1929.

EKRADESHWARI BAHUASIN v. HOMESHWAR SINGH AND OTHERS.

that period accepted maintenance in fact and in kind, and she having thereafter, as was also within her legal right, changed her residence and gone to live with her father, what was the date of that change? The evidence upon that subject is far from clear. It appears to be established that she left by the family car on a visit to her father to attend the sradh ceremonies of her deceased mother. When there she made up her mind to stay on, and she has done so ever since. The Board is of opinion that this happened in the end of 1921, and that accordingly maintenance on the scale fixed by the Court below should run not from the date of decree, as found by the High Court, nor from the date of suit in April, 1922, but from 1st January, 1922.

Their Lordships will humbly advise His Majesty that the decree appealed from be affirmed subject to the modification that the maintenance allowance be granted from 1st January, 1922. There will be no costs in the appeal.

Solicitors for appellant: *Pugh and Company.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

APPELLATE CIVIL.

Before Das and Fazl Ali, JJ.

NARPAT SINGH

v.

MAHIDHAR JHA.*

1929.

Feb., 13.
March, 6.

Limitation—suit for rent—ex-parte decree and sale—landlord, holding purchased by—decree set aside on ground of fraud—subsequent suit for rent since date of sale—claim, whether barred by limitation.

*Appeal from Appellate Decree no. 116 of 1927, from a decision of Rai Bahadur Amrita Nath Mitra, Additional District Judge of Bhagalpur, dated the 3rd August, 1926, affirming a decision of Babu Krishna Sahay, Subordinate Judge of Bhagalpur, dated the 30th June 1925

1929.

NARPAT SINGH v. MAHIDHAR JHA.

A brought a suit for rent against *B* and others and obtained an ex-parte decree. On the 16th of July, 1916, the holding was sold in execution and purchased by *A* who also claimed to have obtained delivery of possession through the court. On the 26th of May, 1921, the defendant applied for the setting aside of the ex-parte decree on the ground that they had no knowledge of the suit and the execution proceedings and that they had continued to be in possession of the lands in spite of the sale and the alleged delivery of possession. On the 16th of January, 1922, the ex-parte decree and sale were set aside, the findings of the court being that summons had been fraudulently suppressed, the plaintiff never obtained possession of the land and that the defendants, who were all along in possession, had been deliberately kept in ignorance of the decree and the execution proceedings. On the 16th March, 1923, the plaintiff brought the present suit for the recovery of rent from the defendants since the date of sale onwards on the assumption that the defendant had all along been in possession of the holding. The defence was that the claim for rent for more than 3 years before the institution of the suit was barred by limitation. It was contended on behalf of the plaintiff that inasmuch as he purchased the holding on the 6th July, 1916, he could not afterwards sue the defendants for rent and, therefore, his claim for rent from the date of the purchase onwards could not be barred by limitation as the cause of action arose after the ex-parte decree and the sale in his favour were set aside. The courts below gave a modified decree.

Held, affirming the decision of the courts below, that the plaintiff could not take advantage of his own fraud and as the cause of action was not, in the circumstances of the case, suspended, the plaintiff's claim for rent for a period beyond 3 years preceding the suit was barred by limitation.

Hurro Prashad Rai v. *Gopal Das Dutt*(1) and *Mohamed Majid* v. *Mohamed Ahsan*(2), followed.

Ranee Surno Moyee v. *Shoshee Mokhee Burmonia*(3), *Lakhan Chunder Sen* v. *Madhu Sudan Sen*(4), *Midnapur Zamindary* v. *Jaga Nath Sarangi*(5) and *Muthu Korakkai Chetty* v. *Madar Ammal*(6), distinguished.

(1) (1878) I. L. R. 3 Cal. 817.
(2) (1896) I. L. R. 23 Cal. 205.
(3) (1867-69) 12 Moo. I. A. 244.
(4) (1908) I. L. R. 35 Cal. 209.
(5) (1921) 59 Ind. Cas. 314.
(6) (1920) I. L. R. 43 Mad. 185.

1929.

NARPAT SINGH v. MAHIDHAR JHA.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

N. C. Ghosh and *N. C. Sinha*, for the appellant.

The respondent was not represented.

