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April 26

NAGUBAI AMMAL & OTHERS
v.
B. SHAMA RAO & OTHERS.

[S. R. DAS, C.J., VENKATARAMA AYYAR and JAFER IMAM JJ.]

Lis pendens, Scope of—If prevents passing of title as between the transferor and the transferee—Nonjoinder of Receiver in insolvency in the execution proceeding—Effect—Transferee pendente lite, if entitled to attack execution sale on that ground—Limitation and adverse possession against a purchaser in execution of a decree on a prior mortgage—Commencement—'Collusive' and 'fraudulent'—Distinction—Admission—Evidentiary value—When can shift the burden of proof—Maxim that 'a person cannot approbate and reprobate'—Applicability—Transfer of Property Act (IV of 1882), s. 52—Indian Limitation Act (IX of 1908), Art. 142.

The appellants as defendants in a suit for declaration of title to certain building sites sought to resist the respondents' claim, arising by purchase from a purchaser in a sale in execution of a mortgage decree passed on a mortgage deed of 1918, by a counter-claim based on a purchase of the same lands made in 1920 by their predecessor-in-interest from one of the mortgagors against whom was then pending a suit for maintenance and for declaration of a charge on the land in suit. That suit was decreed in 1921 and the lands were purchased by the decreeholder in execution of her decree in 1928. The mortgagor had been adjudged an insolvent in 1926 and the Official Receiver in whom his estate vested was not made a party to the execution proceeding. Suit to enforce the mortgage deed of 1918 was brought in 1933 impleading the Official Receiver and the purchaser in execution of the maintenance and charge decree but not the appellants. In execution of the decree passed in this suit, the lands in suit were sold to a third party in 1936 and in 1938 the respondent's father purchased them.

The respondent did not specifically raise the question of lis pendens in his pleading nor was an issue framed on the point, but he raised the question at the very commencement of the trial in his deposition, proved relevant documents which were admitted into evidence without any objection from the appellants who filed their own documents, cross-examined the respondent and invited the court to hold that the suit for maintenance and a charge and the connected proceedings evidenced by these documents were collusive in order to avoid the operation of s. 52 of the Transfer of Property Act. The District Judge held that the appellants' title acquired by the purchase of 1920 was extinguished by the sale held in execution of the charge decree by the operation of s. 52 of the Transfer of Property

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Act and decreed the suit and his decision was affirmed by the High Court in appeal.

Held, that the decisions of the courts below were correct and must be affirmed.

That in the facts and circumstances of the case the omission of the respondent to specifically raise the question of lis pendens in his pleading did not take the appellants by surprise and was a mere irregularity which resulted in no prejudice to them.

Rani Chandra Kunwar v. *Chaudhri Narpat Singh* ([1906] L.R. 34 I.A. 27), applied.

Siddik Mahomed Shah v. *Mt. Saran and Others* (A.I.R. 1930 P.C. 57), explained and held inapplicable.

That s. 52 of the Transfer of Property Act did not prevent the vesting of title in a transferee in a sale pendente lite but only made it subject to the rights of other parties as decided in the suit and subsequent insolvency of the transferor could not, therefore, vest any title in the Official Receiver or make the title of the execution purchaser liable to attack on the ground that the Receiver was not made a party to the execution proceeding. That even assuming that title could not wholly pass by a transfer pendente lite and some interest would still subsist in the transferor to vest in the Receiver, the lands in suit having been sold in execution of a charge decree, the sale would at the most be not binding on him and he could, if he so chose, move to set it aside; but the transferee pendente lite or his representative could not be allowed to make his non-joinder a ground for attacking the sale.

Wood v. *Surr* ([1854) 19 Beav. 551), applied.

Inamullah Khan v. *Shambhu Dayal* (A.I.R. 1931 All. 159), *Subbaiah* v. *Ramasami Goundan* (I.L.R. [1954] Mad. 80) and *Kala Chand Banerjee* v. *Jagannath Marwari* ([1927] L.R. 54 I.A. 190), referred to.

That no question of limitation or adverse possession really arose in the case. It was well settled that a claim of adverse possession could not affect the right of a prior mortgagee to bring the properties to sale and adverse possession against the purchaser under that sale could not commence prior to the date of sale.

Held further, that there was a fundamental distinction between a collusive and a fraudulent proceeding in that while the former was the result of an understanding between the parties, both the claim and the contest being fictitious, and the purpose to confound third parties, in the latter the contest was real, though the claim was untrue, and the purpose to injure the defendant by a verdict of the court obtained by practising fraud in it;

that an admission was a mere piece of evidence and could not be conclusive except by way of estoppel when it had been acted

upon to his detriment by the person to whom it was made, the weight to be attached to it depending on the circumstances of each case, and the onus of proving that it was not true could not shift to the maker of it unless it was so clear and unambiguous as to be conclusive in absence of any explanation from him.

Slatterie v. *Pooley*, ([1840] 6 M. & W. 664) and *Rani Chandra Kunwari* v. *Choudhri Narpat Singh* ([1906] L.R. 34 I.A. 27), referred to.

That the maxim that 'a person could not approbate and reprobate' had its origin in the doctrine of election and was confined to reliefs arising out of one and the same transaction and against the parties to it. Where, however, there was no question of election, as the relief claimed was one and the same, although based on different and inconsistent grounds, the maxim had no application.

