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it. But whether Inas, Rofi, Aziz, and Kutab were relations of the ancestors of Allal and Roshan, grandfathers of the present defendants, is unknown. Even assuming that the etmams bearing those names have some connection with the original etmams of Allal and Roshan, there is no evidence to show how long they existed,—that is to say, whether they were created before or after the Permanent Settlement. It seems to us, therefore, that there is no evidence to support the finding of the Judge in favor of the defendants that the etmam in suit was in existence at the time of the Permanent Settlement. We, therefore, set aside his judgment and restore that of the first Court, with costs of this Court and of the Court below.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Tottenham.

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 March 11.

RAJKISHORE SHAHA (PLAINTIFF) v. BHADDOO NOSHOO AND OTHERS
 (DEFENDANTS).*

Money-Decree on Mortgage Bond—Subsequent Suit by Mortgagee to enforce his lien on the Property Mortgaged.

The plaintiff, a mortgagee of certain specific property, given as security for an advance, obtained a money-decree against the representatives of his debtor. A third person, having a claim against the same debtor, seized and attached the specific property mortgaged to the plaintiff, and sold it to A, who had notice of the plaintiff's lien. The plaintiff then brought a suit against A and the representatives of his debtor, to have his lien declared and debt satisfied.

Held, that, notwithstanding the plaintiff's previous money-decree, he was still entitled to enforce his lien against the property pledged.

IN December 1875, one Asman Singh executed a bond in favor of the plaintiff in consideration of a loan of Rs. 899, pledging, as collateral security, an elephant. Asman Singh subsequently died, and on the 8th May 1877, the plaintiff obtained a money-decree on the bond against the representatives of Asman Singh.

* Appeal from Original Decree, No. 278 of 1879, against the decree of J. W. Campbell, Esq., Judge of Rungpore, dated the 16th June 1879.

On the 16th May 1877, one Keuaram (who was also a creditor of Asman Singh) obtained a decree against his representatives, and in execution of this decree put up the elephant for sale. The elephant was purchased by the defendant Bhadoo, who had express notice of the plaintiff's lien.

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Bhadoo, after the purchase, refused to recognize the plaintiff's lien, whereupon the plaintiff brought this present suit to have his lien declared, and the elephant sold in satisfaction thereof.

The defendant contended that the question was *res judicata* under the plaintiff's decree of the 8th May 1877; that the plaintiff's lien had merged in the judgment under that decree, and that the lien had passed to himself when he purchased at the auction-sale.

The District Judge held, that the plaintiff's lien had not been extinguished by the judgment, and that it did not pass to the purchaser of the elephant; but that, as against the defendant, the plaintiff's lien was lost, that the suit was not barred as *res judicata*, but that the plaintiff was only entitled to a declaratory decree.

The plaintiff appealed to the High Court, on the grounds that he ought to have obtained a decree for the sale of the elephant, and that the Judge was in error in deciding that the plaintiff's lien was extinguished as against the defendant.

Baboo Nulit Chunder Sen for the appellant.

Baboo Sreenath Dass, Baboo Ganendro Nath Dass, Baboo Amarendra Nath Chatterjee, and Moonshree Serajul Islam for the respondents.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

MORRIS, J.—The plaintiff, appellant, lent money, in December 1875, to one Asman Singh, who, as security for the repayment of the loan, mortgaged an elephant to the plaintiff, retaining possession of the animal.

Asman Singh having died without paying off the debt, the plaintiff sued his representatives in 1877, and obtained a money-decree on the 8th May 1877. Subsequently, one Kenaram

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Oswal, who held another decree against Asman Singh, caused the mortgaged elephant to be sold in execution of that decree. The present plaintiff objected to the sale, on the ground of his own lien upon the elephant, and the sale was effected with notice to the purchaser of the plaintiff's claim. The present suit was brought against the auction-purchaser and against the debtors to obtain an order for the sale of the elephant in satisfaction of the debt.

The purchaser, the defendant No. 1, represented that the elephant had passed into the hands of the third parties, who intended to buy it from him.

Thereupon these parties were made defendants. It does not appear, however, even in the statement of the defendant No. 1, that they have acquired any interest in the elephant. As, therefore, they are not properly parties to the suit or the appeal, the appeal against them must be dismissed with costs. The point in dispute is, whether or not the plaintiff, having once obtained a decree for the money due to him, can bring another suit of the present kind to recover the money from the property that was pledged to him.

The lower Court has held that such suit is not barred, but that the plaintiff is entitled to a declaratory decree only, affirming that his lien on the pledged elephant still exists. It has refused him the full relief sought, because he has not demonstrated his inability to execute the decree of the 8th May 1879, by proceeding against other property of the debtors before seeking to follow the pledged property in the hands of another party.

We may note that no objection has been taken by the respondent, the defendant No. 1, to the Judge's findings, so far as they are in favor of the plaintiff; we think that those findings ought to have been followed up by a decree for the relief sought, it being of course left to the option of the defendant No. 1 to pay off the claim and retain the elephant. Had he bought it at the execution-sale without notice of the plaintiff's lien, we might have been disposed to hold that the plaintiff was bound to exhaust all other property of his debtors if it could be shown they had any, before attaching what had been sold to

another, although that was the very property pledged to him. But we are not aware of any principle of law or equity which should compel a creditor to abstain from executing his decree against the property pledged, and to harass himself with endeavours to find other property to attach, merely because a third party has chosen to buy the pledged property with full knowledge of the lien existing upon it. It is admitted by the lower Court that the plaintiff must have ultimately had recourse to such a suit as the present one, on failure to recover the amount of his decree by other means. We think that he was entitled to bring his suit in the first instance as he has done, and was not bound to avail himself of this remedy only as a last resource. In the Full Bench case of *Haran Chunder Ghose v. Dinobundhoo Bose* (1), the Judges expressly lay down that, notwithstanding a previous money-decree against the mortgagor, there is a right of suit against a third party to enforce the lien against the property pledged. Mr. Justice Markby observed, that the right to sell the very thing pledged is inherent to the pledgee, and, as a general rule, no claimants upon the property posterior to the first pledgee can interfere with this right, though of course they may have a right to redeem before sale.

Entirely concurring in this opinion, we think that the appellant has established his right to the relief sought for in his plaint against the defendant No. 1.

We accordingly amend the decree of the lower Court by adding to the declaration therein contained an order that, subject to the right of the defendant No. 1 to redeem the elephant, the amount of the plaintiff's claim, or as much of it as possible, be realised by the sale of the said elephant, any surplus sale-proceeds being returned to the defendant; and we direct that the defendant No. 1 do pay the plaintiff's cost in both Courts.

Appeal allowed.

(1) 23 W. R., 187.

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