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32 C. 351=9 C. W. N. 277 =2 Cr. L.J. 78.

In *Durgo Das Rukhit* v. *Queen Empress* (1) decided by Prinsep and Stanley JJ., it was observed: "Sanction under section 195, Code of Criminal Procedure, should be given only on application made for it by some person who may desire to complain of the particular offence, and whose complaint could not be entertained without such sanction;" and further :— " It is sufficient at present to repeat that sanction under section 195 was given *proprio motu* by the Deputy Collector and without application for it by any person desiring to make a complaint regarding these offences. As to what followed, we do not mean to say that the District Magistrate was not competent under section 190 (1) (*c*) to take cognizance of the offence, but as the matter was then before him he was competent to do so only on sanction properly given, and there was no proper sanction."

The only case which has been cited to the contrary as directly bearing on the question is *Empress* v. *Nipcha* (2), where the learned Judges say that it was competent for the Magistrate to take up the **[356]** case, although the person to whom sanction was given did not avail himself of it. But that was clearly an *obiter dictum*, as the Sessions Judge had acquitted the prisoners on the merits apart from the question of the legality of the Magistrate's proceedings.

The conclusion at which we arrive is that a sanction expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority, and that the Magistrate acted in this case illegally in accepting and acting upon the complaint of Sarat Chandra Banerjee.

We, therefore, make the Rule absolute on the first ground, and direct that the prosecution be quashed.

It is unnecessary for us to express any opinion regarding the second ground stated in the Rule.

Rule absolute.

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32 C. 357 (=1 C. L. J. 23).

[357] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

JOY CHANDRA BANERJEE *v.* SREENATH CHATTERJEE.*

[1st July, 1904.]

Estoppel by judgment—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Purchaser, previous to suit—Defence in previous suit—Vendor, possession of—Pleader, non-disclosure of facts by—Evidence Act (I of 1872), s. 115—Fraud—Silence when fraudulent.

A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase, although the former had, as pleader for the vendors, actively defended the suit.

Mercantile Investment and General Trust Company v. *River Plate Trust Loan, and Agency Company* (3) *Mohunt Das* v. *Nilkomul Dewan* (4) followed.

If, however, the purchaser had allowed the vendors to remain in possession intending to mislead the plaintiff who having been so misled had sued them, the decree in the suit would bind him on the ground of fraud.

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* Appeal from Appellate Decree No. 544 of 1901, against the decree of Girish Chunder Chatterjee, Additional Subordinate Judge of Dacca, dated Dec. 12, 1900, reversing the decree of Bunwari Lal Banerjee, Munsif of Munshigunge, dated July 28, 1900.

(1) (1899) I. L. R. 27 Cal. 820.
(2) (1878) I. L. R. 4 Cal. 712.
(3) (1894) 1 Ch. 578.
(4) (1899) 4 C.W.N. 283.

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Silence amounts to fraud for which a Court will grant relief only when it is the non-discloser of those facts and circumstances which one party is *legally* bound to communicate to the other.

Fox. v. *Mackreth* (1) followed ; *M'Kenzie* v. *British Linen Company* (2) distinguished.

The silence must also be a true cause of the change of position of the other party. *Pickard* v. *Sears* (3) referred to.

A person conducting as pleader the defence on behalf of a defendant is under no legal obligation to disclose to the plaintiff the fact that the defendant had, prior to the suit, transferred the subject-matter of the suit to him.

Mohunt Das v. *Nilkomul Dewan* (4) referred to.

Section 115 of the Evidence Act (I of 1872) does not apply to a case in which a belief otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised.

[**Ref.** 1 C. L. J. 337 ; 7 C. L. J. 604 ; 6 C. L. J. 621 ; 18 C. L. J. 362 =18 C. W. N. 173 =21 I. C. 519 ; **Dist.** 21 I. C. 979=19 C. L. J. 34.]

SECOND APPEAL by the plaintiff, Joy Chandra Banerjee.