Verschures Creameries Ltd. v. *Hull and Netherlands Steamship Company Ltd.* ([1921] 2 K.B. 608), considered and distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 216 of 1953.

On appeal from the judgment and decree dated the 8th March, 1951 of the Mysore High Court in Regular Appeal No. 123 of 1947-48 arising out of the decree dated the 23rd June 1947 of the Court of District Judge, Bangalore in Original Suit No. 84 of 1945-46.

K. S. Krishnaswami Iyengar and *M. S. K. Sastri* for the appellants.

R. Ganapathy Iyer and *K. R. Krishnaswamy* for the respondent No. 1.

1956. April 26. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—This appeal arises out of a suit instituted by one Krishna Rao, since deceased, and now represented by his son and heir, the respondent herein, for a declaration of his title to certain building sites situate in Bangalore in the State of Mysore, and for consequential reliefs. These properties belonged to one Munuswami, who died leaving him surviving his third wife Chellammal, three sons by his predeceased wives, Keshavananda,

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Madhavananda and Brahmananda, and three minor daughters, Shankaramma, Srikantamma and Devamma. On 1-9-1918 the three brothers executed a usufructuary mortgage for Rs. 16,000 in favour of one Abdul Huq over a bungalow and vacant sites including the properties concerned in this litigation. A period of three years was fixed for redemption. There was a lease back of the properties by the mortgagee to the mortgagors on 3-9-1918, and it was also for a period of three years. On 6-9-1918 the three brothers effected a partition under a deed, Exhibit K, which provided *inter alia* that they were to pay each a sum of Rs. 8 per mensem to their step-mother, Chellammal, for her maintenance, and that their step-sisters should be under their protection.

On 6-6-1919 Chellammal presented a plaint *in forma pauperis* claiming maintenance and praying that it might be charged on the properties specified in the plaint. That was Miscellaneous Case No. 377 of 1918-19. At the same time, she also presented as the next friend of her minor daughters, Srikantamma and Devamma, two plaints *in forma pauperis*, Miscellaneous Cases Nos. 378 and 379 of 1918-19 claiming maintenance and marriage expenses for them, and praying that the amounts decreed might be charged on the schedule-mentioned properties. The properties which are involved in this suit are included in item 8 in schedule A annexed to all the three plaints. On 17-6-1920 permission to sue *in forma pauperis* was granted in all the three cases, and they were registered as Suits Nos. 98 to 100 of 1919-20. We are concerned in this appeal with only one of them, the suit of Devamma which was Miscellaneous Case No. 379 of 1918-19, subsequently registered as Suit No. 100 of 1919-20.

The suits were contested, and decreed after trial on 12-12-1921. The decree in O. S. No. 100 of 1919-20 directed the defendants each to pay to the plaintiff a sum of Rs. 6 per mensem for maintenance until her marriage and Rs. 1,500 for marriage expenses, and the payment of the amount was made a first charge on the properties. In execution of this decree, the

properties with which we are now concerned, were sold on 2-8-1928 and purchased by Devamma, the decree-holder. A sale certificate was issued to her on 21-11-1930 (Exhibit J-5). Proceedings were also taken in execution of the decrees obtained by Chellammal and Srikantamma and of one Appalaraju, and all the properties comprised in the mortgage were sold and purchased by third parties. It must be mentioned that all the three brothers were adjudicated insolvents on their own application, Brahmananda by an order dated 23-3-1923 in Insolvency Case No. 7 of 1921-22 and Keshavananda and Madhavananda by an order dated 19-2-1926 in Insolvency Case No. 4 of 1925-26. It also appears from the evidence of D.W. 5 that at about this time all of them left the place.

While these proceedings were going on, Abdul Huq, the mortgagee, filed on 16-8-1921, O.S. No. 27 of 1921-22 against Keshavananda and his two brothers for recovery of arrears of rent due by them under the lease deed, and obtained a decree on 21-10-1921 but was unable to realise anything in execution thereof, and the execution petition was finally dismissed on 22-1-1926. He then filed a second suit against the mortgagors, O.S. No. 86 of 1931-32, for arrears of rent for a period subsequent to that covered by the decree in O.S. No. 27 of 1921-22 and for possession of the properties on the basis of the lease dated 3-9-1918, and obtained a decree on 22-3-1932 but was unable to get possession, as the properties were in the occupation of third parties under claims of right. Abdul Huq died on 20-3-1933, and thereafter, his legal representatives filed on 30-8-1933 O.S. No. 8 of 1933-34 to enforce their rights under the mortgage deed dated 1-9-1918. Among the defendants who were impleaded in this suit were the mortgagors Keshavananda and Madhavananda, Gururaja, son of Brahmananda who had died, the Official Receiver and the purchasers of the mortgaged properties in execution of the maintenance decrees and the decree of Appalaraju. Devamma was the third defendant in this action. The plaint alleged that the mortgagors had failed to

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pay rent as provided in the lease deed dated 3-9-1918, and had suffered collusive decrees to be passed against them in the maintenance suits and other actions, and that properties had been sold fraudulently in execution of those decrees. On the basis of these allegations, the plaintiffs prayed for a decree for possession as against the purchasers including Devamma, and for a sum of Rs. 5,000 as damages. In the alternative, they prayed for a decree for sale of the mortgaged properties for the amount due under the mortgage.

