

plaintiffs the usual mortgage decree for Rs. 4,976 as against all the defendants (the decree against defendants 4 and 5 being limited to the assets of Sheikh Nagu in their hands) with costs throughout and interest at 6 per cent. on the decree from the date hereof until realization. Period of redemption, six months.

FOSTER, J.—I agree in the order to be passed, but I wish to make a remark or two on one point. It is not the plaintiffs' case nor is it our finding that the first mortgage bond of 1903 was rescinded by the second mortgage bond of 1907. After studying the terms of section 6 of Regulation III of 1872 I think it quite possible that the question may arise whether by that provision of law so large an inroad on the law of contract has been made in the Santal Parganas as to nullify bona fide contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest; and some fresh consideration, for instance, the rescission of the previous bond or forbearance to sue, has passed from the mortgagee to his debtor. So far as I am aware the matter has not been decided in any case; and I wish to reserve an open mind on the subject.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Adami and Sen, J.J.*

MUSSAMMAT BATINA KUER

*v.*

RAJA RAM PANDEY.\*

*Limitation, suspension of, during the lifetime of limited Hindu owner—adverse possession, whether can be pleaded for the first time in appeal.*

\* Appeal from Appellate Decree no. 1254 of 1922, from a decision of B. Ram Chandra Chaudhuri, Additional Subordinate Judge of Saran, dated the 18th August, 1922, reversing a decision of Maulavi Sayed Muhammad Ibrahim, Additional Munsif of Siwan, dated the 26th November, 1922.

1926.

BASUDEO  
BHAGAT

*v.*

SHEIKH  
KADIR.

DAS, J.

1925.

June, 24.

1925.

MUSSAMMAT  
BATINA  
KUER  
v.  
RAJA RAM  
PANDEY.

Limitation having once commenced to run in the lifetime of a full Hindu owner, is not suspended on his death and succession by a limited owner.

*Lilabati Misrain v. Bishun Chobey* (1), followed.

A plea of adverse possession may be taken for the first time in appeal if it arises on facts stated in the pleadings and the opposite party is not taken by surprise.

Appeal by the plaintiff.

This appeal arose out of a suit by the plaintiff-appellant for a declaration that a deed of zarpeshgi, dated the 20th December, 1907, executed by Muhammad Inderbaso in favour of the defendant no. 1 was fraudulent and collusive and without legal necessity; that the said mortgagor had no right or title to execute the zarpeshgi deed and that therefore it was not operative on plaintiff who had inherited the land in dispute from her father Sadhu Dubey.

The case of the plaintiff was that one Sheo Dubey had two sons Nackched and Chulhai; that Nackched had a son Dukhi Dubey and Chulhai had a son Sadhu Dubey; that Dukhi and Sadhu were joint; that Dukhi died and Sadhu came into the family property by survivorship; that after Sadhu's death his widow Mussammat Jharo succeeded her and that after Mussammat Jharo the plaintiff inherited the property in suit from her father. The plaintiff alleged that Inderbaso Kuer, the widow of Dukhi, illegally and fraudulently executed a deed of zarpeshgi, dated the 20th December 1907 in favour of her brother, the defendant no. 1, who in turn assigned the mortgage in favour of defendant no. 2. The case for the defence was that the plaintiff was not the daughter of Sadhu and Jharo; that Dukhi and Sadhu were not joint when Dukhi died; that upon Dukhi's death Inderbaso Kuer succeeded to his property and upon her death her daughter Sona Kuer succeeded. The defendant no. 1 alleged that he was the daughter's

(1) (1907) 6 Cal. L. J. 621 (635).

son of Inderbaso, that is the son of Sona Kuer and not the brother of Inderbaso Kuer as alleged by the plaintiff.

The Munsif held that the plaintiff was the daughter of Sadhu Dubey; that the zarpeshgi deed was fraudulent and collusive; that Dukhi died whilst living joint with Sadhu and that defendant no. 1 was the brother of Inderbaso; and he decreed the suit. On appeal, the Subordinate Judge affirmed the finding that the plaintiff was the daughter of Sadhu; but he held that, even assuming that Inderbaso, the mortgagor of defendant no. 1, had no title to the land in suit, the defendant no. 1 having got possession of the land in 1907 on the basis of his zarpeshgi and having continued in possession for over 12 years his title was perfected by adverse possession. He therefore allowed the appeal and dismissed the suit.