[358] The facts of the case were briefly these: Taluk Parbati Charan Sen was sold free from encumbrances for arrears of revenue and purchased in equal shares by Shashimukhi and Saudamini on the 28th June 1884. The plaintiff purchased kismut Nagerhat appertaining to the said Taluk from the two ladies by two kobalas dated August 27 and September 12, 1885, respectively. In 1893 plaintiff brought a suit to eject two persons, Ram Chandra and Nagarbasi, from the lands in suit appertaining to the said kismut ; they pleaded that they had no concern with the lands which, as they alleged, were in the possession of two persons, Dengar and Raj Kumar, as cultivator under third parties ; Dengar and Raj Kumar were then added as party-defendants to the suit, and the plaintiff obtained a decree against all the four on the 9th July 1894, and in execution thereof obtained symbolical possession on the 22nd December 1894. On the 17th November 1892, Ram Chandra and Nagarbasi had sold their interest in the land to Ananda Chandra Acharjee, the predecessor in interest of defendants Nos. 3 to 6, and Prasanna Chandra Chatterjee, the father of defendants 1 and 2. Ananda, who was a pleader, had filed the written statement and conducted the defence of Nagarbasi in the suit of 1893, but he did not disclose to the plaintiff the fact of his purchase. The plaintiff alleged in the plaint that he remained in possession through his *bargadars* till 1896, when on being dispossessed he brought a suit in 1897 under section 9, Act I of 1877, which was dismissed, and he therefore brought this suit on the 20th February 1900 for recovery of possession of and declaration of title to the lands.

The principal defendants Nos. 1 to 6 pleaded, *inter alia*, that the decree in the suit of 1893 was fraudulent and collusive and in no way binding on them inasmuch as it was passed in a suit instituted against their vendors long after they had parted with all their interest in the property in suit ; and that the suit being brought more than 12 years after the date of the revenue sale was barred under Art. 121. Schedule II of the Limitation Act.

The Court of first instance gave judgment for the plaintiff, but, on appeal, the Subordinate Judge reversed the decree of the first Court and dismissed the plaintiff's suit. The plaintiff then appealed to the High Court.

(1) (1791) 2 R. R. 55.
(2) (1881) 6 App. Cas. 82.
(3) (1837) 6 A. & E. 469; 45 R. R. 538.
(4) (1899) 4 C. W. N. 283.

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[359] Babu *Lal Mohan Das* and Babu *Priya Nath Sen*, for the appellant.

Babu *Nilmadhab Bose* and Babu *Hari Mohan Chakravarti* for the respondents.

GEIDT AND MOOKERJEE, JJ. On the 28th June 1884 Taluk Parbati Charan Sen was sold for arrears of revenue and purchased by two ladies Shashimukhi and Saudamini. On the 27th August 1885 the plaintiff purchased from Shashimukhi her moiety share in kismut Nagerhat situated within aforesaid taluk, and on the 12th September following he purchased the other half from Saudamini. In 1893, the plaintiff sued two persons, Nagarbasi and Ram Chandra, under section 37 of Act XI of 1859 to avoid and annul the tenancy which they claimed in the lands now in suit and to eject them. Upon the objection of the defendants in that case, two other persons named Raj Kumar and Dengar were added as party-defendants as they claimed to hold as sub-tenants of the land. The plaintiff was successful in that litigation, and on the 9th July 1894 obtained a decree for khas possession; on the 22nd December 1894, he was put in symbolical possession by the Court. The plaintiff alleges that he subsequently settled the land with the actual cultivators of the soil who were in peaceful possession till they were disturbed by the present defendants on the 20th November 1896. Subsequently the plaintiff sued under section 9 of the Specific Relief Act, but was unsuccessful. The plaintiff accordingly brought the present suit on the 20th January 1900 for declaration of his title by purchase and for ejectment of the defendants. The first six defendants resisted the plaintiff's claim mainly on the ground that the decree in the previous suit was fraudulent and collusive and in no way binding on them, inasmuch as it was passed in a suit instituted against their vendors, long after they had parted with all their interest in the property in suit. In fact the defendants alleged that they had purchased from the original tenants Nagarbasi and Ram Chandra whatever interest they had in the property in suit under a conveyance dated the 17th November 1892; that consequently when in 1893 the plaintiff instituted the previous suit against those persons they [360] had no subsisting interest, and that therefore the proceedings in that suit were infructuous and the resulting decree was wholly inoperative. The defendants further contended that as the present suit was instituted more than twelve years after the date of the revenue sale, it was barred under Art. 121 of the Second Schedule of the Limitation Act. The Court of first instance found that the conveyance upon which the defendants sought to found their title purported to be in favour of two persons, namely, Prasanna Chandra Chatterjee, father of the first two defendants, and Ananda Chandra Acharjee, uncle of defendants 3 and 4, and father of defendants 5 and 6. It was also found that Ananda Chandra Acharjee was the pleader who had throughout conducted the defence in the previous litigation, that he had never disclosed his purchase during the pendency of the earlier suit, and that neither he nor his brother-in-law, Prasanna, who had joined with him on the purchase, came into possession of the property after the date of the conveyance. The learned Munsif accordingly concluded that the deed of sale was not *bona fide* and that the consideration was not proved to have passed. He held therefore that the decision in the previous suit was operative and binding on the present defendants, and made a decree for ejectment with mesne profits.