FAZL ALI, J.—This appeal arises out of a suit for arrears of rent for the years 1320 to 1330 Fasli. The Courts below have decreed the suit so far as the arrears of rent for the years 1327 to 1330 are concerned and have dismissed the suit in respect of the arrears for the years 1320 to 1326 on the ground that the claim is barred by limitation. It is conceded before us that the claim for rent up to the third quarter of 1323 Fasli is barred but it is argued that the plaintiff is entitled to a decree for the arrears of the last quarter of 1323 Fasli and of the years 1324 to 1326. *6th March, 1929.*

Now, in order to understand the arguments advanced in this respect it will be necessary to refer to a few facts. It appears that the plaintiff brought a suit against the defendants for recovery of rent for the years 1316 to 1319. He got an ex-parte decree on the 1st May 1913 and in execution of the decree the entire holding was sold and purchased by him on the 6th July, 1916. It also appears that the plaintiff at one time contended that he had also taken delivery of possession in respect of the holding through the Civil Court. On the 25th May, 1921, the defendants applied to have the ex-parte decree set aside on the allegation that they had absolutely no knowledge of the suit and the execution proceedings and that they had continued to be in possession of the lands in spite of the sale and the alleged delivery of possession. On 16th January, 1922, the Munsif of Madhipura allowed the application and set aside the decree. He found that the summons had been fraudulently suppressed,

1929.

NARPAT SINGH v. MAHIDHAR JHA.

FAZL ALI, J.

that the plaintiff never got possession of the lands as alleged by him and that the defendants who were all along in possession had been deliberately kept by him in ignorance of the decree and the execution proceedings. On 16th March, 1923, the plaintiff brought the present suit and although previously his case had been that the defendants were out of possession since the date of dakhaldehani and the plaintiff had inducted new tenants on the land, he now proceeds on the basis that the defendants were all along in possession as found by the Munsif and claims rent from the defendants since the date of the sale. The plaintiff now says that as he purchased the holding on the 6th July, 1916, he could not afterwards sue the defendants for rent and therefore his claim for rent from the date of the purchase onwards cannot be barred by limitation as the cause of action arose after the ex-parte decree and the sale in his favour were set aside. He relies in this connection on *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(1). The two Courts below, however, have tried to distinguish the facts of the present case from those of *Surnamoyee's* case(1) and have held that the plaintiff cannot be permitted to take advantage of his own fraud. The only question with which we are concerned in this appeal is as to whether the Subordinate Courts have taken a correct view on the question of limitation and whether the present case is or is not covered by the authority of the Privy Council decision relied on by the plaintiff.

In *Surno Moyee's* case (1) a patni taluk was sold for arrears of rent under Act VIII of 1819. It was sold for a sum greatly in excess of the rent in arrears and the purchaser was put in possession of the taluk. Out of the purchase money the arrears were paid and the balance remained in the Collector's hands for the benefit of those who were entitled to it. A suit was then brought to set aside the sale of the patni taluk on the grounds of irregularity and the sale was ultimately set aside. The result was that the zamindar had to

(1) (1867-69) 12 Moo. I. A. 244.

pay back the purchase money to the purchaser with interest and that the patnidars were again put into possession of the taluk and they recovered the mesne profits for the period during which they were out of possession from the purchaser. The zamindar then brought a suit for the recovery of the arrears of rent which had accrued before and during the time the patnidars were out of possession. The High Court decided that the suit not being brought within three years from the time the rent first became due was barred by section 32 of Act X of 1859. The decree of the High Court was reversed in appeal by the Judicial Committee and it was held that the claim was not barred. Sir James Colvile who delivered the judgment in that case observed as follows, " Their Lordships' view of the case is this: that, upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place. It follows, that upon the language of the 32nd section of Act no. X of 1859, the appellant was not barred from her remedy. Their Lordships further authorise me to say, that they do not concur in the view taken by the High Court, that the appellant can be said to have committed an act of trespass, because, when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, and that her proceedings, therefore, became inoperative. Their Lordships cannot treat this as an act of trespass, or hold with the High Court, that in bringing this suit she is a person seeking to take advantage of her own wrong. They must also respectfully dissent from another statement of the learned Judges of the High Court, to the effect that the appellant might have sued for these arrears pending the proceedings to set aside the sale of the putnee. It is clear, that until the sale had been finally set aside, she was in the position of a person whose claim had

1929.

NARPAT SINGH v. MAHIDHAR JHA.