The suit was contested, and issues raised as to whether the sales were collusive, and whether the plaintiffs were entitled to possession and damages, and alternatively, as to what amounts were payable under the mortgage and to what reliefs the plaintiffs were entitled. At the trial, the plaintiffs abandoned the relief as to possession and damages, and it accordingly became unnecessary to go into the question as to the collusive character of the maintenance decrees and the execution sales. On 26-9-1935 a decree was passed determining the amount payable to the plaintiffs on redemption, providing for payment thereof on or before 26th January 1936, and in default, directing the sale of the properties. In execution of this decree, the properties were sold in court-auction sometime in 1936, and purchased by one Chapman, and possession was taken by him through court on 18-2-1937. On 25-1-1938, Saldhana, who was the agent of Chapman, and became his executor on his death, sold the building sites now in dispute and forming part of the properties purchased in court auction, to Krishna Rao, the plaintiff in the present action. When Krishna Rao attempted to take possession of the sites, he was obstructed by one Garudachar, claiming title under a sale deed dated 1-12-1932 executed by one Lokiah, the husband of Srikantamma, sister of Devamma, and he accordingly filed O.S. No. 92 of 1938-39 in the court of the Subordinate Judge, Bangalore for establishing his title to the suit properties, and for an injunction restraining Garudachar from interfering with his possession. The

suit was decreed on 23-7-1940, and the matter having been taken in appeal to the High Court by Garudachar, the parties entered into a compromise, and a decree, Exhibit E-1, was passed in terms thereof on 18-9-1942. Under this decree, the title of the plaintiff to the suit properties was recognised. After obtaining this decree, Krishna Rao started building on the sites, when he met with fresh obstruction, this time from the appellants who set up that they were in possession under a claim of title.

Under the partition deed entered into by the mortgagors on 6-9-1918 (Exhibit K), Keshavananda was allotted two plots, Nos. 3 and 4 to the west of East Lal Bagh Road in the plan, Exhibit G. These are the very plots, which form the subject-matter of the present suit. On 30-1-1920 Keshavananda conveyed these properties to Dr. Nanjunda Rao under a deed of sale, Exhibit VI. There was on the same date a sale by Brahmananda of plots Nos. 1 and 2 to Dr. Nanjunda Rao, but those properties are not involved in this litigation. On the death of Dr. Nanjunda Rao, his sons partitioned the properties, and in the division the suit properties fell to the share of one Raghunatha Rao, and on his death in 1938, his estate devolved on his widow, Nagubai, who is the first appellant. On 28-5-1939 she executed a trust deed settling a moiety of these properties on the Anjaneyaswami Temple at Karaikal, and the trustees of that institution are the other appellants in this appeal. In view of their obstruction, Krishna Rao instituted the suit out of which the present appeal arises, for a declaration of his title to the sites in question, and for an injunction restraining the defendants from interfering with his possession, or in the alternative, for a decree in ejectment if they were held to be in possession. The claim made in the plaint is a simple one. It is that the title of Chapman as purchaser in execution of the decree passed on the mortgage dated 1-9-1918 prevailed against all titles created subsequent to that date, and that accordingly Dr. Nanjunda Rao and his successors acquired under the sale deed dated 30-1-1920 no title which could be

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set up as against that of the plaintiff. The defendants contested the suit on the ground, firstly, that as they were not impleaded as parties in the suit on the mortgage, O.S. No. 8 of 1933-34, their right of redemption remained unaffected by the decree passed therein or the sale in execution thereof; and secondly, that the suit was barred by limitation, because the plaintiff was not in possession within 12 years of the suit, and also because the defendants had acquired title to the suit properties by adverse possession for over 20 years.

The District Judge of Bangalore, who tried the suit, held that the title of Dr. Nanjunda Rao to the suit properties under the sale deed dated 30-1-1920 was, under section 52 of the Transfer of Property Act, subject to the result of the maintenance suit of Devamma (O.S. No. 100 of 1919-20), and was in consequence extinguished by the purchase by her in execution of the charge decree in that suit. On the question of limitation, the learned Judge held that the plaintiff had established possession of the properties within 12 years of the suit, and that the defendants had failed to establish title by adverse possession. In the result, he granted a decree in favour of the plaintiff for possession of the suit properties. The defendants appealed to the High Court, Mysore and by their judgment dated 8-3-1951 the learned Judges agreed with the District Judge that by reason of section 52 of the Transfer of Property Act, the title of Dr. Nanjunda Rao based on the deed dated 30-1-1920 came to an end when Devamma purchased the properties in execution of her maintenance decree, and dismissed the appeal, but granted a certificate under article 133(1) of the Constitution, and that is how the appeal comes before us.