Upon appeal by the defendants, the decree of the Court of first instance has been reversed and the plaintiff's suit dismissed. The learned

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Subordinate Judge has held that the conveyance upon which the defendants rely is genuine and supported by consideration; he has further held, although his finding upon this point is not very clear, that the plaintiff obtained symbolical possession, but never succeeded in getting actual possession as against the defendants whose possession commenced at the latest about 1896, their vendors having admittedly lost possession within a year after the date of their conveyance of 1892. The Court below accordingly concluded that the previous decree was not binding upon the present defendants as they had not been made parties to the former suit and that there was no legal obligation upon them or their predecessors to come forward voluntarily and to disclose their title in the course of the previous litigation.

The plaintiff has appealed to this Court, and on his behalf it has been contended by his learned vakil that the defendants are [361] precluded from defeating the rights of the plaintiff under the decree of the previous suit, either on the ground of estoppel or by reason of their fraudulent conduct. The facts upon which reliance is placed on behalf of the appellants are, *first*, that Ananda Chandra had taken a conveyance of the property in suit before the litigation was commenced, and, *secondly*, that he conducted the defence in the previous suit with full knowledge that he himself as one of the transferees was interested in the properties in suit, that the actual defendants had no subsisting interest therein, and that the plaintiff had commenced, and was prosecuting, the action in ignorance of the transfer. We shall consider separately each of the two grounds upon which the decree in the previous suit is, it is contended, binding upon the present defendants.

First, as to the applicability of the doctrine of estoppel, we are of opinion that it cannot be successfully contended that the decree in the previous case was *inter partes* and consequently binding upon the present defendants. As pointed out by Romer, J., in *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Company* (1), a purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against his vendor commenced after the purchase. The view we take is supported also by the decision of this Court in the case of *Mohunt Das* v. *Nilkomul Dewan* (2). Again, it seems to us to be quite clear that section 115 of the Indian Evidence Act, which provides that "when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing," is of no avail to the plaintiff, if he relies merely upon the ground that the predecessors in interest of the present defendants did not disclose their title during the pendency of the previous litigation and does not further allege that he was induced to institute the previous action against persons who had parted with their interest in the property in suit, in reliance upon some representation, act or omission on the part of the predecessors of these defendants. It [362] may be assumed that by reason of the silence of the defendants or their predecessors, the plaintiff continued to prosecute the suit upon the impression on the basis of which he had instituted it; but section 115 of the Indian Evidence Act does not apply to a case in which a belief has not been initially caused, but when otherwise caused has been only allowed to

(1) (1894) 1 Ch. 578.

(2) (1889) 4. C. W. N. 283.

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continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised. We are bound to hold, therefore, that the plea of estoppel cannot be sustained on the ground it has been sought to be based, and that the defendants are not, on this ground, debarred from disputing the validity of the plaintiff's title to ejectment founded on the previous decree.

