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was a case of different kind from that with which we are now dealing; and it seems to us scarcely, upon its own facts, to support the argument which has been adduced for the appellants in a case of the present kind. The case at page 238 of the same volume also, it appears to us, presents some points of difference from the present case, especially this difference, that whereas, as we understand, if the plaintiff's title were found to be proved in the present case, it would stand equally good against all the defendants; in that case the success of one of the defendants depended upon a circumstance which did not arise in the case of the other defendants. It seems to us difficult to say that in the present case the decree appealed against in the lower Appellate Court did not proceed on any ground common to all the defendants, when there are at least two grounds which were common to them all; the first being the title of the plaintiff, which, if it succeeded at all, would succeed equally against them all, and secondly, the ground that they had combined to oust the plaintiff from the land in dispute.

In this view we think that the learned Subordinate Judge was justified in decreeing the whole appeal, with reference to the terms of the provisions of section 544 of the Code of Civil Procedure; and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

30 C. 433.

[433] APPELLATE CIVIL.

BANKU BEHARI SHAHA *v.* KRISHTO GOBINDO JOARDAR.*

[11th December, 1902.]

Document, execution of—Signature, sufficiency of—Limitation Act (XV of 1877) Sch. II, Arts. 91 and 142—Suit to recover possession of immoveable property—Cancellation of document not required to be set aside—Fraud.

A document is nullity, where the executant of it signed only on the first page, but did not sign on the other pages, having discovered that it was not in accordance with the terms previously agreed upon; such a document does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands.

Thoroughgood's case (1), *Foster* v. *Makinnon* (2), *Sham Lall Mitra* v. *Amarendra Nath Bose* (3) and *Raghubar Dyal Sahu* v. *Bhikya Lall Misser* (4) referred to.

A suit to recover possession of immoveable property by setting aside a document on the ground of fraud, but which document does not require to be set aside or cancelled, is governed by Article 142 and not by Article 91, Schedule II of the Limitation Act (XV of 1877).

[Rel. on 32 Cal. 473; 7 O. C. 319; Ref. 29 C. L. J. 55=23 C. W. N. 93=49 I. C. 76.]

SECOND APPEAL by Banku Behari Shaha, the defendant No. 1.

This appeal arose out of an action brought by the plaintiffs to recover possession of share of a certain mouzah with mesne profits, and for a declaration that the pottah by virtue of which the defendant No. 1 had dispossessed them (the plaintiffs) was not executed in the proper way, and void for want of consideration. The allegation of the plaintiffs

* Appeal from Appellate Decree No. 809 of 1900, against the decree of G. K. Deb, Esq., District Judge of Nuddea, dated the 17th of April 1900, affirming the decree of Babu Prassanna Coomar Ghose, Subordinate Judge of that district, dated the 3rd of March 1899.

(1) (1584) 2 Co. Rep. 9.
(2) (1869) L. R. 4 C. P. 704.
(3) (1895) I. L. R. 23 Cal. 460.
(4) (1885) I. L. R. 12 Cal. 69.

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was that the defendant No. 2, Girija Prosonno Ghose, executed a *mourasi* pottah of his 4-annas [434] share in mouzah Atharkada in favour of defendant No. 1, Banku Behari Shaha, on the 9th Falgoon 1301 B. S. (20th February 1895). But before that pottah was registered he executed a second *mourasi* pottah of the same property in favour of them (the plaintiffs) on the 21st Falgoon of that year, and registered it on the following day. Subsequently the defendant No. 1 got his *pottah* registered under the provisions of s. 35 of the Indian Registration Act. The plaintiffs alleged that they became aware of the defendant's pottah in Joista 1302 B. S. (May, 1895) on account of certain rent-suits having been dismissed which they brought against some tenants of that mouzah on the basis of their subsequent pottah. Hence the present suit was brought. The defence of the defendant No. 1 was that his pottah having been executed for consideration, prior to the pottah of the plaintiffs; his pottah was entitled to a priority over that of the plaintiffs, and that the plaintiffs having had knowledge of his (the defendant's) pottah, long before three years prior to the institution of the suit, it was barred under Article 91, Schedule II of the Limitation Act.

The Court of First Instance held that Article 91, Schedule II of the Limitation Act, applied to the case, and that the suit was not barred by limitation, because the facts entitling the plaintiffs to have the pottah of defendant No. 1 set aside became known to them within three years before the institution of the suit. On the merits, it found that the pottah of defendant No. 1 was fraudulently obtained and was not properly executed. The plaintiffs' suit was decreed. On appeal, the District Judge of Nuddea, Mr. G. K. Deb, affirmed the decision of the first Court.

