Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

SURNOMOYE DASSYA AND ANOTHER (DEFENDANTS) *v.* THE LAND MORTGAGE BANK OF INDIA, LIMITED (PLAINTIFFS).* 1881 *March* 4.

Reg. VIII of 1819, *s.* 17, *cl.* 5—*Patni Talook—Sale for Arrears of Rent—Attachment—Priority—Mortgage.*

The patnidar of a talook granted a durpatni to the defendants on the 10th of February 1869. The same patnidar afterwards mortgaged the patni talook to the plaintiffs, who obtained a decree on their mortgage on the 28th September 1874. The patni was sold for its own arrears on the 17th November 1876; and after payment of rent and all expenses, there remained a surplus in the hands of the Collector, which was attached by the plaintiffs in execution of their decree on the 9th of November 1876. On the 12th January 1877, the defendants instituted a suit against the patnidar, under cl. 5, s. 17, Reg. VIII of 1819, for compensation for the loss of the durpatni, and obtained a decree, which the Court directed should be satisfied out of the surplus sale-proceeds; and the Collector, notwithstanding the plaintiffs' attachment, allowed the defendants to obtain the amount decreed out of the surplus sale-proceeds.

In a suit by the plaintiffs to recover the amount paid for compensation, on the ground that the plaintiffs' attachment was prior to the defendants' suit,—*Held*, that the defendants' decree must, notwithstanding the plaintiffs' attachment, be satisfied out of the surplus sale-proceeds in priority to the plaintiffs' decree.

THIS suit was brought by the Land Mortgage Bank against the defendants to establish their right to a sum of Rs. 865-5-9, which had been obtained by the defendants, Nos. 1 and 2, under these circumstances.

The patnidar of a talook had granted a durpatni of it to the defendant No. 1 on the 10th of February 1869.

The same patnidar then mortgaged to the Land Mortgage Bank this talook and other properties on the 8th of March 1872, for a sum of Rs. 45,000. On the 28th September 1874, the Bank obtained a decree for the sum due to them upon this mortgage, and declaring their rights under it.

* Appeal from Appellate Decree, No. 1790 of 1879, against the decree of A. C. Brett, Esq., Judge of Jessore, dated the 12th May 1879, modifying the decree of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 6th of June 1878.

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The patnidar having then made default in payment of his rent, the talook was put up and sold by auction for its own arrears on the 17th of November 1876; and after paying the rent and all expenses, there remained a surplus of the sale-proceeds in the hands of the Collector of Rs. 2,138-1-5.

By means of this sale the durpatnidar, the defendant No. 1, lost his durpatni; and, therefore, on the 12th of January 1877, the defendants Nos. 1 and 2 (the latter being the wife of the defendant No. 1) brought a suit against the patnidar (under the provisions of cl. 5 of s. 17 of Reg. VIII of 1819) to recover compensation for the loss of the durpatni, and to have the amount of the compensation paid to them out of the surplus proceeds, it being alleged that the durpatni was purchased with the money of the defendant No. 2.

In this suit the defendants Nos. 1 and 2 obtained a decree for the sum of Rs. 865-5-9, by way of compensation, and the Munsif ordered that sum to be paid to them out of the surplus proceeds.

Meanwhile, immediately after the sale of the patni, the Land Mortgage Bank, on the 9th of December 1876, placed an attachment upon the sum of Rs. 2,133-1-5, the surplus proceeds; but the Collector, notwithstanding this attachment, allowed the defendants Nos. 1 and 2 to obtain the Rs. 865-5-9 out of the surplus proceeds, in accordance with the Munsif's order.

This suit was then brought, on the 28th of March 1878, by the Bank, for the purpose of recovering the Rs. 865-5-9 from the defendants Nos. 1 and 2; and they contended, that as their attachment was prior to the suit of the defendants Nos. 1 and 2, they were entitled to the whole surplus proceeds to the exclusion of the defendants' claim.

The view of the Subordinate Judge was, that the two defendants had a right to bring their suit for the sum which they obtained, and that it was properly paid over to them out of the surplus proceeds. He, therefore, dismissed the plaintiffs' suit.

The District Judge took a different view. He considered that the case came within the provisions of s. 17 of the Regulation; but he thought that the plaintiffs had an equal right with the defendants Nos. 1 and 2 to the surplus proceeds, as being assignees

of a valuable interest in the talook; but that as the sum was not sufficient to satisfy both, he decided that the surplus proceeds ought to be divided between the parties rateably in proportion to the value of their respective interests in it. Putting, therefore, the value of the plaintiffs' interest at Rs. 2,000, and that of the defendants at Rs. 865-5-9, he held that the defendants were entitled to Rs. 550 out of the surplus, and the plaintiffs to the residue. He therefore gave the plaintiffs a decree for Rs. 315, and ordered each of the parties to pay their own costs.

Baboo *Mutty Lall Mookerjee* for the appellants.

Baboo *Kashi Kant Sen* for the respondents.

The judgment of the Court (GARTH, C. J., and MCDONELL, J.) was delivered by

GARTH, C. J.—We think that the District Judge has taken an erroneous view of this case. [His Lordship then stated the facts as above, and continued.]

Both parties complain of this decision, the plaintiffs (by way of appeal), on the ground, that the defendants were not entitled to any part of the surplus proceeds; and the defendants (by way of cross objection) on the ground, that they are entitled to the whole of the Rs. 865-5-9, and that the Court below was wrong in directing them to restore Rs. 315 to the plaintiffs.

It is strange that, during the whole of the argument in this Court, we have been allowed to remain under a wrong impression as to a point upon which, as it seems to us, the whole case turns. We were led to suppose, that the suit brought by the defendants, in which they recovered the Rs. 865-5-9, was not brought *within two months from the time of the sale of the patni*; and if that had been so, we think that the Munsif would have had no power to order that sum to be paid out of the surplus proceeds.

The words of cl. 5 of s. 17 are: "It shall be competent to any one conceiving himself to possess such an interest, &c., to bring forward his claim to the price he may have paid for the same, or for a just compensation for the loss sustained by him in con-

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sequence of the sale, *by instituting a regular suit at any time within two months from the date of sale.*"

If, therefore, the suit of the defendants had not been brought within two months from the date of sale, the Munsif, although he might have given them a decree enforceable in the ordinary way, could not have decreed the amount out of the surplus proceeds.

It now turns out, however, that the suit was brought duly within the two months, and that, therefore, the Munsif's decree was quite regular.

That being so, the only question is, whether the plaintiffs, who had placed an attachment upon the surplus proceeds immediately after the sale, are entitled to recover from the defendants the whole or any part of the sum which has been awarded them out of those surplus proceeds by the Munsif.

It has been suggested to us, that although the plaintiffs did not bring any suit under cl. 5 of s. 17, yet they must be considered as having made a claim to the surplus proceeds by placing an attachment upon them. But that is a course, which appears to us not to be warranted by cl. 5. The only claim which can be made under cl. 5 is *by a regular suit*, and the decree which is to be made in that suit is of a special nature, *enforceable only as against the sale-proceeds;* and if the plaintiffs in this suit had intended to proceed against those proceeds under cl. 5, they could only have done so by instituting a regular suit.

This they have not done; and as the defendants have taken the proper course, and have obtained a judgment, we think, that they have secured a right to the sale-proceeds to the amount of their judgment prior to any right of the plaintiffs.'

It may be that the plaintiffs may enforce their attachment as against the residue of the sale-proceeds; but that question does not arise in this suit.

The result is, that the judgment of the District Judge must be reversed, and that of the Subordinate Judge restored; and that the plaintiffs must pay the costs in all the Courts.

Appeal allowed.