FAZL ALI, J.

been satisfied; and that her suit might have been successfully met by a plea to that effect." Now, the facts of the present case are somewhat different from those of *Surno Moyee's* case(1). In *Surno Moyee's* case(1) the patnidar had been actually dispossessed and after possession was restored to him, the zamindar had to pay back the amount which he had received out of the sale proceeds to satisfy his claim for arrears of rent and the patnidar also recovered mesne profits from the purchaser for the years he had been out of possession. These facts, however, standing by themselves, would not have probably made very great difference. It is however to be noted that in *Surno Moyee's* case(1) the decree and the sale were set aside because as their Lordships of the Judicial Committee pointed out " The zamindar had, in pursuing the remedy which was clearly competent to her *inadvertently omitted one of the formalities* prescribed by law and that in bringing the suit she was by no means seeking to take advantage of her own wrong ". In the present case, however, it has been found by both the Courts below that the decree and the sale obtained by the plaintiff were obtained by fraud and that was the ground on which those proceedings were set aside. Keeping these facts in view let us now turn to Article 2 of Schedule III of the Bengal Tenancy Act. This Article provides three years as the period of limitation for a suit by the landlord for the recovery of arrears of rent and it also provides that this period will run from the *last day of the agricultural year in which the arrear fell due*. The critical question then is whether any arrears can be held to have fallen due after the holding had been sold and the plaintiff had purchased it or whether the cause of action should be held to have been suspended till the ex-parte decree was set aside. It is urged on behalf of the appellant that as a result of the sale the defendants no longer remained tenants of the holding and the rent cannot be said to have fallen due so long as the sale subsisted; but the plaintiff's cause of action arose and the obligation to pay

(1) (1867-69) 12 Moo. I. A. 244.

rent revived as soon as the decree and the sale were set aside. It is to be remembered, however, that in the proceedings under Order IX, rule 13, the plaintiff definitely alleged that the defendants were not in possession since he had obtained delivery of possession and that he had inducted new tenants on the land. If, therefore, these allegations had any truth, it is clear that the plaintiff would not have been entitled to any rent for the period during which the defendants were out of possession according to the plaintiff. The plaintiff's case, however, was not believed by the Munsif who set aside the ex-parte decree and the plaintiff now proceeds on the admitted case of the defendant that they have all along been in possession. Now, the defendants no doubt admit that they were never dispossessed but they also say that they were all along treated as tenants of the land and the plaintiff never allowed them to know about the decree, sale or delivery of possession. The lower Appellate Court has also definitely held that the plaintiff went on issuing invitation letters to the defendants even after the sale asking them to attend the Punia ceremony in 1918, 1920 and 1921. The question now is whether in these circumstances the plaintiff should be permitted to say that the claim for rent is not barred, that they did not sue for rent because there was no cause of action and their cause of action should be held to have been suspended till the decree and the sale were set aside. It is true that in *Surno Moyee's* case(1) such a plea was allowed, but as I have already sufficiently indicated that case is clearly distinguishable from the present case. In that case the patnidar had been dispossessed in execution of the rent decree and when the decree was set aside he got back the patni with mesne profits and the landlord was compelled to pay back the amount which he had received out of the purchase money in satisfaction of the arrears of rent. In these circumstances it was considered only fair to hold that he took back the estate subject to the obligation to pay rent to the landlord, their Lordships of the

(1) (1867-69) 12 Moo. I. A. 244.

1929.

NARPAT SINGH v. MAHIDHAR JHA.

FAZL ALI, J.

Judicial Committee observing that if a contrary view was taken it will be " a very unfortunate result and a result which will work great injustice, for the patnidars have got back the patni and have at the same time relieved themselves from the obligation of paying for that period the very rent upon which they held it." Their Lordships further took care to point out that the zamindar " in bringing the suit for rent was not a person seeking to take advantage of her own wrong ". To my mind therefore if the plaintiff in this case with a fraudulent decree and sale in his pocket attempts to argue on their strength that by virtue of the sale in their favour the defendants had ceased to be tenants and so he could not sue as long as the decree and the sale subsisted, the simple reply to this is that if the plaintiff chooses to say that the defendants were not his tenants between the date of the sale and the setting aside of the ex-parte decree, he has no right to sue them for rent at all and he cannot maintain the present claim which is based on the assumption that they were such tenants. In other words, either his claim is barred by limitation or he cannot sue the defendants for rent for a period during which if they ceased to be his tenants at all, they ceased to be so in consequence of his own fraud.