Dr. *Ashutosh Mukerjee* (Babu *Biraj Mohun Mazumdar* with him) for the appellant. As to the question of Limitation, I submit that either article 91 or 95 of the Limitation Act applies to this case. In s. 3 of the Limitation Act, it appears that 'plaintiff' includes any person from, or through whom a plaintiff derives his right to sue. [BANERJEE, J. The word 'plaintiff' does not occur in article 95.] It occurs in article 91. Plaintiff's suit is barred by limitation. It has been held in the case of *Jugaldas* v. *Ambashankar* (1) that the circumstance that the plaintiff was in possession through [435] his tenants could not affect the application of the Act. He would equally be bound to take proceedings to set aside the document within the time limited by the Act. The Privy Council case of *Janki Kunwar* v. *Ajit Singh* (2) is really applicable. It is not essentially a suit for possession of immoveable property in the sense to which 12 years' limitation is applicable. The immoveable property could not have been recovered until the pottah was set aside, and it was necessary to bring a suit to set that aside. This case falls within article 91 of the Limitation Act (XV of 1877) and is barred.

Mr. *Rash Behari Ghosh* (Babu *Saroda Charan Mitter* with him) for the respondent. This being a suit for recovery of immoveable property, 12 years' limitation is applicable under article 142 of the Limitation Act. This is no deed at all, there being no complete execution of it, and therefore it need not be set aside. From the evidence in this case it appears that the executant never intended to execute the deed and the mind of the signer did not accompany the signature. Therefore there was no document at all in the way of the plaintiff to be set aside: see Pollock

(1) (1888) I. L. R. 13 Bom. 501. (2) (1887) I. L. R. 15 Cal. 58.

on Contracts (7th Edn.), pp. 461-462, and the case of *The Oriental Bank Corporation* v. *John Fleming* (1). Unless the deed is operative between the parties, it is not necessary to set it aside : see *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (2).

Dr. *Mookerjee* in reply.

Cur. adv. vult.

BANERJEE AND GEIDT, JJ. This appeal arises out of a suit brought by the plaintiffs, respondents, for recovery of possession and mesne profits of a 4-anna-share of a certain mouzah named Fatihpur in *darmaurusi* jote right under a pottah granted to them by defendant No. 2, Girija Prosanno Ghose, on the 21st of Falgoon 1301, and for a declaration that the pottah dated the 9th of Falgoon 1301, by virtue of which defendant No. 1 had dispossessed them, was not executed in the proper way and was void of consideration, and inoperative. The defence of [436] defendant No. 1, who alone put in a written statement, was to the effect that the suit was barred by limitation, and that the answering defendant's pottah was valid and operative, and, being of a prior date, should prevail against that of the plaintiffs.

The Courts below have held that though the period of limitation applicable to the suit was not 12 years, but 3 years under Article 91 of Schedule II of the Limitation Act, it was not barred, because the facts entitling the plaintiffs to have the pottah of defendant No. 1 set aside became known to them within three years before the institution of the suit. On the merits they have concurrently found that the pottah of defendant No. 1 had not been properly executed, and was obtained by fraud and without payment of any consideration. And they have accordingly given the plaintiffs a decree.

In second appeal it is contended for the appellant, defendant No. 1, that, upon the facts found as to the plaintiffs' knowledge of the defendant's pottah, the Court of Appeal below ought to have held that the suit was barred under Article 91 of Schedule II of the Limitation Act ; while, on the other hand, the learned vakil for the plaintiffs, respondents, in answer to this contention, urges that the suit being one for recovery of possession of immoveable property, and the cancellation of the defendant's pottah being asked for only as subsidiary relief, the period of limitation applicable to the suit is 12 years, and that upon the facts found as to the manner in which the defendant's pottah was signed and came to the hands of defendant No. 1, that document was void *ab initio* and did not require to be set aside.

We are of opinion that the appellant's contention is so far correct that if the period of limitation applicable to the suit is 3 years under Article 91 of Schedule II of the Limitation Act, it is barred according to the finding of the lower Appellate Court to the effect that the plaintiffs knew of the defendant's pottah, and of the reasons why it was inoperative, more than three years before the suit. We are also of opinion that if the immoveable property covered by the defendant's pottah could not be recovered until that document was set aside, and it was necessary to bring a suit to set it aside, the mere fact of the principal relief asked for in this [437] suit being the recovery of possession of that property could not save it from being barred by limitation. The decision of the privy

(1) (1879) I. L. R. 3 Bom. 242 (265). (2) (1885) I. L. R. 12 Cal. 69.

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Council in the case of *Janki Kunwar* v. *Ajit Singh* (1) is clear authority on this point, and their Lordships' decision in *Malkarjun* v. *Narhari* (2) also goes in the same direction.

But we think the facts found by the lower Appellate Court as to the manner in which the pottah propounded by defendant No. 1 came to be signed by the grantor and to pass into the possession of the grantee, clearly show that it was a nullity from its inception and was never intended to be operative: it was not a voidable deed, but was one that was void *ab initio*, and so it did not require to be set aside. The passage of the judgment of the Court of Appeal below in which those facts are to be found runs thus:—

