1902 DEC. 5. CIVIL RULE. 30 C. 425.

authority for holding that a mortgagee may come in under section 310A. Now, so far as this Court is concerned, the cases, I believe I may correctly state, have proceeded on the ground that the sales being under the Bengal Tenancy Act would convey to the purchaser a right to avoid these incumbrances; and, therefore, it has been held that the mortgagee has such an interest in the immoveable property, that he is entitled to come in under section 310A, or, I should say more correctly, within the corresponding section, which is exactly in the same terms, namely, section 174 of the Bengal Tenancy Act. The facts of the case of *Srinivasa Ayyangar* v. *Ayyathorai Pillai* (1) are not fully stated; but so far as the latter part of the judgment of the learned Judges is concerned, I am unable, after fullest consideration, to agree with it, for it seems to proceed on two cases decided by this High Court, in both of which the sales would confer a right to the purchaser to avoid the incumbrances, and on this ground it was held that the encumbrancer was entitled to come in within the terms of section 310A, or rather section 174 of the Bengal Tenancy Act. The Rule must, therefore, be made absolute, and the order of the Munsif set aside. The petitioner is entitled to his remedy under the ordinary law, and his possession, or his title, has in no way been affected by the proceedings of the sale in execution of the decree against his co-sharers.

[428] A further objection was taken at the latest stage of the case by the learned pleader who opposes the Rule, that we have no authority to proceed in this matter under section 622, Code of Civil Procedure. We think that this is specially a case in which such interference is allowed and is necessary within the terms of that section.

The petitioner will be entitled to two gold mohurs as costs of this Rule, which is made absolute.

STEPHEN, J. I concur entirely in the judgment of my learned brother, and I have only this to say that, on the cases which have been laid before us, and particularly on the case of *Paresh Nath Singha* v. *Nalogopal Chattopadhya* (2), it seems to me plain, that the only person or persons who may apply under section 310A, Code of Civil Procedure, are the judgment-debtor himself and certain persons claiming an interest in the property by a transfer from the judgment-debtor. In the present case, it is plain that the persons, whose right to apply it has been sought to establish, based their claim upon an interest which is no way derived from the judgment-debtor.

Rule made absolute.

30 C. 429.

[429] APPELLATE CIVIL.

RAM KAMAL SHAHA *v.* AHMAD ALI.*

[7th January and 24th February, 1903.]

Appeal—Civil Procedure Code (Act XIV of 1882) s. 544—Appeal on grounds common to all the defendants.

A brought a suit against *B*, *C*, *D*, and others, for recovery of possession of certain immoveable property on declaration of title thereto, alleging that he

* Appeal from Appellate Decree No. 1844 of 1899, against the decree of Babu Jogendra Nath Ray, Subordinate Judge of Chittagong, dated the 4th August 1899, reversing the decree of Babu Pankaja Kumar Chatterjee, Munsiff of Satkania, dated the 13th of March 1899.

(1) (1897) I. L. R. 21 Mad. 416. (2) (1901) I. L. R. 29 Cal. 1.

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was dispossessed by all the defendants together. B, C, and D appeared and contested the suit mainly on the grounds that it was bad for misjoinder of parties, and that the plaintiff had no title to the land in dispute. The Court of First Instance decreed the plaintiff's suit. B and C. alone preferred an appeal, and the lower Appellate Court allowed it, finding that the plaintiff had not proved the title set up by him. On an objection taken by the plaintiff that inasmuch as D did not appeal, he could not have the benefit of it :

Held, that as the decree appealed against proceeded on grounds common to all the defendants, and regard being had to the terms of the provisions of s. 544 of the Civil Procedure Code, the Court below was right in allowing the appeal in favour of *D* also.

Syed Hussain v. *Madan Khan* (1) dissented from. *Sreeram Ghuttuck* v. *Brojo Mohun Ghossal* (2), and *Boydo Nath Surmah* v. *Ojan Bibee* (3) distinguished.

[Fol. 28 Mad. 122=15 M. L. J. 28 ; Ref. 31 Cal. 643 (F. B.)=8 C. W. N. 496 : 17 M. L. J. 119.=2 M. L. T. 104=30 Mad. 470 ; 38 Mad. 456.]

SECOND APPEAL by the plaintiff, Ram Kamal Shaha.

