

APPELLATE CIVIL.

Before Duval and Mitter JJ.

UMAPATI MUKERJEE

v.

SHEIKH SOLEMAN*

1926

Dec. 22.

*Mortgage—Sale in execution—Suit questioning title of purchaser, if lies—
Limitation—Civil Procedure Code (Act V of 1908), s. 47—Limitation
Act (IX of 1908), Sch. I, Art. 181.*

The title of a purchaser in execution of a mortgage decree can be questioned only by a petition in the execution proceedings under section 47 of the Code of Civil Procedure.

Ramabhadra Naidu v. Kadiriyaasami Naicker (1) followed.

The Article applicable for applications under section 47 of the Code of Civil Procedure is article 181 of Schedule I of the Indian Limitation Act, which gives three years from the date when the right to apply accrues. The right to apply accrues at the date of sale.

· SECOND APPEAL by Umapati Mukerjee and others, the defendants.

Defendant No. 1 brought a mortgage suit against the present plaintiffs Nos. 1 to 3 and obtained a decree. In execution of the said decree, the mortgaged properties were purchased by the decree-holder, who applied for possession thereof. There was resistance by the co-sharers, who were no parties to the decree, and they, having failed in their claim, brought a title suit, No. 294 of 1920. The mortgagors also alleged that they were dispossessed of some properties which were

* Appeal from Appellate Decree, No. 1738 of 1924, against the decree of K. C. Nag, District Judge of Birbhum, dated March 31, 1924, affirming the decree of Manoranjan Ray, Munsif of Suri, dated March 4, 1921.

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not covered by the mortgage and, as plaintiffs Nos. 1 to 3, with some other co-sharers, brought a suit No. 295 of 1920, against the mortgagee decree-holder defendant No. 1, for recovery of possession of lands outside the mortgage decree. Both the lower Courts decreed suit No. 295 of 1920 giving effect to the contentions of the plaintiffs.

The defendants thereupon preferred this second appeal to the High Court.

Babu Apurba Charan Mukherjee, for the appellants, contended that the suit was not maintainable under section 47, C. P. C. As to whether the disputed land was inside or outside the mortgage decree it ought to have been decided by the executing Court. I rely on *Ramabhadra Naidu v. Kadiriyaasami Naicker* (1).

Dr. Jadunath Kanjilal, Advocate, with him *Babu Nripendra Chandra Das*, for the respondents. I concede that a separate suit did not lie. The objection, however, was not raised in the Courts below. Even in the grounds of appeal of the second appeal there is no such ground. The objection refers to procedure and cannot be raised at a late stage: *Azizuddin Hossein v. Ramarugra Roy* (2), *Biru Mahala v. Shyama Churn Khawas* (3). The defect, however, is cured by clause (2) of section 47, C. P. C. The suit can be converted to an application under section 47, C. P. C. If objection had been raised in the first Court in which the present suit was brought and which had previously decided the mortgage suit, the defect would have been remedied then and there.

In *Goba Nathu Barola v. Sakharam Tepi Patil* (4) it was held that if there be some other plaintiffs (as

(1) (1921) I. L. R. 44 Mad. 463 ; (2) (1887) I. L. R. 14 Calc. 605.
 L. R. 48 I. A. 155. (3) (1895) I. L. R. 22 Calc. 483.

(4) (1920) I. L. R. 44 Bom. 977.

in this case) who were no parties to the mortgage decree, section 47, C. P. C., will not apply.

The present suit is within time. See Article 181 of the Limitation Act, which applies.

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Cur. adv. vult.

MITTAR J. This is an appeal from a decree of the District Judge of Birbhum affirming a decree of the Munsif of Suri. The appeal has been preferred by the defendants and arises out of a suit (Title Suit No. 29 of 1920) commenced by the plaintiffs, who are the widow and sons and daughters of Milan Sheikh before the Munsif. Plaintiff's case is that plot No. 2 of the plaint belongs to the widow of Milan and that the other plots of the plaint are not covered by the mortgage executed by the sons of Milan in favour of the father of defendant No. 1 and were in possession of the plaintiffs even after delivery of possession to defendant No. 1, but that defendants Nos. 2 to 4 forcibly took possession of them alleging that they took settlement of them from defendant No. 1. The defence of the defendants is that the disputed lands were mortgaged by the sons of Milan Sheikh and were sold in execution of the mortgage decree and purchased by defendant No. 1. Defendants Nos. 2 to 4 claim to have taken settlement from the decree-holder auction-purchaser. Defendants deny the title of the widow and daughter of Milan Sheikh in plots 1 and 3 and they allege that the sons of Milan got the disputed lands (plots 1, 2 and 3) on partition and the widow and daughters of Milan got other lands. Numerous issues were raised, amongst which it is necessary to notice issues Nos. 4 and 5. Issue No. 4 runs as follows:—Have the plaintiffs any title to the lands in suit?

