which might be brought thereon by the appellant that they tendered payment in time. A suit is a demand made judicially for attaining or recovering a right, and it does not lie for the bare performance of a duty at the instance of the person bound to perform it, for the evident reason that, when he is willing to perform it, there is no need for a suit, and that, if he is not, it is for the other party to enforce its performance. It is true that, under the terms of the bond, the regular payment of each instalment is necessary to enable the respondents to preserve their right to pay the balance still due by instalments; but a tender of payment made in time would be effectual for this purpose also. It is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default, and that it continues to subsist. But the suit before us is not one of that kind, and it is not necessary for us to express an opinion on the question whether, under certain circumstances, a declaratory suit may not be brought. We are satisfied that, in its present form, the suit instituted by the respondents cannot be maintained. We set aside the decrees of the Courts below and dismiss the suit. Having regard, however, to the appellant's conduct as found by the Judge, we direct that each party do bear his or their costs.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

SIVARÁMÁ (PLAINTIFF), APPELLANT,
and
SUBRAMANYA (DEFENDANT), RESPONDENT.*

1885. August 5, 10.

Civil Procedure Code, s. 295—Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale—Limitation Act, sch. II, arts. 12, 13.

Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors.

By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855 in March 1881.

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* Second Appeal 224 of 1885.

SIVARÁMÁ v. SUBRAMANYA.

In May 1881 B, a puisne mortgagee, applied to the Court for payment to him of Rs. 500 of this sum, alleging that A was entitled only to Rs. 2,000 and Rs. 280 costs, but not to arrears of rent, in preference to his claim as second mortgagee.

The claim of B was rejected on the 27th May 1881 and the whole amount paid out to A.

In February 1882 B (who had filed a suit on the 23rd March 1881) obtained a decree upon his mortgage.

On the 23rd May 1884 B sued to recover Rs. 510 paid to A on account of rent on the 27th May 1881.

The lower Courts dismissed the suit on the grounds

(1) that A was entitled to treat the arrears of rent as interest;

(2) that the suit was barred by limitation:

Held, on second appeal, that B was entitled to recover the sum claimed.

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge at Calicut, confirming a decree of C. Gopálan Náyar, District Múnsif of Shernád, in suit 279 of 1884.

The facts necessary for the purpose of this report are set out in the judgment of the Court (Hutchins and Parker, JJ.).

Bháshyam Ayyangár for appellant.

Sankaran Náyar for respondent.

JUDGMENT.—The respondent (Subramanya Bhatta) was the first mortgagee of certain properties, on which the appellant (Sivarámá Krishna Bhatta) obtained a puisne incumbrance. Under the terms of his mortgage the respondent was to enjoy the lands as security for the principal sum (Rs. 2,000) advanced, to appropriate to the interest due on that advance a certain sum annually, and to pay the balance of the estimated net produce, 50 paras of paddy, to the mortgagors. He elected, however, to leave the mortgaged lands in the possession of the mortgagors, and he took from them an agreement for the payment of an annual rent equal to the interest and the 50 paras of paddy. In July 1880 he obtained a decree directing that the lands should be sold for the discharge of the principal sum (Rs. 2,000) and costs, and also for the arrears of rent due under the rental agreement. The lands were accordingly sold on the 24th March 1881 for Rs. 2,855.

On the day before the sale the appellant instituted a suit against the mortgagors on his subsequent incumbrance, and on the 24th May 1881 he applied to the Múnsif for payment of Rs. 500 and odd out of the sale-proceeds. He admitted that the respondent, as the first incumbrancer, was entitled to recover first his principal of Rs. 2,000 as well as Rs. 280 for the costs of his suit; but he contended that the respondent was not entitled to any priority in respect of the sum decreed to him as rent.

On the 27th May 1881 the Múnsif dismissed the appellant's application and directed the whole of the sale-proceeds to be paid to the respondent, and the whole sum was accordingly paid out to the respondent on the same day. The Múnsif treated the appellant's application as objecting to the sale as one made for the arrears of rent, and held that he was bound to take steps for the cancellation of the sale before he could lay claim to any part of the proceeds; but the appellant has never denied the validity of the sale; it had been ordered under a decree for the discharge of a prior incumbrance, to which he could not object. His claim was that the sale-proceeds must be taken to represent the mortgaged property, that the respondent was entitled to be paid the principal money due on his incumbrance and costs, but that he had no lien on the proceeds in respect of the rent, and that therefore the surplus proceeds should be paid to himself as the next incumbrancer.