Notwithstanding the tangle of legal proceedings extending over 30 years, which forms the background of the present litigation, the single and sole question that arises for decision in this suit is whether the sale deed dated 30-1-1920 under which the appellants claim is subject to the result of the sale dated 2-8-1928 in execution of the decree in O.S. No. 100 of

1919-20 by reason of the rule of *lis pendens* enacted in section 52 of the Transfer of Property Act. If it is, it is not in dispute that it becomes avoided by the purchase by Devamma on 2-8-1928. If it is not, it is equally indisputable that the appellants as purchasers of the equity of redemption from Keshavananda have a right to redeem the mortgage dated 1-9-1918, and not having been impleaded in O.S. No. 8 of 1933-34 are not bound either by the decree passed therein or by the sale in execution thereof.

On this question, as the plaint in O.S. No. 100 of 1919-20 praying for a charge was presented on 6-6-1919, the sale to Dr. Nanjunda Rao subsequent thereto on 30-1-1920 would *prima facie* fall within the mischief of section 52 of the Transfer of Property Act, and would be hit by the purchase by Devamma on 2-8-1928 in execution of the charge decree. Sri K. S. Krishnaswami Ayyangar, learned counsel for the appellants, did not press before us the contention urged by them in the courts below that when a plaint is presented *in forma pauperis* the *lis* commences only after it is admitted and registered as a suit, which was in this case on 17-6-1920, subsequent to the sale under Exhibit VI—a contention directly opposed to the plain language of the Explanation to section 52. And he also conceded and quite rightly, that when a suit is filed for maintenance and there is a prayer that it be charged on specified properties, it is a suit in which right to immovable property is directly in question, and the *lis* commences on the date of the plaint and not on the date of the decree, which creates the charge. But he contends that the decision of the courts below that the sale deed dated 30-1-1920 is hit by section 52 is bad on the following three grounds: (1) The question of *lis pendens* was not raised in the pleadings, and is not open to the plaintiff. (2) The suit for maintenance, O.S. No. 100 of 1919-20 and the sale in execution of the decree passed therein are all collusive, and section 52 has accordingly no application. (3) The purchase by Devamma in execution of the decree in O.S. No. 100 of 1919-20 on 2-8-1928 is void and inoperative, as the Official Receiver in whom

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the estate of Keshavananda had vested on 19-2-1926 was not a party to the sale proceedings. These contentions must now be considered.

4. We see no substance in the contention that the plea of *lis pendens* is not open to the plaintiff on the ground that it had not been raised in the pleadings. It is true that neither the plaint nor the reply statement of the plaintiff contains any averment that the sale is affected by the rule of *lis pendens*. Nor is there any issue specifically directed to that question. It is argued for the respondent that the allegations in para 4 of the plaint and in para 5 of the reply statement that Dr. Nanjunda Rao being a transferee subsequent to the mortgage could claim no right "inconsistent with or superior to those of the mortgagee and the auction-purchaser" are sufficiently wide to embrace this question, and reference was made to issue No. 3 which is general in character. Even if the plaintiff meant by the above allegations to raise the plea of *lis pendens*, he has not expressed himself with sufficient clearness for the defendants to know his mind, and if the matter had rested there, there would be much to be said in favour of the appellant's contention. But it does not rest there.

The question of *lis pendens* was raised by the plaintiff at the very commencement of the trial on 8-3-1947 when he went into the witness-box and filed in his examination-in-chief Exhibit J series, relating to the maintenance suits, the decrees passed therein and the proceedings in execution thereof, including the purchase by Devamma. This evidence is relevant only with reference to the plea of *lis pendens*, and it is significant that no objection was raised by the defendants to its reception. Nay, more. On 13-3-1947 they cross-examined the plaintiff on the collusive character of the proceedings in Exhibit J series, and filed documents in proof of it. The trial went on thereafter for nearly three months, the defendants adduced their evidence, and the hearing was concluded on 2-6-1947. In the argument before the District Judge, far from objecting to the plea of *lis pendens* being permitted to be raised, the defendants argued

the question on its merits, and sought a decision on the evidence that the proceedings were collusive in character, with a view to avoid the operation of section 52 of the Transfer of Property Act. We are satisfied that the defendants went to trial with full knowledge that the question of *lis pendens* was in issue, had ample opportunity to adduce their evidence thereon, and fully availed themselves of the same, and that, in the circumstances, the absence of a specific pleading on the question was a mere irregularity, which resulted in no prejudice to them.

It was argued for the appellants that as no plea of *lis pendens* was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30-1-1920 was affected by *lis*; and reliance was placed on the observations of Lord Dunedin in *Siddik Mahomed Shah* v. *Mt. Saran and others*(1) that "no amount of evidence can be looked into upon a plea which was never put forward". The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto. The rule applicable to this class of cases is that laid down in *Rani Chandra Kunwar* v. *Chaudhri Narpat Singh: Rani Chandra Kunwar* v. *Rajah Makund Singh*(2). There, the defendants put forward at the time of trial a contention that the plaintiff had been given away in adoption, and was in consequence not entitled to inherit. No such plea was taken in the written statement; nor was any issue framed thereon. Before the Privy Council, the contention was raised on behalf of the plaintiff that in view of the pleadings, the question of adoption was not open to the defendants. It was

(1) A.I.R. 1930 P.C. 57.

(2) [1906-07] L.R. 34 I A. 27.

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held by Lord Atkinson overruling this objection that as both the parties had gone to trial on the question of adoption, and as the plaintiff had not been taken by surprise, the plea as to adoption was open to the defendants, and indeed, the defendants succeeded on that very issue. This objection must accordingly be overruled.