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Issue No. 5 was to the following effect:—"Do the lands in suit appertain to plots 6 to 8 of the sale-certificate as alleged by the defendant?"

The Munsif held that plots 1 and 3 did not belong to the widow and daughters of Milan and further held that the disputed lands were not included in the mortgage executed by the sons of Milan, *i.e.*, Sheikh Soleman and his brothers, who are plaintiffs Nos. 1 to 3 in this suit and respondents before us. The Munsif accordingly declared the title of the plaintiffs to plots Nos. 1 and 2 and a part of plot No. 3 of the plaint and directed that they will recover possession from the defendants. I ought to state that the widow and daughters of Milan are plaintiffs Nos. 4, 5 and 6, respectively, in the suit. The defendants preferred an appeal to the District Judge, who affirmed the decision of the Munsif, holding that the lands decreed were outside the mortgage. Against the decision of the District Judge, a second appeal has been preferred to this Court and it has been contended before us by the learned vakil for the defendants that the suit is barred by the provisions of section 47 of the Civil Procedure Code and that the question whether the disputed lands were or were not included in the mortgage decree or sale should have been determined in a proceeding under section 47 of the Code, as it is a matter which arises in execution of the mortgage decree between the parties to the suit. Reliance has been placed on the decision of the Judicial Committee in the case of *Ramabhadra Naidu v. Kadiriyasami Naicker* (1) in support of this contention. This contention of the appellants is well founded and the respondents admit that section 47 would bar the suit, but the learned advocate for the respondents asked us to treat the suit as a proceeding under section 47 of.

(1) (1921) I. L. R. 44 Mad. 483 ; L. R. 48 I. A. 155.

the Code and to apply the provision of section 47 (2) to the present case. The suit could be treated as a proceeding under section 47 subject to any objection as to jurisdiction and limitation. There was no objection on the score of jurisdiction, as the Court trying the suit was competent to entertain any application under section 47. The objection as to limitation could not be decided when we first heard the appeal on the 25th November as the records of the mortgage execution case had not been sent up. We, therefore, sent for the records of the execution case and we have again heard the parties who were given an opportunity of inspecting the record. It appears that the sale in execution of the mortgage decree took place on the 5th December, 1917, and it was not confirmed till 31st January, 1918. The suit was instituted in May, 1920. The Article applicable for applications under section 47 of the Code is Article 181 of Schedule I of the Indian Limitation Act which gives three years from the date when the right to apply accrues. The right to apply accrued at the date of sale and the suit was well within three years from that date. Consequently, if we treat this suit as an application under section 47 it would be instituted in time. The concurrent findings of both Courts that the lands decreed were outside the mortgaged lands are binding on us in second appeal.

Another point has been taken on behalf of the appellants, viz., that the decree in favour of plaintiffs Nos. 4, 5 and 6, *i.e.*, the widow and daughters of Milan cannot be sustained as it has been found by both Courts that they have got no title to the decreed lands which belong to the plaintiffs Nos. 1, 2 and 3. This has not been controverted by the learned advocate for the respondents. The result, therefore, is that the decree of the Munsif will be varied to this extent,

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viz., that instead of there being a decree for declaration of title and recovery of possession in favour of *all* the plaintiffs, there will be a decree in favour of plaintiffs 1, 2 and 3 alone. With this slight modification the decrees of the Courts below are affirmed. The respondents will be entitled to get the costs of this appeal.

DUVAL J. I agree.

S. M.

Decree modified.

CIVIL RULE.

Before Mukerji and Graham JJ.

DURGA CHARAN CHANDRA

v.

AMBICA CHARAN CHANDRA.*

1927
 Jan. 3.

Mortgage—Right of independent suit by subsequent mortgagee—Transfer of Property Act (IV of 1882), s. 74—Contract Act (IX of 1872), s. 69.

The subsequent mortgagee is not restricted to his right of suit under section 74 of the Transfer of Property Act. He can independently maintain a suit for the recovery of the money, the payment of which created the lien in his favour.

Sheo Saran Chaudhri v. Ram Lagan Das (1), *Lachman Singh v. Sulig Ram* (2), *Anandi Ram v. Dur Najaf Ali Begum* (3), *Sarajubala Roy Chowdhurani v. Kamini Kumar Chowdhury* (4) and *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (5) referred to.

* Civil Rule No. 921 of 1926, against the order of Manmatha Chandra Basu, Officiating Subordinate Judge of Mymensingh, dated May 17, 1926.

(1) (1921) I. L. R. 44 All. 64. (3) (1890) I. L. R. 13 All. 195.

(2) (1886) I. L. R. 8 All. 384. (4) (1925) 43 C. L. J. 142

(5) (1867) 11 Moo. I. A. 241; 8 W. R. 17 P. C.