Secondly, as to the ground of fraud which, it is argued, disentitles the defendants from disputing the validity and the binding character of the previous decree. It has been conceded by the learned vakil for the appellant, and we think very properly, that if A institutes an action against B in respect of some property under a mistaken belief that B is the proper person to be sued there is no legal obligation upon C, the person who ought to be rightly held liable, to inform A of his mistake. It has also been conceded that if A erroneously institutes an action against B in respect of some property, there is no legal obligation on the part of the pleader employed by B to conduct his defence to disclose to A the name of the person properly liable to be sued. But it has been argued that in a case like the present where the events contemplated in the two illustrations have been combined and where the transferee from the original owners, who is the person liable to be sued, is present in Court and as pleader actively conducts the defence on behalf of the transferors, his silence ought to be regarded as fraudulent. In support of this position, reliance has been placed upon passages from Bigelow on Fraud, Vol. 1, page 611 ; Story on Equity Jurisprudence, sections 384, 385 ; and Ewart on Estoppel, page 40 ; reference was also made to the case of *M'Kenzie* v. *British Linen Company* (1).

After a careful examination of the authorities cited, we are unable to hold that they support the broad contention advanced on behalf of the appellants. It cannot be doubted that there may be cases in which there is deception by omission, but silence may be **[363]** treated as deception only when there is a duty to speak ; in other words, as Bigelow points out—" a duty to speak which is the ground of liability arises wherever and only where silence can be considered as having an active property, that of misleading." To take one illustration : the silence of A in the presence of B and C, who are negotiating in regard to a sale of property from B to C, estops A from claiming the property as against C, upon the conclusion of the sale ; but knowledge by an owner of property that some one is about to buy it from a third person does not impose upon the owner a duty to seek out the purchaser and advise him of the facts : *Pickard* v. *Sears* (2). The essence of the matter appears to be that in the one case silence may be treated as a true cause of the change of position, in the other case it cannot be so considered. The question consequently arises, whether there has been on the part of the defendants a disregard of a duty to speak. Now so far as Prasanna (through whom the first two defendants claim) is concerned, there is no suggestion that he was aware of the previous suit or that he in any manner aided or conducted the defence. In so far as Ananda (through whom defendants 3 to 6 claim) is concerned, it is argued that he was present throughout the litigation and actively conducted the defence, and that consequently his silence ought to be regarded as misleading and fraudulent. It appears to us to be unquestionable that from a moral and professional point of view, it was not right for him, as Mr. Justice Banerjee says in the case already referred to, " to have kept

(1) (1881) 6 App. Cas. 82.

(2) (1887) 6 A. & E. 469 ; 45 R. R. 538.

32 C. 357=1 C. L. J. 23.

the plaintiff in the dark and to have made him persevere in his mistake; but it is difficult to say that there was any legal obligation on him to apprise the plaintiff of his mistake. As was observed by Lord Chancellor Thurlow in *Fox* v. *Mackreth* (1), the question in such cases is, not whether an advantage has been taken which in point of morals is wrong, or which a man of delicacy would not have taken, but it is essentially necessary that there should be some obligation on the party sought to be made liable, to make the discovery, so as to bring his silence within some definition of fraud. Again, as pointed out by Story (Equity Jurisprudence, sections 204, 207) it is not every concealment which entitles [364] a party to the interposition of a Court of equity; "the case must amount to the suppression of facts which one party under the circumstances is bound in conscience and duty to disclose to the other party and in respect to which he cannot be innocently silent," or, in other words, "the true definition of undue concealment which amounts to a fraud in the sense of a Court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely in *foro conscientiæ, juris et de jure* to know." Now, it has been conceded by the learned vakil for the appellant that if Ananda had not acted as pleader for the defendants in the previous suit, no fraud could have been charged against him, and we find it difficult to hold that by reason of the additional fact that he acted in his professional capacity for the defendants in a suit erroneously instituted against them, his silence should be regarded as fraudulent in relation to the plaintiff, so as to entitle the latter to deprive him of the undoubted rights he had acquired by his purchase.

