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there must be this division, and that the suit is supplemental to the old one.

There must be an enquiry whether trusts 1 to 9 have been carried out, and what sum is divisible. There will also be an enquiry as to the devolution of the estates since the decree of 1837 to ascertain who are now entitled to share. This enquiry may be assisted by investigation of the records and supplemented by affidavit. The costs of suit will be reserved.

Attorneys for the plaintiffs: Messrs. *Swinhoe & Co.*

Attorney for the defendants Odoychurn and Toolsee Doss: Mr. *Paliologus.*

Attorneys for the other defendants: Messrs. *Beeby and Rutter*, Mr. *H. H. Remfry*, Baboo *Gonesh Chunder Chunder*, Messrs. *Watkins and Watkins*, Baboo *N. C. Burrell*, Baboo *U. L. Bose*, Baboo *B. C. Bonnerjee*, and Baboo *W. C. Bonnerjee*.

PRIVY COUNCIL.

DULICHAND (DEFENDANT) v. RAMKISHEN SINGH AND
 OTHERS (PLAINTIFFS).

P. C.*
 1881
 April 5.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Money paid, but not due, and paid under compulsion.

A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage-debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property, on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed, and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale.

* Present:—SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR R. COUCH.

Held, that this was not a voluntary payment, nor a payment of money equitably due; but one made under compulsion of law, *i.e.*, under pressure of the execution-proceedings. And *held*, that this might be recovered in a suit for a money-decree, the remedy not being confined to the execution-proceedings.

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APPEAL from a decree of the High Court (July 20th 1878), confirming a decree of the Judge of Patna (July 29th 1876).

The respondents sued to obtain a refund of Rs. 78,393, with interest, from the appellant. They had paid this sum to him in order to prevent the sale, in execution of a decree which he, as mortgagee, had obtained against a third party, of lands forming a mouza, in which the plaintiffs had an interest as purchasers. The claim of the latter (preferred under ss. 278, 279 of the Code of Civil Procedure) having been disallowed, they paid into Court an amount sufficient to satisfy the decree. The question now raised on this appeal was whether the suit would lie.

Mr. *Leith*, Q. C., and Mr. *Arathoon* for the appellant.

Mr. *Cowie*, Q. C., and Mr. *Doyle* for the respondents.

The facts, as well as the orders of the Courts in India, are stated in their Lordships' judgment, which was delivered by

SIR M. E. SMITH.—This is a suit brought by the respondents, Ramkishen and others, against Dulichand, the appellant, to recover back a sum of Rs. 78,393, which the respondents had paid to the appellant to prevent the sale of a mouza called Korina, which had been attached and put up for sale in execution of a decree obtained by the appellant against one Neoghi. The suit claimed, in the alternative, that the amount of Rs. 78,393 should be apportioned between Korina and another mouza of the name of Nandan. The point, upon the facts found in the Courts below, is a short and plain one, but in order to make it intelligible, it is necessary to refer to the transactions which took place between the parties, though not at great length.

Ram Rutton Neoghi, a zemindar, was the owner of several mehals, and amongst others of two mouzas called Korina and

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Nandan. These mouzas were mortgaged in the way which will be hereafter described. The first mortgage which appears is of the date of the 3rd July 1865, and is a mortgage of Korina made by Neoghi to the Land Mortgage Bank of India, to secure a lakh of rupees. In January 1867, Neoghi borrowed from one Lutf Ali Khan a sum of Rs. 10,000, and gave as security a mortgage-bond on certain mouzas, not including either Korina or Nandan. It is only necessary to refer to this mortgage-bond for the purpose of explaining the next mortgage transaction, and also of explaining a reference which is made in the course of the proceedings to the debt due to Lutf Ali Khan. It appears that Lutf Ali Khan obtained a decree upon his bond for Rs. 19,416. He did not, apparently, attach the properties included in his mortgage-bond, but he attached, and was about to sell, Nandan. In order to prevent the sale of Nandan, on the 8th of January 1870, Neoghi mortgaged to the appellant, with several other mouzas not material to be mentioned, the two mouzas, Korina and Nandan, to secure Rs. 38,000. The mortgage of Korina was a second mortgage, it being subject to the prior mortgage to the bank; that of Nandan was apparently a first mortgage. The next transaction is a mortgage by Neoghi of Nandan and other mouzas to the respondents for Rs. 5,500. The bank brought a suit on their mortgage, and on the 17th April 1871, they obtained a decree for the sale of Korina and other mouzas to realize the debt due to them. On the 29th July 1872, Korina was attached by the bank, and also by another decree-holder, creditor, one Chuttun Singh. On the 16th December 1872, Mouza Korina was sold under Chuttun Singh's decree, but subject, to the bank's mortgage, to the respondents for Rs. 115. Shortly after the sale, the respondents paid into Court Rs. 58,719 to satisfy the mortgage and decree of the bank against Korina, and in the following October (1873) were put into possession of that mouza. They, therefore, were the purchasers of Neoghi's interest in Korina, which had been sold by Chuttun Singh, and paid off the prior mortgage to the bank, and the amount so paid is found by the Courts below to have exceeded the value of Korina.

