

APPELLATE CIVIL.

1935.

Before Courtney Terrell, C.J. and Saunders, J.

*December,
10, 11.*

NARAYAN PRASAD PANDA

v.

SREEMATI ADARMONI DASI.*

*Limitation—suit for recovery of possession, by mortgagee—
auction-purchaser against purchaser of equity of redemption
during pendency of mortgage suit, whether should be brought
within 12 years from date of sale or delivery of possession—
Lis pendens—possession of purchaser, when becomes adverse—
Transfer of Property Act, 1882 (Act IV of 1882), section 52.*

The plaintiff in execution of a mortgage decree purchased the mortgaged properties and got delivery of possession through court. The defendant on the basis of a private sale during the pendency of the mortgage action got herself registered in Register D. The plaintiff brought the suit for possession and the defendant asserted that the suit should have been brought within 12 years from the date of sale.

Held, that the defendant was bound by the doctrine of *lis pendens* and her position was no better than that of the mortgagor. She obtained the right, title and interest of the mortgagor and was bound by the decree, sale and delivery of possession. As the defendant continued in possession in spite of the delivery of possession her possession became adverse and time began to run against the plaintiff.

Ram Prasad Ojha v. Bakshi Bindeshwari Prasad Sinha(1), followed.

Narain Das v. Lalta Prasad(2), dissented from.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

L. K. Das Gupta, for the appellant.

* Circuit Court, Cuttack. Appeal from Appellate Decree no. 87 of 1930, from a decision of S. K. Das, Esq., I.C.S., Additional District Judge of Cuttack, dated the 31st March, 1930, reversing a decision of E. A. Khan, Esq., Bar.-at-Law, Subordinate Judge of Cuttack, dated the 23rd April, 1928.

(1) (1931) I. L. R. 11 Pat. 165.

(2) (1899) I. L. R. 21 All. 269.

S. C. Chatterjee and A. S. Khan, for the respondents.

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COURTNEY TERRELL, C.J.—This second appeal arises out of a suit which was instituted on the 29th January, 1927, by the plaintiff to recover from defendant no. 1 two pies share of Taluk Panpur, tauzi no. 891 in the Balasore Collectorate. The suit was also for 12 karants odd share from defendant no. 2. The trial Court decreed the suit as against both defendants. Defendant no. 1 alone appealed to the District Judge, and it is with her case alone that we are concerned. The lower appellate court held that the suit against defendant no. 1 was barred by limitation.

The facts are simple. The property originally belonged to one Kailash Chandra Kar, and in 1897 he mortgaged it to the plaintiff. In 1903 the plaintiff sued for a decree for sale on the mortgage, and in 1904 while the suit was pending the defendant no. 1 purchased the two pies share from the mortgagor, Kailash Chandra Kar, who was the owner of the equity of redemption. The purchaser, therefore, was bound by the doctrine of *lis pendens*. In 1909 there was a preliminary decree in the mortgage suit, and in 1910 there was a final decree for the sale of the mortgaged property. On the 16th of December, 1911, the auction sale took place and the plaintiff purchased in the execution and on the 18th of January, 1912, the sale was made absolute. On the 29th of January, 1915, the plaintiff got delivery of possession. The suit was begun on the 29th of January, 1927, exactly 12 years after the delivery of possession. The dispute between the parties came to a head by reason of the application of the plaintiff to register his name in the Land Registration Department. He was registered as proprietor in 1920-21, and on the 23rd of June, 1922, the defendant no. 1 applied to be registered as the proprietor of the two pies share which she had purchased in 1904. The result of that proceeding was that she was so registered in accordance with her petition, and the

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plaintiff's name was expunged from the register of proprietors and accordingly he has been driven to the civil court.

It is contended on behalf of defendant no. 1, and it was held by the lower appellate Court, that the possession of the defendant no. 1 became adverse to the plaintiff from the date of the confirmation of the sale on the 18th of January, 1912, on the ground that the plaintiff might have applied for immediate possession and did not do so and that the suit is, therefore, brought more than 12 years after the date when the plaintiff was entitled to possession. On the other hand, it is contended on behalf of the plaintiff that he did not get delivery from the Court until the 29th of January, 1915, and that his suit being brought within 12 years is in time. The matter of when the adverse possession begins in circumstances of this kind has already been decided by a Bench of this Court in the case of *Ram Prasad Ojha v. Bakshi Bindeshwari Prasad Sinha*(1). The judgment of Noor, J. in that case is very clear, and dealing with a purchaser *lis pendens* he observed as follows:—" His position is no better than that of the mortgagor; he obtained the right, title and interest of the mortgagor subsequent to the passing of the mortgage decree and, therefore, he was bound by the decree, the sale and the delivery of possession.

Now once the Court put the plaintiff's predecessor in interest in possession of the property and the defendant continued in possession of it in spite of this delivery of possession, it is then and then only that the possession of the defendant becomes adverse." I would venture respectfully to agree entirely with the reasoning of the decision, and in the course of this case the authority which was cited by the lower appellate Court was considered. The learned Judge of the lower appellate Court felt himself bound by a decision of the Allahabad High Court in *Narain Das v. Lalta Prasad*(2). The Bench of this Court which

(1) (1931) I. L. R. 11 Pat. 165.

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decided the case reported in 11 Patna considered and disagreed with the judgment of the Allahabad High Court. We are bound by the decision of our own Court especially having regard to the fact that, speaking for myself I think, the judgment of the learned Judges who decided the Patna case was correct. On this ground it is clear that the suit is not barred by limitation.

The judgment of the lower appellate Court must be set aside and the judgment and the decree of the trial Court restored with costs throughout against defendant no. 1.

SAUNDERS, J.—I agree.

Appeal allowed.

REVISIONAL CIVIL.

Before Courtney Terrell, C.J. and Saunders, J.

KESHAB PRUSTI

1935.

v.

ANANTA MAHANTY.*

December,

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Orissa Tenancy Act, 1913 (Act II of 1913), section 204, sub-sections (1) and (4) and section 227—order setting aside sale under section 227, whether appealable—Civil Procedure Code, 1908 (Act V of 1908), Order XLIII, rule (1), clause (g).

Section 204 does not deal with the class of orders that shall or shall not be appealable, but the tribunal to which appeals shall lie if under the law an appeal lies at all.

An order under section 227 of the Orissa Tenancy Act, setting aside a sale, is appealable under Order XLIII, rule 1(j) of the Code of Civil Procedure, 1908.

Applications in revision by judgment-debtors.

* Circuit Court, Cuttack. Civil Revisions nos. 85 and 105 of 1934, from an order of B. Mukherjee, Esq., I.C.S., Collector of Cuttack, dated the 21st August, 1934, revising an order of Babu M. M. Patnaik, Sub-Deputy Collector, Cuttack, dated the 28th March, 1934.

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