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KRISHNA  
GHOSHAMARENDRA  
NATH DEY.

Fletcher J., in my opinion, rightly held the bequest to be good, and the appeal should therefore be dismissed with costs.

WOODROFFE J. I agree.

*Appeal dismissed.*

Attorney for the appellant : *N. C. Bose.*

Attorneys for the respondents : *G. N. Dutt & Co.*

J. C.

[In this case, leave to appeal to the Privy Council has been obtained. LD.]

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PRIVY COUNCIL

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BARHAMDEO PRASAD

v.

TARA CHAND.\*

P. C.\*  
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Nov. 10;  
Dec. 1.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL]

*Limitation—Limitation Act (XV of 1877) Sch. II, Arts. 120, 132—Suit by second mortgagee for surplus proceeds after sale by first mortgagee—Sale proceeds wrongfully withdrawn from Court in execution of decree on later mortgage suit for money—Suit to enforce mortgage—Civil Procedure Code, 1882, ss. 214 and 295 cl. (c).*

Certain immoveable property was mortgaged on 21st May 1887 to the appellants, and on 19th September 1887 the same property was mortgaged by the same mortgagor to the respondents (the mortgage money being repayable on 18th November 1888), and again on 19th July 1889 to the appellants. On 8th October 1890 the appellants, in a suit in which the respondents though made parties did not appear, obtained a decree on their mortgage of 21st May 1887 in execution of which the mortgaged property was sold; and after satisfying the decree the sale proceeds were deposited in Court. On 14th January 1891 the appellants obtained a decree on their mortgage of 19th July 1889 in a suit to which

\* Present : LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALLI.

they did not make the respondents parties; and in execution of that decree, without giving any notice to the respondents, they drew out of Court the surplus proceeds of the former sale, though they were aware of the respondents' mortgage of 19th September 1887, and of its priority to their own. In a suit brought on 17th November 1900 by the respondents against the appellants for the surplus sale proceeds, it was contended that the suit was one for money governed by Art. 120 of Schedule II of the Limitation Act of 1877, and barred as not having been brought within 6 years from the 18th November 1888 when the money became due.

*Held* (affirming the decision of a majority of a Bench of the High Court), that the suit was one "to enforce payment of money charged upon immoveable property" within the meaning of Art. 132 of Schedule II of the Act, and having been brought within 12 years from the date when the money became payable was not barred by limitation.

The surplus sale proceeds represented the security which the respondents had under their mortgage of 19th September 1887, and did not cease to represent that security by the fact of the appellants having wrongfully withdrawn the surplus sale proceeds from the Court where they were deposited.

Under the circumstances of the case section 295 clause (c) of the Civil Procedure Code, 1882, was not applicable.

APPEAL from a decree (10th August 1905) of the High Court at Calcutta, which affirmed a decree (9th June 1902) of the Court of the Subordinate Judge of Monghyr.

Two of the defendants were appellants to His Majesty in Council.

The main question for determination in this appeal was whether it had been rightly decided by the High Court that the suit out of which the appeal arose was one to enforce payment of money charged upon immoveable property within the meaning of article 132 of Schedule II of the Limitation Act (XV of 1877), and was not, therefore, barred by limitation.

The suit was brought on 17th November 1900 to enforce a mortgage against certain defendants described as first and second parties, and against the

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appellants as third parties, under circumstances which are sufficiently stated in the report of the case before the High Court in I. L. R. 33 Calc. 92.