In February 1882 the appellant obtained a decree on his mortgage. In November following he put up to sale and himself purchased the same properties. But these properties had already been sold under the respondent's decree in virtue of a prior incumbrance, and the subsequent sale under the appellant's decree had no legal effect whatever.

The present suit was instituted by the appellant on the 23rd May 1884 to recover from the respondent the sum of Rs. 510 paid to the respondent on the 27th May 1881 on account of his claim for rent. Both the Courts below have held that the appellant is not entitled to this sum as against the respondent, and also that the suit is barred by the Law of Limitation. In both respects the decrees seem to us erroneous.

When immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance, and there is no other incumbrance entitled to priority, the proceeds of sale represent the property itself; and s. 295 of the Procedure Code prescribes how the proceeds should be applied. They are to go

(1) in defraying the expenses of the sale—these have been defrayed;

(2) in discharging the interest and principal money out of the incumbrance;

(3) in discharging subsequent incumbrances if any.

And the penultimate clause of the section provides that, "if

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all or any of such assets be paid to a person who is not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

The appellant, as second incumbrancer, is clearly entitled to the surplus proceeds after discharging the principal and any interest which may be due on the respondent's incumbrance. The question between them, therefore, resolves itself into this—Can the sum claimed by the respondent as rent, and paid to him under the decree for rent, be regarded as interest due on his incumbrance? It appears to us that it cannot; and indeed both the Lower Courts have treated it as rent and not as interest. By letting the mortgaged properties to the mortgagors under the stipulation that they should pay rent in lieu of interest, the respondent elected to convert the interest into rent. No doubt such a course has its advantages; but he is not entitled to those advantages, and also to the advantage of treating the sum conditioned to be paid as if it were interest. He sued for it as rent, and not as interest, and under the terms of the decree, directing the sale of the property, the sum now in question was awarded to him as rent. There is no foundation for the contention that arrears of rent are a charge on the land as against an incumbrance.

As regards limitation, the Múnsif relied on articles 12 and 13, and the Appellate Court on article 12 alone. Article 12 relates to suits to set aside sales. We have already shown that the appellant admits the validity of the sale and does not seek to set it aside. Article 13 applies to suits to set aside the order of a Civil Court in *any proceeding other than a suit*. It has been repeatedly ruled that a proceeding in execution is a proceeding in the suit in which execution has been taken out, and the order in question appears to have been passed in a proceeding in execution in the respondent's suit. But even assuming that the order of the Múnsif, dated the 27th of May 1881, being an order as between the appellant, who was not a party to the suit in which execution had been taken out, and the respondent cannot be regarded as having been made in a proceeding in the respondent's suit, we still consider that article 13 does not apply to the present suit. The appellant does not seek to set aside the order, and the order was not one in a matter which the Múnsif was competent to determine finally. Section 295 does not provide that an order for a payment out of assets shall be final, but, on the contrary, that it shall be subject to the

right of any person entitled to sue the person to whom payment has been made to compel him to refund. The appellant, we may observe, had not at that time obtained his decree, and his position was that of a person merely claiming to be an incumbrancer. It is not necessary to determine whether the plaintiff's suit falls under article 62 or under the general article 120, or whether he has not twelve years from the date of his incumbrance, for it is conceded that the suit will not be barred, unless article 13 applies.

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The result is that the decrees of the Courts below must be reversed, and, in lieu thereof, there will be a decree requiring the respondent to pay to the appellant Rs. 510 with costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

AIYAVU AND ANOTHER*

against

QUEEN-EMPRESS.

1885. August 27.

Criminal Procedure Code, s. 271—Murder—Explanation of charge essential.

At a trial before a Sessions Court a charge was read out to the prisoners to the effect that they at a certain place on a certain date committed murder by causing the death of M, and that they had thereby committed an offence punishable under s. 302 of the Indian Penal Code and within the cognizance of the Court of Sessions. The prisoners pleaded guilty and were convicted on their plea.

The charge was not explained to the prisoners. In answer to questions put by the Court, prisoners stated that they had killed M, and that they made the admissions of their own accord and not on the persuasion of any one:

Held, that the conviction must be quashed and a new trial ordered.

THIS was an appeal from a sentence of death passed by J. C. Hughesdon, Sessions Judge of Tinnevelly, in session case 25 of 1885.

The facts appear sufficiently, for the purpose of this report, from the judgment of the High Court (Muttusámi Ayyar and Hutchins, JJ.).

Mr. *Wedderburn* for the prisoners.

Mr. *Powell* (Acting Government Pleader) for the Crown.

For appellants, it was contended that the conviction must be quashed, the provisions of s. 271 of the Code of Criminal Proce-

* Appeal 288 of 1885.