2. It is next contended that section 52 of the Transfer of Property Act does not operate to extinguish the title of Dr. Nanjunda Rao and his successors under the sale dated 30-1-1920, because the proceedings which resulted in the decree in O. S. No. 100 of 1919-20 and the sale in execution thereof on 2-8-1928 were all collusive. Whether they were so or not is essentially a question of fact, and both the courts below have concurred in answering it in the negative. It is contended for the appellants that this finding is the result of an error into which the learned Judges of the High Court fell as to the incidence of burden of proof, and it should not therefore be accepted. The argument is that Abdul Huq, his legal representatives and the plaintiff himself had admitted again and again in judicial proceedings taken with reference to the suit properties that the decree and sale in O. S. No. 100 of 1919-20 were collusive, and that, in consequence, even if the initial onus of establishing this fact was on the defendants, that was shifted on to the plaintiff on proof of the above-mentioned admissions, and as there was no evidence worth the name on his side to explain them, he must fail.

We must now examine the several statements which are relied on by the appellants as admissions, ascertain what their true import is, and determine what weight should be attached to them. On 27-6-1932 Abdul Huq moved the insolvency court for a direction to the Official Receiver to take possession of the mortgaged properties, which were stated to be in the occupation of one Lokiah. This Lokiah, it has been already mentioned, is the husband of Srikantamma, the sister of Devamma, he having married her after the maintenance suits had been decreed and sometime

prior to the court auction in 1928. In his petition, Abdul Huq alleged that Lokiah conducted proceedings in execution of the decree in O.S. No. 100 of 1919-20 in collusion with the insolvents and without notice to the Official Receiver, and purchased the properties in court auction on 2-8-1928 on behalf of the decree-holder. The decree itself was not attacked as collusive, and as for the sale dated 2-8-1928 it was distinctly alleged in para 3 of the petition that the purchase by Lokiah was for the benefit of Devamma. The substance of the complaint of Abdul Huq was that the execution proceedings and the sales were fraudulent, and intended to defeat his rights to the rents and profits from the properties. In other words, the ground of attack on the sale dated 2-8-1928 was not that it was unreal and collusive, but that it was real but fraudulent.

Now, there is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose". (Wharton's Law Lexicon, 14th Edition, page 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest. The allegations in the petition of Abdul Huq set out above show that the suit itself was not attacked as collusive, but that the execution

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proceedings were impeached as fraudulent. It should be mentioned that on this petition the District Judge passed an order on 30-6-1932 directing the Official Receiver to take the necessary steps and report. But nothing came out of this.

We next come to a petition filed after the death of Abdul Huq by his legal representatives asking for permission of the insolvency court to institute a suit on the mortgage dated 1-9-1918 impleading the Official Receiver as party. The allegations made in the petition are on the same lines as those made by Abdul Huq in his petition dated 27-6-1932, and they do not carry the matter any further. This petition was ordered, and on 30-8-1933 O.S. No. 3 of 1933-34 was instituted. In this suit, as already stated, the plaintiffs sought to recover possession of the properties on foot of the usufructuary mortgage, and ancillary to that relief, they claimed damages from the defendants who were in possession, on the ground that the execution proceedings under which they got into possession were collusive and fraudulent. Thus far, the allegations are a mere repetition of what had been stated in the prior proceedings. But the plaint in the suit went further, and stated for the first time that the proceedings in O.S. No. 100 of 1919-20 and the decree passed therein were collusive. But these allegations were made only as the basis of the claim for damages for non-payment of rent under the lease deed dated 3-9-1918 and non-surrender of possession of the properties, and their true import is that the suit was fraudulent and intended to deprive the mortgagee of the rents and profits to which he was entitled. At the trial, as already stated, the relief for possession and damages was given up, the question as to the collusive character of the sale was abandoned, and a decree for sale was passed. These proceedings are open to the same comment as was made on the petition of Abdul Huq, and do not assist the defendants.

It remains to deal with a proceeding to which the present plaintiff was a party. It will be remembered that after his purchase he was obstructed in his

possession by one Garudachar, and he had to file O.S. No. 92 of 1938-39 to establish his title against him. In his plaint in that suit he stated, obviously adopting what Abdul Huq and his legal representatives had previously alleged, that the decree in O.S. No. 100 of 1919-20 and the execution sale on 2-8-1928 were collusive. On behalf of the appellants, a contention is urged that as the plaintiff obtained a decree in O.S. No. 92 of 1938-39 on the strength of the above allegations, it is not open to him in these proceedings to go back on them, and plead the contrary. That is a contention which will be presently considered. But apart from that, the statements of the plaintiff in his plaint in O.S. No. 92 of 1938-39 considered purely as admissions, do not carry the matter beyond the point to which the statements made by Abdul Huq and his legal representatives in the prior proceedings take us. The question then is, what is the effect to be given to these statements?