On this appeal,

*Ross, K.C.*, and *J. M. Parikh*, for the appellants, contended that the suit was barred by lapse of time. The suit to recover the surplus sale proceeds was not one to enforce payment of money charged upon immoveable property within article 132 of Schedule II of the Limitation Act (XV of 1877) for which the period of limitation was 12 years; but it was a suit for which no period of limitation was expressly provided, and therefore article 120, of Schedule II of the Act was applicable which only allowed 6 years within which the suit must be brought. The suit was one for money on which the respondents say the appellants knew they (the respondents) had a charge, and which had been wrongly paid to the appellants. Section 295 clause (c) of the Civil Procedure Code, 1882, enacts that the surplus proceeds of the sale of immoveable property in execution of a decree on a prior mortgage are to be applied in discharging subsequent mortgage debts. The respondents' remedy was therefore under that section. After the sale of mouzah Chak in satisfaction of the appellants' prior mortgage in execution of a decree to which the respondents were parties, the lien of the respondents on the property sold was discharged, and they no longer had a charge on it. What they had (if anything) was a charge on the surplus proceeds, and their present suit was, it was submitted, a suit for money, and not a suit to enforce a charge on the mortgaged property. Reference was made to *Ram Din v. Kalka Prasad* (1); section 85 of the Transfer of Property Act (IV of 1882);

(1) (1884) I.L.R. 7 All. 502, 506; L.R. 12 I.A. 12, 15.

and section 244 of the Civil Procedure Code, 1882. The respondents' suit was therefore barred, and they were not entitled by virtue of their mortgage to follow the surplus sale proceeds in the hands of the appellants.

*E. U. Eddis*, for the respondents, was not called upon.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This appeal has arisen in a suit which was brought by the plaintiffs on the 17th November 1900, in the Court of the Subordinate Judge of Monghyr, to enforce payment of principal moneys and interest which were charged upon immovable property by a deed dated the 19th September 1887, by which one Kalu Babu mortgaged to the plaintiffs Mouzah Chak and other properties. The mortgage money was repayable on the 18th November 1888. By the suit, so far as it concerned the defendants Barhamdeo Prasad and Ram Sumran Prasad, the plaintiffs sought a decree against them for Rs. 12,197-8-3, together with interest, on the ground that they were in possession of a sum of Rs. 12,197-8-3, which had been deposited in the Court of the Subordinate Judge of Monghyr, and was the balance remaining over of the purchase money of Mouzah Chak, after satisfying a decree for sale of that Mouzah of the 8th October 1890, such possession having been obtained by them wrongfully with full knowledge that it was affected with a charge to the plaintiffs under a mortgage of Mouzah Chak. Barhamdeo Prasad, now dead, is represented in this appeal by his brother, Ram Sumran Prasad. The only question in this appeal is whether the suit so far as it related to Barhamdeo Prasad and Ram Sumran Prasad was a suit to enforce payment of money charged upon immovable property

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within the meaning of article 132 of the second schedule of the Indian Limitation Act, 1877, or was a suit to which article 120 of that schedule applied.

The facts, briefly stated, are as follows: On the 21st May 1887, Kalu Babu mortgaged Mouzah Chak and other properties to Barhamdeo Prasad and Ram Sumran Prasad. On the 19th September 1887, Kalu Babu mortgaged Mouzah Chak and other properties to the plaintiffs, and on the 19th July 1889, Kalu Babu further mortgaged Mouzah Chak to Barhamdeo Prasad and Ram Sumran Prasad. On the 8th October 1890, Barhamdeo Prasad and Ram Sumran Prasad obtained a decree for sale on their mortgage of the 21st May 1887. To the suit in which that decree was obtained the plaintiffs in this suit were made parties, but they did not appear. In execution of the decree of the 8th October 1890, Mouzah Chak was sold. After satisfying that decree a balance amounting to Rs. 12,197-8-3 of the moneys which were realised by the sale of Mouzah Chak remained, and that balance was deposited in the Court of the Subordinate Judge of Monghyr. On the 14th January 1891, Barhamdeo Prasad and Ram Sumran Prasad obtained a decree for sale on their mortgage of the 19th July 1889, and in execution of that decree they, on the 22nd April 1892, drew out of Court the balance of Rs. 12,197-8-3 which had been deposited in Court. Barhamdeo Prasad and Ram Sumran Prasad were well aware of the existence of the plaintiffs' mortgage and that it had priority to the charge they were seeking to enforce, but they did not make the plaintiffs parties to the suit, nor did they give them notice that under the decree of the 14th January 1891 they were drawing out of Court the balance of Rs. 12,197-8-3.

