

the 10th of September, 1908. We think that that period ought to be deducted, because the whole proceeding from the 23rd of May to the 3rd of December, when the certificate was given, was substantially one continuous proceeding. It is true that the conciliator held on the 20th of September, 1908, that the certificate granted by him on the 31st of August, 1908, had become useless; but when we look at the facts, it appears to us that the old certificate merged in the new. It is urged, however, by Mr. R. R. Desai that this is a new case altogether which was not presented to either of the Courts below, and that it raised new facts which ought not to be allowed in second appeal; but assuming that it is a question of fact, we have jurisdiction under the new Civil Procedure Code to record our finding upon it, as the question was not determined by the Courts below and arises on facts which are admitted.

Therefore, looking to the whole proceeding from the 23rd of May 1908 to the 3rd of December 1908 as one and continuous, it must be held that the plaintiff's suit is within time.

For these reasons, the decree must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

HILLAYA SUBBAYA HEGDE (ORIGINAL DEFENDANT No. 3), APPELLANT, v. NARAYANAPPA TIMMAYA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

1911.

September 12.

Fraud—Fraudulent transfer of possession—Reversioner getting into possession from an alienee of the widow—Mortgage by alienee—Suit for foreclosure—Reversioner setting up the plea that widow's alienation beyond her life-time was void—Estoppel between mortgagor and mortgages—Estoppel binds reversioner—Practice.

In 1878, G's widow sold certain property, belonging to G, to G A, who mortgaged it to D in 1892. The widow died in 1897. After G A's death in 1901, H (defendant No. 3), who was a reversioner of G, slipped into possession of the property by

* Second Appeal No. 19 of 1910.

1911.

HILLAYA
SUBBAYA
v.
NARAYAN-
APPA
TIMMAYA.

fraudulently inducing G A's sons (defendants Nos. 1 and 2) to favour his claim. In 1908, the plaintiff who claimed through D, sued to recover his money by sale of the mortgaged property. It was contended by H that it was not competent to G's widow to alienate the property beyond her life-time and that her alienation was not binding on him :—

Held, that H having obtained possession of the property by colluding with defendants Nos. 1 and 2, his fraud was sufficient in law to deprive him of the right to be heard in defence to the suit, that he was entitled to the property as reversionary heir of G.

Held, further, that defendants Nos. 1 and 2 having been in possession of the property as mortgagors of the plaintiff were estopped from denying his right to foreclose the mortgage; and that that estoppel applied also to H who stepped into possession through a fraud common to H as well as defendants Nos. 1 and 2.

The true owner of property is entitled to retain possession even though he has obtained it from a trespasser by force or other unlawful means. This principle applies only when the true owner gets into possession without bringing himself within the law of estoppel.

As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property.

SUIT to foreclose a mortgage.

The mortgaged property belonged originally to one Ganpaya. After Ganpaya's death, in 1878, his widow Devamma and his widowed sister-in-law sold the property to Ganpaya Adenaya on the 24th September 1878. He mortgaged the property to Devappa (uncle of plaintiff) on the 28th June 1892. Devamma died in 1897 and Ganpaya Adenaya died in 1901. Some time afterwards, Hillaya (defendant No. 3), who was a reversioner of Ganpaya, fraudulently went into possession of the property by colluding with Ganpaya Adenaya's sons (defendants Nos. 1 and 2). The plaintiff brought this suit in 1908 to recover his money by sale of the mortgaged property. The defendant No. 3 contended *inter alia* that he was the owner of the property as reversionary heir to Ganpaya; and that the alienation by Devamma was illegal and void after her death.

The Subordinate Judge dismissed the suit. This decree was reversed, on appeal, by the District Judge, who held that defendant No. 3 "contrived to slip into possession no doubt by including Ganpaya's sons defendants Nos. 1 and 2 to favour

his claim," and that "defendant No. 3 may or may not be the reversionary heir of Ganpaya, but having failed to take possession from Ganpaya Adenaya of the property in dispute for nearly twenty years he can derive no advantage from getting fraudulent possession through defendants 1 and 2."

The defendant No. 3 appealed to the High Court.

Nilkanth Atmaram, for the appellant.

K. H. Kelkar, for the respondent.

CHANDAVARKAR, J.—The facts of the case, as found by the Court below, are shortly these. The property belonged to one Ganpaya who died in the year 1878, leaving him surviving a widow by name Devamma, and a widowed sister-in-law. These two widows on the 24th of September 1878 sold the property to one Ganpaya Adenaya. Ganpaya Adenaya in the year 1892 mortgaged it to the respondent-plaintiff's uncle Devappa. Ganpaya Adenaya died in 1901 and in the year 1897 Devamma died. The respondent now sues to foreclose; the appellant resists the claim on the ground that Devamma had no right to mortgage the property beyond her life-time, and that he, as the reversionary heir of her husband, is entitled to it, free of the mortgage.

