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legal representative is, as ruled by the Privy Council, certainly a party to the decree under execution, he is so only for the purpose of the obligation created by it being enforced against him and the execution-creditor is not at liberty to insist on the enforcement of any obligation which is not included in it. In *Suraj Bunsi Koer* v. *Sheo Proshad Sing*(1), the claim asserted by sons to the recovery of their shares in ancestral property sold in execution of a decree against their father was entertained and decreed by the Privy Council in a subsequent suit, and the present suit, though brought by the execution-creditor, rests on the same principle, viz., the obligation on which the second suit is based is distinct from that created by the decree in the first suit. Another contention in appeal is that the claim is barred by limitation. The suit was clearly one to enforce payment of money charged on immovable property, and the contest was whether the charge was validly created by the father as against his son. The claim is therefore not barred by limitation, and we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1888. April 17.

MOIDIN AND ANOTHER (DEFENDANTS), APPELLANTS,

and

OOTHUMANGANNI (PLAINTIFF), RESPONDENT.*

Limitation—Adverse possession—Redemption of land by one of two co-mortgagors and re-mortgage thereof—Possession under second mortgage for more than 12 years.

A and B, two brothers, being entitled to certain land, mortgaged it in 1852 to C. In 1864 A redeemed the mortgage and re-mortgaged the land to D for the same amount. In 1885 the defendants (sons of A) redeemed the mortgage to D. In 1886 the plaintiff (son of B) sued defendants and the representatives of C and D to redeem a moiety of the land on payment of a moiety of the amount due on the mortgage of 1852. The defendants pleaded, *inter alia*, that the suit was barred by limitation as the land had been held adversely since the mortgage of 1864:

Held, that in the absence of proof that the land was held with an assertion of adverse title the plaintiff was entitled to a decree.

APPEAL from the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, confirming the decree of T. Venkatarama

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(1) L.R., 6 I.A., 88.

* Second Appeal No. 849 of 1887.

Chetti, District Munsif of Pattukota, in suit No. 279 of 1886. The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

Krishnasami Ayyar for appellants.

Ambrose for respondent.

JUDGMENT.—The appellants' father and the respondent's father were brothers, and in 1852 they jointly mortgaged the property in dispute for Rs. 200 to the grandfather of defendant No. 1. In 1864 the appellants' father redeemed the mortgage and re-mortgaged the property for the same amount and on the same terms to defendant No. 4, and in 1885 the appellants redeemed the second mortgage. Thereupon, the respondent brought the present suit to redeem the mortgage with respect to his moiety of the property in suit. Both the Courts below decreed the claim, and several objections are taken in second appeal.

It is urged that the mortgage which the respondent sought to redeem is stated in the plaint to be the mortgage of 1852, though it ceased to exist in 1864, and that the lower Courts were in error in passing a decree in his favor. We observe, however, that the appellants resisted the respondent's claim and relied, *inter alia*, on the redemption of the first mortgage in 1864. The Court of first instance recorded the fourth issue to ascertain the effect which such redemption had on the respondent's claim as co-mortgagor. We see no reason for saying that the appellants were taken by surprise, and that the Court ought not to have decreed to the plaintiff the relief he was entitled to upon the facts found.

Another objection urged in appeal is, that the respondent's claim is barred by limitation, and that the appellants' possession through defendant No. 4 from 1864 was adverse to it. The redemption of the original mortgage by the appellants' father in 1864 created in his favor only a charge on the share of respondent's father in the property mortgaged for his proportion of the mortgage debt and the expenses incurred in redeeming and obtaining possession of the mortgaged property. The possession arising from such redemption is then referable to the first mortgage, so far as the respondent's interest in the property is concerned, in the absence of distinct evidence to show it was acquired or retained with an assertion of adverse title and thereby became hostile to the respondent's claim. The finding of the Courts below on this point is that there is no satisfactory evidence

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of adverse title. It is said that the separate residence of the appellants' branch of the family, the division of a few salt pans which originally formed family property, and the recital in (exhibit I) that the property is that of the appellants, constitute sufficient evidence of adverse title, and that the lower Courts have failed to give due effect to it. We are not prepared to hold that the evidence relied on has not been considered, on the other hand the lower Courts have come to the conclusion that it is consistent with the appellants' possession as trustees in respect of the respondent's moiety of the property in dispute. Although the respondent attested exhibit I, and although there is a recital in it that the property in question is that of the appellants, we must construe the expression as intended to have application as between them and the party in whose favor it was executed. The impression which the respondent's attestation conveys is rather in favor of a belief that he had an interest in the property than that he had no interest in it. We may also refer, in support of our view that the period of limitation did not run from 1864, to the decision of the Bombay High Court in *Ramachandra* v. *Sadashiv*(1). As to the decision on *Umr-un-nissa* v. *Muhammad*(2) to which the appellants' pleader draws our attention, we observe that it is not a case in point, the only question decided there being that the period of limitation could not be taken to have run from the date of the death of the co-mortgagor's predecessor in title. The appellants' pleader next relies on ss. 74 and 95 of the Transfer of Property Act, as showing that, notwithstanding the redemption by the appellants' father, they were not entitled to obtain possession of the property under mortgage, and that the possession which they actually obtained must, therefore, be taken to have been adverse to the respondent's claim. This contention cannot be upheld; the true construction of s. 95 is that the co-mortgagor redeeming the whole of the mortgaged property has as well a right of obtaining possession as of treating the co-mortgagor's share of the mortgage debt as a charge on the latter's interest in the property redeemed.

The second appeal must fail, and we dismiss it with costs.

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(1) I.L.R., 11 Bom., 422. (2) I.L.R., 3 All., 24.