An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. In the present case, there is no question of estoppel, as the title of Dr. Nanjunda Rao arose under a purchase which was long prior to the admissions made in 1932 and in the subsequent years. It is argued for the appellants that these admissions at the least shifted the burden on to the plaintiff of proving that the proceedings were not collusive, and that as he gave no evidence worth the name that these statements were made under a mistake or for a purpose and were, in fact, not true, full effect must be given to them. Reliance was placed on the well-known observations of Baron Park in *Slatterie* v. *Pooley*(1) that "what a party himself admits to be true may reasonably be presumed to be so", and on the decision in *Rani Chandra Kunwar* v. *Chaudhri*

(1) [1840] 6 M. & W. 664, 669; 151 E.R. 579, 581.

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Narpat Singh: *Rani Chandra Kunwar* v. *Rajah Makund Singh*(1), where this statement of the law was adopted. No exception can be taken to this proposition. But before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained. It has been already pointed out that the tenor of the statements made by Abdul Huq, his legal representatives and the plaintiff was to suggest that the proceedings in O. S. No. 100 of 1919-20 were fraudulent and not collusive in character. Those statements would not, in our opinion, be sufficient, without more, to sustain a finding that the proceedings were collusive.

But assuming that they are sufficient to shift the burden on to the plaintiff of proving that the decree and sale in O. S. No. 100 of 1919-20 were not collusive, the evidence adduced by him is, in our opinion, ample to discharge that burden. He has filed Exhibit J series, which give a complete picture of the proceedings in O. S. No. 100 of 1919-20. Under the partition deed, Exhibit K, it will be remembered, the brothers agreed to pay a monthly maintenance of Rs. 8 each to their step-mother, Chellammal. This, however, was not charged on the family properties. With reference to their step-sisters, Srikantamma and Devamma, the provision was simply that the brothers should protect them. It will also be remembered that under the partition Keshavananda and Brahmananda each got two vacant sites in full quit of their shares. It appears from Exhibit J-10, paragraph 2, that the two brothers were contemplating the disposal of their plots, in which case the claim of Chellammal and the step-sisters to maintenance would be defeated. It became accordingly necessary for them to safeguard their rights, and for that purpose, to file suits for maintenance and claim a charge therefor on the family properties. That the apprehensions of Chellammal were well-founded is established by the fact that the two brothers entered into agreements for the sale of their vacant sites to Dr. Nanjunda Rao on 20-10-1919, and sale deeds were actually executed

(1) [1906-07] L.R. 34 I.A. 27.

pursuant thereto on 30-1-1920. There cannot be any doubt, therefore, that the suits were *bona fide*. This conclusion is further reinforced when regard is had to the conduct of the litigation. Two of the brothers contested the suit. It underwent several adjournments, and was heard finally in December 1921. At the trial, a number of witnesses were examined on either side, and the judgment, Exhibit J-6, shows that the contest centred round the quantum of maintenance payable to the plaintiffs, and it was keen, even bitter. When at last the plaintiffs obtained decrees, they had no easy time of it in realising the fruits thereof. The troubles of a creditor, it has been said, begin after he obtains a decree, and so it was with the plaintiffs. Exhibit J-4 shows that Devamma had to file several applications for execution, before she could finally bring the properties to sale and in view of the heavy encumbrances to which they were subject, she had herself to purchase them on 2-8-1928. The sale was confirmed on 21-11-1930, and the sale certificate, Exhibit J-5, was issued, and she got into possession. To sum up, the claim on which the suit was laid was true and honest; it was hotly contested by the defendants, and prolonged proceedings in execution had to be taken for realising the fruits of the decree. These are facts which are eloquent to show that the suit in O.S. No. 100 of 1919-20 and the sale on 2-8-1928 were not collusive.

The plaintiff also went into the box, and stated in cross-examination that though when he filed O.S. No. 92 of 1938-39 he had thought that the proceedings were collusive, he now thought otherwise. Counsel for the appellants strongly criticised this evidence, and contended that in the absence of facts as to why he changed his mind, the statement of the plaintiff that he now thought otherwise was worthless. But then, the plaintiff as also Abdul Huq and his legal representatives were utter strangers, and their statement about the collusive character of the proceedings, in O.S. No. 100 of 1919-20 could only be a matter of inference. If on the materials then before him the plaintiff could have thought that those proceedings

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were collusive, there is no reason why on the materials now before him he could not think otherwise. It was open to the defendants to have further cross-examined him about the materials which led him to change his opinion, but they chose not to pursue the matter. Both the courts below have, on a careful consideration of the record, come to the conclusion that the proceedings in O.S. No. 100 of 1919-20 were not collusive, and we do not see sufficient grounds for disturbing that finding, which must be affirmed.

We shall now deal with the contention of the appellants that in view of what happened in O.S. No. 92 of 1938-39 it is not open to the plaintiff to plead in these proceedings that the decree and sale in O.S. No. 100 of 1919-20 are not collusive. It is argued that in his plaint in O.S. No. 92 of 1938-39 the plaintiff alleged that the proceedings in O.S. No. 100 of 1919-20 were collusive, adduced evidence in proof of these allegations, persuaded the court to give a finding to that effect, and obtained a decree on the basis of that finding, and he cannot therefore be permitted in this litigation to change his front and plead that the proceedings in O.S. No. 100 of 1919-20 are not collusive and succeed on it. This bar arises, it is argued, on the principle that a person cannot both approbate and reprobate.