The District Judge, without finding whether the appellant is reversionary heir, has allowed the respondent's claim. He has held that Ganpaya Adenaya, the respondent's mortgagor, became owner of the property under the sale from Devamma. That view of the law cannot be accepted as sound in the absence of a finding that the sale by Devamma, who had a Hindu widow's estate, was for necessary purposes, and was, therefore, binding on her husband's reversioners, and that the appellant was the reversionary heir he claimed to be.

If, therefore the case had rested solely upon the considerations above dealt with, the decree of the District Judge would have had to be reversed. But the District Judge has also recorded another finding which is decisive of the case against the appellant. The suit was brought by the respondent for foreclosure against defendants 1 and 2, his mortgagors.

1911.

HILLAYA
SUBBAYA
v.
NARAYAN-
APPA
TIMMAYA.

1911.

HILLAYA
SUBBAYA
v.
NARAYAN-
APPA
TIMMAYA.

The District Judge has found as a fact upon the evidence that the appellant (defendant No. 3) revived his "old claim" against Ganpaya Adenaya and "contrived to slip into possession" of this property "by inducing Ganpaya's sons, defendants 1 and 2, to favour his claim". At the conclusion of his judgment that finding is repeated by the Judge in these words: "Defendant 3 may or may not be the reversionary heir of Ganpaya, but having failed to take possession from Ganpaya Adenaya of the property now in dispute for nearly twenty years, he can derive no advantage from getting fraudulent possession through defendants 1 and 2 or their tenants".

This finding, which, being one of fact, has not been and indeed could not be questioned by the appellant in his memorandum of second appeal to this Court, amounts to this, that he obtained possession of this property by colluding either with defendants 1 and 2, who are the heirs of the respondent's mortgagor deceased, or with their tenants. This fraud on the part of the appellant is sufficient in law to deprive him of the right to be heard in defence to this suit, that he is entitled to the property as reversionary heir of Devamma's husband. The law is that no man shall be allowed to profit by his own fraud and it would be a violation of that sound maxim if we were to allow the appellant to succeed in this suit after he has obtained possession by means of fraud and collusion.

No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: *Lillu bin Raghushet v. Annaji Parashram* ⁽¹⁾, and *Bandu v. Naba* ⁽²⁾. But that is so only where the true owner gets into possession without bringing himself within the law of estoppel. Here the facts raise an estoppel as against the appellant whose ownership is denied and has to be proved. As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. As is said in the text-books, a mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of

(1) (1881) 5 Bom. 397 at p. 391. (2) (1890) 15 Bom. 238.

his mortgagor to mortgage the property. Therefore defendants Nos. 1 and 2, having been in possession of the property as mortgagors of the respondent (plaintiff), were bound to hold it in that capacity. If they were threatened or obstructed by the appellant claiming as the true owner, they ought to have given him (plaintiff) notice of the threat or obstruction so as to enable him to defend his rights as a mortgagee. But according to the finding of the learned District Judge, instead of doing that, they colluded with the appellant and that collusion was brought about by the appellant himself. It is by means of his own fraud that the appellant got into possession with the help of defendants 1 and 2, the heirs of the mortgagor. Under these circumstances the rule of estoppel which applied to them extends to the appellant also : *Pasupati v. Narayana* ⁽¹⁾. On this ground, and this ground alone, the decree must be confirmed, without prejudice to the right, if any, of defendant No. 3 to recover possession of this property by a separate suit. We must, therefore, confirm the decree of the Court below with costs.

Decree confirmed.

R. R.

(1) (1889) 13 Mad. 335.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GOVIND BABA GURJAR (ORIGINAL DEFENDANT), APPELLANT, v. SHRIMANT
JIJIBAI SAHEB (ORIGINAL PLAINTIFF), RESPONDENT.*

1911.

September 14.

Ornaments—Unauthorized Pledge—Suit against pledgor—Subsequent pledge—Recovery of Judgment against pledgor—Non-satisfaction—Suit against pledgee for detention after demand—Tort-feasors—Judgment not res judicata—Omission to raise an issue suggested by defendant—Defendant not claiming under a person against whom the issue was decided after defendant's transaction—Moveable property—Doctrine of lis pendens not applicable—Party and privy.

Plaintiff brought a suit, No. 159 of 1897, against M to obtain a declaration that M was not adopted by plaintiff's step-mother and that she (the plaintiff) was the owner of the property in suit as the heir of her father and to obtain possession. The cause of action was laid in March 1897. The property in suit included

* First Appeal No. 191 of 1908.