The learned Advocate for the appellant has referred us to three other cases namely, *Lakhan Chunder Sen* v. *Madhu Sudan Sen*(1), *Midnapur Zamindary Co.* v. *Jaga Nath Sarangi*(2) and *Muthu Korakkai Chetty* v. *Madar Ammal*(3). These decisions, do not carry us any further than *Surno Moyee's* case(4) and only re-affirm the principle that in certain cases there will be a suspension of cause of action when it would be infructuous to sue on the original cause of action and also that in certain special circumstances time will not run against a suitor. There is no doubt that the rule laid down in *Surno Moyee's* case(4) has been applied in a number of cases but there are also on

(1) (1908) I. L. R. 35 Cal. 209.
(2) (1921) 59 Ind. Cas. 314.
(3) (1920) I. L. R. 43 Mad. 185.
(4) (1867) 12 Moo. I. A. 244.

the other hand a number of cases in which the limitations of the rule have been pointed out and emphasised. In *Huro Prasad Rai* v. *Gopal Das Dutt*(1) where a landlord ignoring the rights of the tenants brought a suit for khas possession and having failed sued for arrears of rent, their claim was held to be barred. In distinguishing that case from *Surno Moyee's* case(2) it was pointed out by Garth, C.J., that no man can take advantage of his own mistake to get rid of the operation of the Limitation Act. This case went up to the Privy Council and Sir Robert Collier who delivered the judgment of the Judicial Committee held that the appellant's case did not come " within the exception to the operation of the statute established in the case of *Ranee Surno Moyee*(2)". Again in *Mohamed Majid* v. *Mahomed Ahsan*(3) when a landlord ejected the tenants unlawfully and compelled them to institute proceedings by which they recovered possession and afterwards he sued them for rent, a Division Bench of the Calcutta High Court held that the decision in *Surno Moyee's* case(2) was not applicable and dismissed the suit on the ground that no man should be allowed to take advantage of his own illegal action, their Lordships' observations in this respect being as follows, " In the present case the plaintiffs throughout acted illegally. They made it necessary for the defendants to bring the suit for recovery of possession in consequence of their unlawful act in dispossessing them and therefore in endeavouring to avoid the law of limitation in the words of their Lordships of the Privy Council ' they were seeking to take advantage of their own wrong '."

Again, in a number of cases decided under section 14 of the Limitation Act, it has been pointed out that the section has no application when bad faith is established. In my opinion the Courts below have

(1) (1878) I. L. R. 3 Cal. 817. (2) (1867) 12 Moo. I. A. 244.
(3) (1896) I. L. R. 23 Cal. 205.

1929.

NARPAT SINGH v. MAHIDHAR JHA.

taken a correct view of the case and the appeal must be dismissed. As however the respondents did not appear in this Court there will be no order for costs.

DAS, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Fazl Ali, JJ.

1929.

Jan., 31.
Mar., 11.

RAM RACHHYA SINGH THAKUR

v.

RAGHUNATH PRASAD MISSER.*

Vendor and Vendee—registered sale deed—portion of purchase money stipulated to be paid to vendor's creditor—no specified time fixed—default in payment— vendor, whether entitled to recover unpaid purchase money—damage, proof of, whether necessary—suit by vendor—measure of compensation—limitation—Limitation Act, 1908 (*Act IX of* 1908), *schedule* 1, *article* 116, *applicability of—terminus a quo.*

Where, by a registered deed of sale, the plaintiff transferred certain properties to the defendant in consideration of the latter agreeing to apply a portion of the purchase-money to the payment of a previous debt due by the vendor, no specified time having been fixed by the deed of conveyance, and one of the stipulations being that in the event of the payment being made at a later date the vendee would be responsible for the payment of whatever interest might accrue due to the creditor from the date of the execution of the sale deed, and, the defendant having failed to pay off the vendor's creditor, in breach of the covenant stipulated in the sale deed, the plaintiff's brother paid the same.

*Appeal from Appellate Decree no. 1486 of 1926, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Darbhanga, dated the 9th June, 1926, reversing a decision of Babu Teknath Jha, Munsif of Darbhanga, dated the 10th December, 1925.