Concurrently with these proceedings affecting Korina, others were going on with regard to Nandan. The respondents, on the 29th of February 1872, obtained a decree in a snit which they had brought on their mortgage of Nandan, and attached it and other mouzas. On the 5th August 1872, the appellant intervened in the execution-proceedings in this suit. He gave notice of his mortgage, and required that it should be notified at the time of the sale; and it was so notified. The sale was made subject to that notification, and of course subject to the mortgage to the appellant, upon which he at that time claimed that a sum of Rs. 1,51,239 was due. It is plain what the effect of such a notification upon the sale must have been, and the biddings were only for the equity of redemption, which was of small value. The sale took place in August 1872, and the purchaser was one Dindyal, the appellant's brother, the price being Rs. 11,710. A certificate of sale and possession were obtained on the 11th September 1873. It has been found by both Courts that Dindyal purchased benami for the appellant. The appellant, therefore, having given notice of his mortgage, purchased the equity of redemption subject to his own debt, and thus became both owner of the equity of redemption and mortgagee. In that state of things it became material to inquire what was the value of Nandan. It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the appellant's mortgage, and was sufficient to cover not only that amount, but the Rs. 19,416 due to Lutf Ali Khan, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage-debt was satisfied by the purchase of Nandan and the value of that estate. The appellant, having thus obtained the full amount of his debt, could no longer avail himself of any other part of his security. The mortgage was only a security for the debt, and when it was satisfied, there was an end of any right to resort to the further securities he held. What gives occasion to the present action are the circumstances which will now be stated.

On the 1st of July 1872, the appellant sued Neogli on his mortgage for principal and interest. The claim he then made

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was the same he had notified in the suit brought by the respondents as mortgagees of Nandan, to which reference has been already made, namely, Rs. 1,51,239. It appears that sum included penal interest, and the Courts reduced it to a sum of Rs. 78,393. In June 1873 he obtained a decree, and on the 7th January 1874 an order to attach Korina. At the time he obtained that order he had become the purchaser of Nandan under the circumstances which have been stated; and his obtaining it after his mortgage-debt had been thus virtually satisfied was clearly inequitable. Korina being attached, the respondents intervened, as the purchasers of that mouza, and as representing the first mortgagees of it, the bank, and filed objections to the attachment and sale. The respondents in this way made the strongest protest that they could against the sale, but their objections did not prevail. The Judge of Patna disallowed them, and the High Court, upon appeal affirmed the decision of the Judge, stating that the petitioner must be left to his remedy, if any, in a regular suit. The result was, that the sale of Korina was ordered to take place; and to prevent that sale, and to protect the property which they had purchased, the respondents paid into Court the sum of Rs. 78,393 to satisfy the appellant's decree. They at once gave notice in writing that they should seek a refunding of that money in due course of law, and the present suit was brought for that purpose.

It is only necessary to refer shortly to the judgments. Both the Courts have concurred in holding that the plaintiff is entitled to recover. Certain facts are found clearly and succinctly by the Judge of the District Court. His findings are these: "I find, therefore, that the following facts are established: (i) that Mouzas Korina and Nandan are both made subject to a lien of Rs. 78,393 by the mortgage of January 1870"—that is, the appellant's mortgage; "(ii) that plaintiffs have, as owners of Mouza Korina, paid off a lien of a date prior to 1870 on Mouza Korina,"—that is, the bank's mortgage,—“exceeding in amount the estimated value of Mouza Korina as estimated by defendant himself; (iii) that the whole amount of the lien of Rs. 78,393, therefore, falls upon Mouza:

Nandan, if its value is equal to the amount of the lien ; (iv) that the value of Mouza Nandan is equal to the amount of such lien, even if Rs. 18,393 paid by the defendant be deducted"—that is, the amount said to have been paid to Lutf Ali ; "that plaintiffs, having paid this lien, are entitled to recover the amount so paid from the auction-purchaser of Monza Nandan ; that defendant No. 1 is the auction-purchaser of Mouza Nandan." It has been shown that at the time that this payment of Rs. 78,393 was made by the respondents to the appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that, in such a case, it is inequitable that he should hold the money paid to him, under compulsion, by the respondents. It is to be observed that the appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case, it is unnecessary to go into the question of marshalling the securities.

The arguments at the bar were not directed to show that there is any equity upon which the appellant could retain this money ; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution-proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouza which the respondents had purchased, and was made therefore under compulsion of law,—that is, under force of these execution-proceedings. In this country, if the goods of a third person are seized by the Sheriff and are about to be sold as the goods of the defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid ; it is the compulsion under which they are about to be sold that makes the payment involuntary. See *Valpy and others, assignees of Bate, v. Manley* (1).

It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit ; but none were pointed out by Mr. Ara-

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thoou which would afford a suitable remedy, or which would preclude such an action as the present.

Their Lordships think the decree of the Judge of Patna is incorrect in declaring that the plaintiffs are entitled to realize the decretal money by auction-sale of Mouza Nandan; and that it ought to be amended by striking out that declaration. In the view they take of the case, the decree should be a simple money-decree. On the whole case, they agree with the Courts below, though not altogether on the same grounds, that the plaintiffs are entitled to succeed in the action; and they will humbly advise Her Majesty, subject to the amendment above indicated, to affirm the decrees appealed from. The appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: Mr. T. L. Wilson.

Solicitors for the respondents: Messrs. Barrow & Rogers

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Field.

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July 4.

DEGAMBER MOZUMDAR AND ANOTHER (DEFENDANTS) v. KALLYNATH ROY (PLAINTIFF).*

Principal and Agent—Form of Suit for Account—Procedure on taking Accounts—Misjoinder—Limitation—Notice of Objections to Decree by Respondent—Accounts of Joint Property—Civil Procedure Code (Act X of 1877), ss. 250, 395, and 396; sched. iv, Form 157—Limitation Act (XV of 1877), s. 5.

In a suit for an account by a principal against his agent, the plaintiff should ask in his plaint that a proper account may be taken. If the defendant is found liable to render such account for a certain period, the Court should make

Appeal from Appellate Decrees, Nos. 447 and 448 of 1880, against the decree of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 10th of December 1879, modifying the decree of Baboo Gungachurn Sircar, Subordinate Judge of that district, dated the 20th of November 1878.