Now, the facts relating to the litigation in O.S. No. 92 of 1938-39 are that Garudachar set up title to the suit properties under a purchase dated 1-12-1932 from Lokiah, and it was the truth and validity of this sale that was really in question in that suit. Lokiah purchased these and other properties in execution of the money decree of one Appalaraju, and therefore his title cannot prevail as against that of Devamma under the purchase under the charge decree on 2-8-1928. In his plaint in O.S. No. 92 of 1938-39, the plaintiff attacked the purchases of both Devamma and of Lokiah as fraudulent and collusive. But, in fact, as Garudachar did not claim any title under Devamma, there was no need to attack the purchase by her on 2-8-1928. The suit was contested,

and in the judgment that was given, Exhibit E, the title of the plaintiff was upheld and a decree granted in his favour. There was an appeal against the decree by Garudachar, R.A. No. 101 of 1940-41, and that was disposed of on a compromise by the parties, under which the title of the plaintiff to the suit properties was affirmed and Garudachar was granted some other vacant sites in satisfaction of his claim. It is difficult to say on these facts that the allegation of the plaintiff that the proceedings in O.S. No. 100 of 1919-20 were collusive was either the foundation of his claim, or that he obtained any benefit under the decree on that basis. Counsel for the appellants sought to rely on the findings in Exhibit E, as establishing that the proceedings in O.S. No. 100 of 1919-20 were collusive. But as that judgment was not inter parties, the findings therein are inadmissible in this litigation, and, moreover, there having been an appeal against that judgment, the findings in Exhibit E lost their finality, and when the parties settled their claim by granting to Garudachar another property in substitution, they ceased to possess any force even inter parties.

But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in O. S. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in O. S. No. 100 of 1919-20 are not collusive, not on the ground of *res judicata* or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Company Ltd.*(1), and in particular, the observations of Scrutton, L.J., at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree. Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and

(1) [1921] 2 K B. 608.

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breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L. J.:

"Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act".

The observations of Scrutton, L. J. on which the appellants rely are as follows:

"A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election—namely, that no party can accept and reject the same instrument: *Ker* v. *Wauchope*(1): *Douglas-Menzies* v. *Umphelby*(2). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction".

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's Laws of England, Volume XIII, page 454, para 512:

"On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs),

(1) [1819] 1 Bli. 1, 21. (2) [1908] A C. 224, 232.

be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it".

The plaintiff obtained no advantage against the appellants by pleading in O. S. No. 92 of 1938-39 that the proceedings in O. S. No. 100 of 1919-20 were collusive; nor did they acting on those pleadings acquire rights to the suit properties. Nor is there any question of election, because the only relief which the plaintiff claimed in O. S. No. 92 of 1938-39 and which he now claims is that he is entitled to the suit properties. Only, the ground on which that relief is claimed is different and, it is true, inconsistent. But the principle of election does not forbid it, and there being no question of estoppel, the plea that the proceedings in O. S. No. 100 of 1919-20 are not collusive is open to the plaintiff.

3. It was finally contended that the purchase by Devamma in execution of the decree in O. S. No. 100 of 1919-20 was void and conferred no title on her, because the Official Receiver in whom the estate of Keshavananda, the mortgagor, had vested on his adjudication as insolvent on 19-2-1926 had not been made a party to those proceedings, and that, in consequence, the title of Dr. Nanjunda Rao and his successors under the sale deed dated 30-1-1920 continued to subsist, notwithstanding the court auction sale on 2-8-1928. The obvious answer to this contention is that the properties which were sold on 2-8-1928 did not vest in the Official Receiver on the making of the order of adjudication on 19-2-1926, as they had been transferred by the mortgagor, long prior to the presentation of Insolvency Case No. 4 of 1925-26 under the very sale deed dated 30-1-1920, which forms the root of the appellants' title. That sale was no doubt *pendente lite*, but the effect of section 52 is not to wipe it out altogether but to subordinate it to the rights based on the decree in the suit. As between the

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parties to the transaction, however, it was perfectly valid, and operated to vest the title of the transferor in the transferee. Under section 28(2) of the Insolvency Act, what vests in the Official Receiver is only the property of the insolvent, and as the suit properties had ceased to be his properties by reason of the sale deed dated 30-1-1920, they did not vest in the Official Receiver, and the sale held on 2-8-1928 is not liable to be attacked on the ground that he had not been impleaded as a party thereto.

But it is argued for the appellants that having regard to the words of section 52 that *pendente lite* "the property cannot be transferred", such a transfer must, when it falls within the mischief of that section, be deemed to be *non est*, that in consequence Keshavananda must, for purposes of *lis pendens*, be regarded as the owner of the properties, notwithstanding that he had transferred them, and that the Official Receiver who succeeded to his rights had a right to be impleaded in the action. This contention gives no effect to the words "so as to affect the rights of any other party thereto under any decree or order which may be made therein", which make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers *pendente lite* have been held to be valid and operative as between the parties thereto. It will be inconsistent to hold that the sale deed dated 30-1-1920 is effective to convey the title to the properties to Dr. Nanjunda Rao, and that, at the same time, it was Keshavananda who must be deemed to possess that title. We are, therefore, unable to accede to the contention of the appellants that a transferor *pendente lite* must, for purposes of section 52, be treated as still retaining title to the properties.