This appeal arose out of an action brought by the plaintiff to recover possession of certain immoveable property on declaration of title thereto. The allegation of the plaintiff was that the land in dispute belonged to one Mohamed Nachim, deceased (father of defendant No. 10), who sold it to him on the 28th Kartic 1249 B. S. (12th November 1842) for valuable consideration, but his vendor having refused to give up possession after the transfer, he had to bring a suit against the said Mohamed Nachim, **[430]** and obtained a decree; that defendants Nos. 1 and 3 subsequently, under colour of a sham lease from the said Mohamed Nachim, kept him out of possession of the disputed land; that he sued them in ejectment and recovered judgment; and that eventually the defendants combined to dispossess him once again, and actually dispossessed him in the month of Sraban 1257 B. S. (1850). Defendant No. 4 by one written statement and defendants Nos. 6 and 7 jointly by another written statement contended that the suit was bad for multifariousness, inasmuch as they were separately in possession of different parcels of the lands sued for, and want of parties; that it was barred by limitation ; that the plaintiff was not a *bona fide* purchaser for valuable consideration ; and that the disputed land did not appertain to the taluk of Mohamed Nachim, the vendor of the plaintiff ; and that they held the parcels of lands in their respective possession under different titles from third parties.

The Court of First Instance overruled the defendant's objection, and having found that the plaintiff had succeeded in proving his title and possession, and also that of his predecessor in title, decreed the suit. The defendants Nos. 6 and 7 alone preferred an appeal to the lower Appellate Court, which allowed it, finding that the plaintiff had not proved the right which he set up to the land in dispute, or possession by himself or on the part of his predecessor in title.

Babu *Harendra Narayan Mitter* for the appellant.

Babu *Dhirendra Lal Khastagir* for the respondent.

STEVENS AND STEPHEN, JJ. This second appeal arises out of a suit brought by the plaintiff, as the purchaser of a certain *taluka* right, for declaration of title and possession of certain property upon the allegation that he had been dispossessed from that property by all the defendants together. It was alleged that some of those defendants in collusion with the rest had actully ejected the plaintiff by ploughing the land.

(1) (1894) I. L. R. 17 Mad. 265.
(2) (1869) 11 W. R. 449.
(3) (1869) 11 W. R. 238.

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The title of the plaintiff was denied, as was the possession of himself and his predecessor in title, and the alleged dispossession.

The suit was defended by three of the defendants only—the 4th, the 6th and the 7th. One written statement was filed by the 4th [431] defendant, and another by the 6th and 7th defendants. Both sets of defendants objected that the suit was bad for misjoinder. But that objection was overruled by the Court of First Instance on the ground that, according to the case of the plaintiff, the defendants had all combined to dispossess him and that it was evident upon their own case that, as the Munsiff expresses it, they had "laid their heads together to back the plaintiff," by which we presume he meant that they laid their heads together to eject the plaintiff. The Court of First Instance further found in favour of the title and the possession of the plaintiff and his predecessor in title, and against the title set up respectively by the 4th defendant and the defendants Nos. 6 and 7.

The defendants Nos. 6 and 7 alone preferred an appeal to the lower Appellate Court.

The lower Appellate Court allowed the appeal, finding that the plaintiff had not proved the right which he set up to the land in dispute or possession by himself or on the part of his predecessor in title.

Three grounds were taken in arguing this appeal before us. One was, that the learned Judge of the lower Appellate Court had misconceived the case; secondly, it was urged that the lower Appellate Court ought to have ordered a further investigation. As regards these two points, nothing need be said. The only substantial point is the third, which we proceed to notice; that is, that as the 6th and 7th defendants alone appealed, being interested under different title from the 4th defendant in separate portions of the land, the appeal ought to have been allowed only as far as they were concerned, and not also in favour of the 4th defendant.

Upon the other side, reference has been made to section 544 of the Code of Civil Procedure, which provides, so far as it is necessary to quote it for the purpose of this case, that where there are more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the defendants, any one of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the defendants.

The question is whether it can be said that the decree appealed against in this case proceeded on any ground common to all the defendants. In this connection, we have been referred [432] on the part of the appellant to the case of *Syed Hussain* v. *Madan Khan* (1), as also to the cases of *Sreeram Ghuttuck* v. *Brojo Mohun Ghossal* (2) and *Boydo Nath Surma* v. *Ojan Bibee* (3). The Madras case is based apparently upon the former case of this Court, to which we have just referred.

With regard to the Madras case, (1), with great respect, we must say that in our opinion the decision seems somewhat to narrow the effect of the provisions of section 554. That section does not require that the decree appealed against should proceed *exclusively* on grounds common to all the defendants, but that it should proceed on any ground common to all the defendants.

The case in page 449 of the 11th volume of the Weekly Reporter

(1) (1894) I. L. R. 17 Mad. 265.
(2) (1869) 11 W. R. 449.
(3) (1869) 11 W. R. 238.

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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.