On behalf of Barhamdeo Prasad and Ram Sumran Prasad it was contended in the Court of the

Subordinate Judge that this suit, so far as it related to the claim of the plaintiffs against them in respect of the Rs. 12,197-8-3, surplus moneys of the sale of Mouzah Chak, was barred by limitation; their contention on the point of limitation was that article 120, and not article 132, of the second schedule of the Indian Limitation Act, 1877, applied to that claim. They also raised various other contentions in the Court of the Subordinate Judge to which it is not now necessary to refer. The Subordinate Judge held that the surplus sale proceeds of Mouzah Chak were part of the mortgage security to which the plaintiffs were entitled under their mortgage, and gave the plaintiffs a decree. From that decree of the Subordinate Judge Ram Barhamdeo Prasad and Ram Sumran Prasad appealed to the High Court at Calcutta. In that appeal two learned Judges, Henderson and Sale, JJ., held that the surplus sale proceeds of Mouzah Chak were portion of the security to which the plaintiffs were entitled to look for satisfaction of their mortgage, and that they were entitled to follow that mortgage security in the hands of Barhamdeo Prasad and Sumran Prasad. Mr. Justice Henderson also suggested that Barhamdeo Prasad and Sumran Prasad, having obtained possession of the surplus proceeds which had been deposited in Court with the knowledge that they were subject to the claim of the plaintiffs in priority to their own claim, and that they had abstained from giving notice of that suit to the plaintiffs, might be taken to hold the surplus proceeds under an implied trust for the plaintiffs. The High Court, holding that the suit was a suit to enforce a claim for money charged upon immovable property and had been brought within time, dismissed the appeal. From that decree of the High Court this appeal has been brought.

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Before this Board it was contended on behalf of the appellants that this suit, so far as it related to the appellants, was not a suit to enforce payment of money charged upon immovable property, and that it was a suit to which article 120 of the second schedule of the Indian Limitation Act, 1877, applied, and consequently that the suit was not brought within time. It was also contended by one of the counsel of the appellants that as the Rs. 12,197-8-3, surplus assets, had been received by Barhamdeo Prasad and Ram Sumran Prasad, who were not entitled to receive such surplus assets, the case came within section 295 of the Code of Civil Procedure, 1882, and the remedy of the plaintiffs by a suit under that section was barred by time. As to the last-mentioned contention, it is sufficient to say that the facts of this case show that section 295 of the Code of Civil Procedure, 1882, does not apply.

If Mouzah Chak had not been sold under the decree for sale of the 8th October 1890 it could not be suggested that the plaintiffs could not by suit, subject to the rights of the prior mortgagees, have enforced payment of the money charged upon that Mouzah by their mortgage of the 19th September 1887. Mouzah Chak was sold under the decree for sale of the 8th October 1890, which Ram Barhamdeo Prasad and Ram Sumran Prasad had obtained on their prior mortgage, and the surplus moneys of that sale represented the security which the plaintiffs had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Ram Barhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited. Their Lordships do not think that it is necessary to decide the point referred to in the

judgment of Mr. Justice Henderson, viz., that under the circumstances of this case the money in the hands of the appellants was saddled with a charge in favour of the plaintiffs to the amount of their charge, but they do not wish to be understood to express dissent from that view. For the decision of this case, it suffices to say that in their Lordships' opinion this is a suit to enforce payment of money charged upon immovable property within the meaning of article 132 of the second schedule of the Indian Limitation Act, 1877, and having been brought within twelve years from the time when the money sued for became due is within time. The appeal fails.

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Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondents : *Theodore Bell & Co.*

J. V. W.

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