But although the plaintiff is not entitled, in our opinion, to have judgment in his favour upon the grounds we have discussed, there is another aspect of the case, which does not appear to have been very clearly appreciated in the Courts below, and upon which we think the plaintiff is entitled to succeed. The plaintiff alleged in his plaint that the predecessor of the defendants after their alleged purchase did not take possession of the property, but intentionally allowed their vendors to continue in possession as before, and consequently in ignorance of the transfer he instituted the previous suit against the original tenants. Now, it appears to us to be quite clear that if it is found as alleged that the predecessors in interest of the defendants after their purchase of the 17th November 1892 allowed their vendors to continue in possession with an intention to mislead the plaintiff, and if it is further found that he had been induced to institute the previous suit in ignorance of the transfer and in reliance upon the continued actual possession of the transferors, the position of the plaintiff would be materially altered. It is perfectly true that "silence without fraud cannot operate as an estoppel to assert one's rights over property [365] when the party sought to be estopped was at the time in possession, for possession is notice:" Bigelow on Estoppel, 4th ed., page 557. But in a case like the present where the purchaser intentionally leaves the vendor in possession with a view to mislead the plaintiff, where the plaintiff in ignorance of the transfer and in reliance upon the possession of the vendors sues them, and where one of the transferees with full knowledge that the suit has been erroneously instituted against persons who have no subsisting interest in the property in litigation, actively defends the suit,

(1) (1791) 2 R. R. 55.

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nominally as the agent of his vendors, but substantially for his own benefit, where all this is done with the view that the successful plaintiff may be met with the objection that the fruits of his litigation are illusory and that a subsequent claim by him may be effectively met by the bar of limitation, there is unmistakeable indication of fraud carefully planned and successfully carried out. There is, however, no clear finding in the judgment of the learned Subordinate Judge upon several of the points we have just indicated; for instance, he does not decide upon the question of possession immediately after the transfer of 1892 and at the date of the institution of the previous suit, nor has he decided whether the plaintiff was actually aware of the transfer, or sued the vendors of the defendants because he was misled by their continued possession. These are questions which must be investigated before the plaintiff's action can be dismissed. We may add that the case before us furnishes an illustration of the undoubted hardship which may be caused to an innocent person in the position of the plaintiff, by reason of an obvious defect in the law relating to the transfer of tenancies; and until the Legislature intervenes and provides for the service of notice upon the landlord in every case of a transfer of a tenancy of every description in some such manner as the one prescribed in section 12 of the Bengal Tenancy Act, cases like the present must occur.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge reversed, and the case remitted to him, so that he may rehear the appeal and determine the question of fraud in accordance with the observations contained in this judgment. If he determines the issue of possession and the question of fraud against the plaintiff, the suit must fail; if, on the other **[366]** hand, he finds upon these matters in favour of the plaintiff, the decree in the previous suit must be held to bind the defendants and the claim of the plaintiff must succeed as against them. If the Subordinate Judge considers that additional evidence is necessary to enable him to decide the case he will be at liberty to proceed under sections 568 and 569 of the Code of Civil Procedure.

The costs of this appeal will abide the result.

Appeal allowed: case remanded.

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32 C. 367 (=9 C. W. N. 364=1 C. L. J. 161=2 Cr. L. J. 110.)

[367] CRIMINAL REVISION.

Before Mr. Justice Henderson.

HARA CHARAN MOOKERJEE *v.* KING EMPEROR.*

[16th January, 1905.]

Judicial proceeding, offence in the course of—Resistance to delivery of possession—Criminal Procedure Code (Act V of 1898), ss. 4 (m), 476—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 328.

Where in an execution case a warrant for the delivery of possession of lands was entrusted for execution to the Nazir who went to the spot but was obstructed by the opposite party to the suit, and on his reporting the matter, the Munsif held an enquiry under s. 476 of the Criminal Procedure Code and sent the accused to the Magistrate for trial under s. 186 of the Penal Code:—

Held, that the "judicial proceeding" in the case determined when the Munsif finally decided the case, there being no further question left for determination as to the rights of the parties to the suit upon which evidence could

* Criminal Revision No. 992 of 1904, against the order of Gagan Behari Chowdhuri, Munsif of Narainganj, dated August 27, 1904.