Enayet Ali and Rahat Baksh, and notices (as he alleged) were issued to the defendants. Subsequently he filed the present suit against Enayet Ali and Rahat Baksh, alleging that the year prescribed by the Regulation had expired and that the conditional sale had become conclusive, and praying in the alternative (in case the Court did not think it proper to declare the sale conclusive) for foreclosure under the Transfer of Property Act.

Enayet Ali did not appear, but Rahat Baksh contested the case on the ground that Enayet had no right to the land, Ahmad being the real owner, and that his own title as purchaser at the execution sale ought to prevail. He also alleged that the mortgage by Enayet Ali to the plaintiff and the proceedings under the Regulation were fraudulent and collusive.

The Court of first instance held that Ahmad, and not Enayet, was the proprietor of the land in suit, and that he was in possession of it until Rahat Baksh purchased it and was put into possession through the Court. The Court further found that the plaintiff's deeds represented a genuine transaction on his part, but that he had advanced the money without sufficient enquiry, and that the proceedings under the Regulation were defective.

Upon appeal the plaintiff contended that Ahmad, having bought the land in the name of his son, and having allowed Enayet to deal with it as his own property, was estopped from showing the *benami* nature of the transaction.

The lower Appellate Court, without deciding as to the *bonâ fides* of the plaintiff's mortgage, held that Ahmad Ali was the real

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owner, and upon the question of estoppel observed—"It does not appear that it was with the knowledge and consent of Ahmad Ali that his son Enayet borrowed money from the plaintiff on the security of the land in suit. There is nothing to show that Ahmad allowed his son to deal with the land as his own. Besides, the position of the second defendant is different from that of an ordinary assignee. He is the purchaser of the right, title, and interest of Ahmad Ali in the disputed land at a sale in execution of a decree, and I do not think that he is precluded from showing that in point of fact Ahmad, and not Enayet, was the real owner."

The plaintiff appealed to the High Court principally upon the ground of estoppel.

Baboo *Harendra Narayan Mitra* appeared for the appellant.

Baboo *Durga Mohun Das* and Baboo *Tarakishore Chowdhry* appeared for the respondent Rahat Baksh.

The judgment of the High Court (MACPHERSON and BEVERLEY, JJ.) was as follows:—

This is a suit for possession of property the mortgage of which is said to have been foreclosed under Regulation XVII of 1806, or, if the proceedings under that Regulation are found to be defective, as they have been, for foreclosure under the Transfer of Property Act (IV of 1882).

On the 6th January 1876, the first defendant, Enayet Ali, the son of Ahmad Ali, mortgaged the property by way of conditional sale to the plaintiff for a sum of Rs. 150. In July or August 1878 he received a further advance of Rs. 30, and executed a fresh deed of the same character to secure that sum, as well as the principal and interest due under the first deed. Title deeds, consisting of a kobala by which Enayet Ali is said to have purchased the land, and some kabuliyats, were made over when the first transaction took place, and have been produced by the plaintiff. In 1876, Enayet Ali and his father, Ahmad Ali, borrowed some money from the second defendant, Rahat Baksh, who got a decree against them in 1877, and in December 1878 brought this property to sale in execution of his decree and purchased it himself. The sale was preceded by a claim on the part of Ahmad Ali that the property was *wakf* and not saleable. This was rejected, and a

suit which Ahmad Ali afterwards brought to have it declared that the property was *wakf* was also dismissed.

'Both the Courts have found that Ahmad Ali was the true owner, and on this ground the lower appellate Court has confirmed the decree of the Munsiff dismissing the suit without deciding whether the mortgage by Enayet Ali to the plaintiff was a *bonâ fide* transaction.

It is contended for the appellant (the plaintiff) that the Subordinate Judge has not properly dealt with the case, and that he ought to have found that there was a good mortgage by Enayet Ali, and that the respondent was estopped from denying Enayet Ali's title.

We think that as against the respondent there is no estoppel. As pointed out in *Dinendronath Sannial* v. *Ramkumar Ghose* (1), a purchaser at a sale in execution of a decree is in a different position to a purchaser at a private sale, and acquires the title of the judgment-debtor, not through the judgment-debtor, but by operation of law and adversely to him. In *Lala Parbhu Lal* v. *Mylne* (2) it was also held that a purchaser at an execution sale is not the representative of the judgment-debtor, and is not estopped by the conduct which would estop the latter from denying the title of the person through whom title was claimed by the other side.