But assuming that Keshavananda had still some interest in the properties left even after he had sold them on 30-1-1920 and that it would vest in the Official Receiver on the making of the order of adjudication on 19-2-1926, what is its effect on the title of Devamma as purchaser in court auction in execu-

tion of her charge decree? It has been held by the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari*(1) that when in execution of a mortgage decree properties are sold without notice to the Official Receiver in whom the equity of redemption had vested prior to the sale, such sale would not be binding on him. But here, it is not the Official Receiver, who impeaches the sale as bad. In fact, he was a party to O.S. No. 8 of 1933-34 and would be bound by the sale in execution of the decree therein, under which the plaintiff claims. It is the purchaser *pendente lite* in the charge suit, O.S. No. 100 of 1919-20, that now attacks the sale held on 2-8-1928 as null and void. Is he entitled to do so? Counsel for the respondent has invited our attention to the decision in *Wood* v. *Surr*(2). There, the mortgagor filed a suit for redemption in 1838. A preliminary decree for accounts was passed in 1843 and pursuant thereto, a final decree was made in 1848 declaring the amount payable, and time for payment was given till 1849. The amount not having been paid, the mortgage became foreclosed. During the pendency of these proceedings, the mortgagor was adjudicated bankrupt in 1844, but the Official Assignee, in whom the equity of redemption had vested, was not impleaded in the mortgage action. In 1841, the mortgagor had created a further mortgage in favour of one Mrs. Cuppage, and she was not made a party in the redemption suit. After the foreclosure of the mortgage in 1849, one Mr. Wood claiming in the rights of Mrs. Cuppage instituted an action to redeem the mortgage. The question was whether being transferee *pendente lite* he was bound by the foreclosure proceedings. The contention on his behalf was that as the official assignee was not a party to those proceedings, there had been no proper foreclosure, and that the whole matter was at large. In negativing this contention, Sir John Romilly, M. R. observed:

"There can be no question but that the suit (Davis's suit) was defective by reason of no notice having been taken of the insolvency. The proceeding

(1) [1927] L R. 54 I.A. 190. (2) [1854] 19 Beav. 551; 52 E.R. 465.

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having gone on exactly as if no insolvency had taken place, the subsequent proceedings would, in my opinion, be wholly inoperative against the assignee-in-insolvency and if he thought fit to contest the validity of the decree of foreclosure against Davis, it could not be held to be binding on such assignee. But that does not conclude the question, which really is, whether the plaintiff who, but for this, would in truth have been bound, can take advantage of this objection. I am of opinion that although the suit was undoubtedly defective, by reason of this insolvency, the assignee alone could take advantage of this defect. It is obvious that Davis himself could not take advantage of it, or if from any subsequent cause, or any subsequent circumstance, the insolvency or bankruptcy had been superseded or annulled, he could not have said that the foreclosure was not absolute against him".

These observations directly cover the point now in controversy, and they embody a principle adopted in the law of this country as to the effect of a sale in execution of a decree passed in a defectively constituted mortgage suit. Such a sale, it has been held, does not affect the rights of redemption of persons interested in the equity of redemption, who have not been impleaded as parties to the action as they should have been under Order 34, Rule 1, Civil Procedure Code but that it is valid and effective as against parties to the action. This rule has been affirmed even when the person in whom the equity of redemption had vested is the Official Receiver, and he had not been made a party to the proceedings resulting in sale. Vide *Inamullah Khan* v. *Shambhu Dayal*(1) and *Subbaiah* v. *Ramasami Goundan*(2). We should accordingly hold that even assuming that the equity of redemption in the suit properties vested in the Official Receiver on the adjudication of Keshavananda, his non-joinder in the execution proceedings did not render the purchase by Devamma a nullity, and that under the sale she acquired a good and impeccable title, subject to any right which the Official Receiver

(1) A.I.R. 1931 All. 159. (2) I.L.R. [1954] Mad. 80.

might elect to exercise, and it is not open to attack by the transferee *pendente lite* under the deed dated 30-1-1920 and his representatives, the present appellants. In the result, we agree with the courts below that the title of the appellants has been extinguished under section 52 of the Transfer of Property Act, by the court sale dated 2-8-1928.

It must be mentioned that the appellants also pleaded that the suit was barred by limitation under article 142 on the ground that the plaintiff and his predecessors had not been in possession within 12 years of the suit, and that further the defendant had acquired title by adverse possession commencing from 1920. The learned District Judge, found on both the issues in favour of the plaintiff, and though the correctness of these findings was attacked in the grounds of appeal to the High Court, there is no discussion of the question in the judgment of the learned Judges, and we must take it that the point had been abandoned by the appellants. We accordingly declined to hear them on this question. We may add that the question of limitation cannot really arise on the facts of this case, inasmuch as the possession which is claimed to be adverse is stated to have commenced in 1920, and it is well settled that such possession cannot affect the right of a prior mortgagee to bring the properties to sale, and adverse possession against the purchaser under that sale cannot commence prior to the date of that sale, and the present suit was instituted on 8-1-1945 within 12 years of the sale, which took place in 1936.

The appeal fails, and is dismissed with costs.