*N. N. Sinha*, for the appellant.

*H. N. Prasad*, for the respondents.

SEN, J. (after stating the facts set out above, proceeded as follows): It is contended before us, first, that the question of adverse possession was not in issue and that the court of appeal was not competent to raise it or pass his decision on it. Secondly, that the question whether Dukhi or Sadhu were joint or separate was not gone into by the court of appeal; that he should have gone into the question fully.

There is no doubt that title by adverse possession does not appear to have been raised in the pleadings, but the principle has often been laid down that a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the court of appeal if such a case arises on facts stated in the pleadings and the party is not taken by surprise. The learned Subordinate Judge bases his decision on the following facts: He finds that as early as 1898 in the cadastral survey Inderbaso Kuer's name is recorded in the survey khatian, and he observes that

1925.

---

MUSSAMMAT  
BATINA  
KUER  
v.  
RAJA RAM  
PANDEY.

1925.

MUSSAMMAT

BATINA

KUER

v.

RAJA RAM

PANDEY.

SEN, J.

this entry must be regarded as a presumptive piece of evidence of possession of Mussammat Inderbaso. He finds that in 1901 there was a zarpeshgi in favour of defendant no. 1 granted by Inderbaso Kuer; he finds that in 1907 the zarpeshgi in suit was executed; that the dues of the previous bond were satisfied out of the consideration of the disputed zarpeshgi in favour of defendant no. 1. These two old registered bonds, he observes, executed so long ago as 1901 and 1907, show that Mussammat Inderbaso exercised acts of possession over the disputed land. He also records it as an admitted fact that Sadhu, the father of the plaintiff appellant, "died 7 or 8 years ago", and that the defendant's possession over the land in suit commenced during Sadhu's lifetime and further that admittedly he is still in possession. He also states that the witnesses of the plaintiff had to admit that plaintiff never got possession of the land in suit; that in fact not a single witness examined by the plaintiff spoke a word about the possession of the plaintiff or her predecessor Sadhu over the land in suit. It is also found that at the Revisional Survey of 1919, the name of defendant no. 1 was entered as being in possession as zarpeshgidar of Inderbaso. Now most of the material facts above mentioned were stated in the pleadings and evidence was gone into in detail on all the points. On the principle laid down in the case of *Lilabati Misrain v. Bishun Chaudhurain*(<sup>1</sup>) the learned Subordinate Judge rightly comes to the conclusion that limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner. Upon the facts found and upon the facts appearing in the pleadings I am inclined to think that the finding as to adverse possession is well sustainable. Ordinarily the principle no doubt holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but where the fact is so clear and

(1) (1907) 6 Cal. L. J. 621 (635).

unmistakable that the plaintiff has never been in possession of the land claimed for nearly 22 years and where on the other hand possession is exercised adversely to him as found in the present case, I see no reason for interference.

The appeal is dismissed with costs.

ADAMI, J. I agree.

*Appeal dismissed.*

---

## APPELLATE CIVIL.

---

*Before Das and Foster, J.J.*

BIBI UMA HABIBA

v.

MUSSAMMAT RASOOLAN.\*

*Code of Civil Procedure, 1908 (Act V of 1908), section 73—Court, jurisdiction of, to enquire into bona fides of decree.*

An executing court making a rateable distribution under section 73 of the Code of Civil Procedure, 1908, has no power to make enquiries into the bona fides of the decrees of the rival claimants.

*Shankar Sarup v. Mejo Mal* (1), relied on.

Appeal by the decree-holder.

The appellant held a money decree for her dower, her deceased husband being one Manzoorul Haq. In the course of the execution, after realization of certain assets, the respondent Bibi Rasoolan put in a claim for rateable distribution under section 73 of the Code of Civil Procedure. Thereupon the decree-holder, Bibi Uma Habiba, made objection to this intrusion in the course of her execution on the ground that the

1925.

MUSSAMMAT  
PATINA  
KUER

v.

RAJA RAM  
PANDEY.

SEN, J.

1926.

Jan., 27.

---

\* Appeal from Original Order no. 113 of 1925, with Civil Revision no. 182 of 1925, from an order of B. Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 17th April, 1925.

(1) (1901) I. L. R. 23 All. 313, P. C.