But an estoppel is only a matter of proof. If the plaintiff could take advantage of it, the effect would be to prevent the defendant from denying the title of Enayet Ali and to establish in that way the plaintiff's case. The plaintiff could, however, establish his case equally well by proving that his mortgage was good as against Ahmad Ali, whose title the defendant had acquired, and in the opinion of both the Courts established. If he had a good mortgage on the property when it was in the hands of Ahmad Ali he had, we conceive, apart from any question of estoppel, an equally good mortgage when the property passed to the defendant. But the plaintiff set up no such case as that. He asserted the title of Enayet Ali, the defendant asserted that of Ahmad Ali, and they went to trial on the issue whether the property belonged to the one or the other. That being so, the plaintiff cannot now

(1) I. L. R., 7 Calc., 107; L. R., 8. I. A., 65.

(2) I. L. R., 14 Calc., 401.

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raise a case which was not raised or put in issue in the lower Courts. Had the suit been against Ahmad Ali, it might have been sufficient for the plaintiff on the issue as to ownership to prove a mortgage by Enayet Ali under circumstances which, if not rebutted, might bind Ahmad Ali. But the defendant as purchaser at an execution sale had no knowledge of the circumstances under which Enayet Ali made the mortgage, and he was entitled, if the plaintiff intended to rely on them, to have the question put in issue and fully enquired into. If we allowed the point to be taken now, we should have to remand the case for that purpose. The case is not one in which, even if we could, we should be disposed to show any indulgence. The plaintiff has remained silent for nearly 10 years, and we cannot suppose he was ignorant of the title set up by the defendant or of the litigation by which he secured it; even after the written statement was filed he did not ask for an issue on the question whether his mortgage was good as against Ahmad Ali.

In all the cases cited by the appellant, with the exception of *Bhugwan Doss* v. *Upooch Singh* (1) and *Poreshnath Mukerji* v. *Anathnath Deb* (2) the contest was between the true owner of the property, as plaintiff or defendant, and a purchaser from his benamidar. They do not, therefore, apply to the present case. Nor do the two excepted cases apply. In the case of *Bhugwan Doss* v. *Upooch Singh* (1) it was found that although the name of the benamidar was used, the mortgage was in fact effected by the true owner, and in the other case it was held that a mortgagee who would be estopped by the representation of his mortgagor was not placed in any better position by his having purchased the mortgage property at a sale in execution of the decree which he had obtained on his mortgage bond.

Some reliance was placed on a dictum of Phear, J. in the case of *Bhugwan Doss* v. *Upooch Singh* (1), as showing that the onus was on the defendant to prove that the mortgage was not binding on Ahmad Ali, but the dictum, though applied to that case, referred to one in which the true owner was contesting an alienation by his benamidar. As already observed, the defendant is not a representative of Ahmad Ali.

(1) 10 W. R., 185. (2) I. L. R., 9 Calc., 265.

In the view taken we may assume that there was a real mortgage by Enayet Ali, and it is unnecessary to remand the case to have that point determined.

It was lastly argued that as the mortgage carried with it a guarantee of title, some relief should be given as against the mortgagor; but no such relief was asked for in the plaint, and it is too late to ask for it now. We dismiss the appeal with costs.

Appeal dismissed.

A. A. C.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1892 *July* 20.

GOSEO BEHARY PYNE AND ANOTHER (DEFENDANTS NOS. 1 AND 2) *v.* SHIB NATH DUT (PLAINTIFF) AND OTHERS (DEFENDANTS NOS. 3, 4 and 5).

Sale for arrears of rent—Patni sale—Mortgage security, conversion of—Surplus sale proceeds, charge of mortgagee upon—Charge—Transfer of Property Act (IV of 1882), s. 73.

A patni taluk having been sold for arrears of rent under Regulation VIII of 1819, the surplus sale proceeds held in deposit in the Collectorate were drawn out at intervals by the holders of money decrees against the patnidars. The plaintiff, who held a mortgage of the taluk, sued to recover from these decree-holders the amount of his unsatisfied claim. Two of the defendants pleaded that, over and above the amount taken by them, there remained in deposit sufficient money to satisfy the plaintiff, and that the other unsecured creditors who had drawn out this balance should alone be held liable.

Held, that the surplus sale proceeds were to be regarded as the shape into which the plaintiff's security was converted, and as before such conversion the security could not be split up into parts, the plaintiff was entitled to realise the balance due to him out of the whole of the surplus, as otherwise his security would be diminished.

ONE Khairat Ali Sheik, the predecessor of the defendants Nos. 6 to 11, on the 18th December 1878 borrowed from the plaintiff the

* Appeal from Appellate Decree No. 1331 of 1891, against the decree of J. Crawfurd, Esq., District Judge of Hooghly, dated the 7th of May 1891, affirming the decree of Baboo Kedar Nath Mojoomdar, Subordinate Judge of that district, dated the 20th of May 1890.