"As to the allegation about the lease to the defendant being a fraudulent transaction, the *onus* of proving it lay on the plaintiffs. The plaintiffs have sought to discharge this *onus* by calling Girija Prasanna Ghose and his gomastha, Ishan Chunder Mozumdar, to prove the circumstances under which the lease to the defendant came to be executed. They both say that the defendant's man, Hari Dobey, acted for the defendant on the occasion; that defendant has agreed to take a lease of Girija Prasanna's share in Fatihpur and Chur Ramnagore on payment of the *salami* and rent referred to above; that a lease was accordingly drafted by Girija Prasanna's man, Inatullah; that afterwards the draft was taken to the cutcherry of defendant's master, Srikanta Shaha, by Hari Dobey for being fair copied; that when the fair copy was brought it was signed on the first page by Girija Prasanna, and that at that time Ishan Chander Mozumdar having turned up, he was asked by Girija Prasanna, whose eyesight was defective, to read it, and that when it was discovered that it was not in accordance with the terms previously agreed to, Girija Prasanna refused to sign the other pages and asked Ishan Mozumdar to keep it. It was then that Hari Dobey took it away on pretence of rectifying the omission, but he afterwards refused to return unless the money spent on stamps, &c., was paid to him. The Subordinate Judge has believed this evidence and found [438] as a fact that the lease to the defendant was obtained by fraud." And later on, in the judgment this finding is affirmed by the lower Appellate Court. This shows that the signature of the grantor on the defendant's pottah is, to use the language of Byles, J. in *Foster* v. *Mackinnon* (3), "invalid not merely on the ground of fraud, but on the ground that the mind of the signor did not accompany the signature; in other words, he never intended to sign, and therefore in contemplation of law never did sign the contract to which his name is appended."

Thoroughgood's case (4), the case of *Foster* v. *Mackinnon* (3) just referred to, and other cases to which reference is made in Pollock on Contracts, 5th edition, pages 441-45, are authorities for the view we take that the pottah of defendant No. 1 must be treated as a nullity from the beginning, as a document which never had been executed in the true sense of the term, and as not requiring therefore to be set aside. That a document which was never intended by the executant to be operative does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the

(1) (1887) I. L. R. 15 Cal. 58.
(2) (1900) I. L. R. 25 Bom. 337; L. R. 27. I. A. 216.
(3) (1869) L R. 4 C. P. 704, 711.
(4) (1584) 2 Co. Rep. 9.

person in whose favour it stands, has been held by this Court in the cases of *Sham Lal Mitra* v. *Amarendra Nath Bose* (1) and *Rajhubar Dyal Sahu* v. *Bhikya Lal Misser* (2).

It was argued for the appellant that as the lower appellate Court has found that "the plaintiffs could not recover possession of the property leased out to them until the prior lease in favour of the defendant was set aside," it is not open to this Court in second appeal to set aside that finding and take a different view of the defendant's lease. We do not feel pressed by this argument at all. If the so-called finding had been a finding of fact, no doubt we could not interfere with it. But it is clearly no finding of fact. It is only an inference of law deduced from the facts found, from which we have shown above the very opposite inference arises, namely, that the lease in favour of defendant No. 1 was a nullity from the beginning and did not require to be set aside.

[439] For the foregoing reasons we must hold that this suit, so far as it seeks for recovery of possession of immoveable property, is not barred by limitation, the prior pottah propounded by the defendant No. 1 being void *ab initio*, and that this appeal should be dismissed with costs, the declaration by the Courts below that, that pottah is inoperative being treated merely as a finding auxiliary to the granting of the decree for possession.

Appeal dismissed.

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30 C. 440 (=7 C. W. N. 520).

[440] APPELLATE CIVIL.

LAKSHMI PRIYA CHOWDHURANI *v.* RAMA KANTA SHAHA.*

[2nd July, 1902.]

Limitation—Limitation Act (XV of 1877,*) Sch. II, Art.* 29*—Suit for money wrongly taken out in execution—Regulation VIII of* 1819*—Putnee taluk.*

A suit to recover the surplus proceeds of a sale held under Regulation VIII of 1819, wrongfully taken out by the defendant in execution of a decree against a third party, does not come under Art. 29, Sch. II of the Limitation Act.

Jagjivan Javherdas v. *Gulam Jilani Chaudhri* (3) dissented from.

[**Ref.** 6 C. L. J. 535; 31 Mad. 431 (F. B.)=18 M. L. J. 590=4 M. L. T. 271; 12 M. L T. 458=23 M. L. J. 519=1912 M. W. N. 1179=16 I. C. 914; **Dist.** 38 Mad. 972.]

APPEAL by the defendant, Lakshmi Priya Chowdhurani.

The plaintiffs were owners of 12 annas and odd gandas, and Ram Sundar Shaha, the ancestors of defendants Nos. 8, 9 and 10 and the defendant No. 11 were the owners of the remaining 3 annas and odd gandas share of a certain putnee taluk. On the 26th May 1893, the plaintiffs purchased the said 3 annas and odd gandas of the taluk from the defendants Nos. 3 to 7, who had purchased the same at an auction sale on the 16th March 1891. Thus the plaintiffs became owners of the entire taluk. The taluk was then put up to sale for arrears of rent under Regulation VIII of 1819, and purchased by the defendant No. 6 for

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* Appeal from Original Decree No. 341 of 1898, against the Decree of S. N. Huda, Esquire, Officiating District Judge of Noakhali, dated the 15th of August 1898.

(1) (1895) I. L. R. 23. Cal. 460.
(2) (1885) I. L. R. 12 Cal. 69.
(3) (1883) I. L. R. 8 Bom. 17.