

action to eject them; but it must be remarked that in that case the ryots did not question the decree for their ejection by appeal to this Court, and therefore we need not consider the judgment as deciding anything contrary to the other cases quoted above.

We accordingly follow those decisions and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Maclean.

CALLY NATH BUNDOPADHYA (PLAINTIFF) *v.* KOONJO BEHARY SHAHA AND OTHERS (DEFENDANTS).*

1883
SRISHTEE-
DHUR
BISWAS
v.
MUDAN
SIRDAR.

1883.
March 7.

Mortgage—Money Decree on Mortgage Bond—Mortgagee's lien—Registration Act (XX of 1866,) s. 53—Frame of Suit—Parties.

A and *B*, co-mortgagees, obtained a summary decree under the Registration Act XX of 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to *C* and *D* in March 1869. *C* and *D* having also obtained a decree on their mortgage brought the property to sale in execution of their decree and purchased it themselves in December 1874.

A not having had the whole of his mortgage debt satisfied instituted a suit on the 13th December 1879 against *C* and *D*, and the representatives of *B* (*B* having meanwhile died and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of *C* and *D*, and to recover the share of the mortgage debt still due to himself alone.

Held, that *A* did not acquire a better right to proceed against the property by reason of its having come into the hands of *C* and *D*, nor did *C* and *D* take subject to a greater burden than the mortgagor himself, and that as *A* had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit, merely because it was in the hands of third parties.

Quære.—Whether the suit being one for only a portion of the debt due on the mortgage (*B*'s representatives not having joined and claimed the share due to them) was not properly framed, assuming it would lie.

* Appeal from Appellate Decree No. 1484 of 1881, against the decree of F. McLaughlin, Esq., Judge of Backergunge, dated the 28th May 1881, affirming the decree of Baboo Bani Madhub Mitter, First Subordinate Judge of that district, dated the 24th April 1880.

1883

CALLY NATH
BUNDO-
PADHYA
v.
KOONJO
BEHARY
SHAHA.

Syud Emam Momtazooddeen Mahomed v. Raj Coomar Dass (1); and
Jonmenjoy Mullick v. Dossmoney Dossee (2) referred to.

THE plaintiff in this suit, instituted on the 13th December 1879, sought to have his right to a prior lien on certain properties declared, and to obtain the amount due to him upon a mortgage-bond by the sale of those properties.

He alleged in his plaint that one Koylash Nath Bhuttacharji borrowed Rs. 1,500 from him and a like sum from Jugul Kishore Gupta, the father of the defendants 4 and 5, on a mortgage-bond, dated the 4th Pous 1273 (18th December 1866); that he and Jugul Kishore Gupta obtained a decree against Koylash Nath Bhuttacharji under Act XX of 1866 on the 6th May 1868; that a part of the mortgaged property lying within the jurisdiction of the Dacca Court was sold under it, and that he and his co-mortgagee then brought a suit in the Second Subordinate Judge's Court at Backergunge against the mortgagor to establish their lien over the properties in dispute, and obtained a decree on the 13th September 1873; that subsequently to the mortgage in favor of himself and Jugul Kishore, Koylash Nath Bhuttacharji again mortgaged the properties to the defendants Nos. 1 and 2 on the 24th Falgoon 1275 (6th March 1869); that the defendants Nos. 1 and 2 instituted a suit on their mortgage against Koylash Nath Bhuttacharji, and obtained a decree on the 12th July 1870, and in execution of that decree brought the disputed properties to sale on the 3rd December 1874 and purchased them themselves in the name of defendant No. 3; that in the meantime the plaintiff had brought the properties to sale under his decree, and they were purchased by his wife, Nityakali Dabi, on the 3rd February 1875, but on her trying to get possession she was resisted by the defendants Nos. 1 and 2; that she thereupon instituted a suit to obtain possession, but being unsuccessful in such suit the plaintiff had to return her the purchase-money. The plaintiff, therefore, now brought the present suit to have his right to a lien over the disputed properties declared, and to obtain the amount of the debt due to him satisfied by the sale of those properties, and he joined the defendants Nos. 4 and 5, who were

(1) 14 B. L. R., 408 : S. C., 23 W. R., 187.

(2) I. L. R., 7 Calc., 714 : S. C., 9 C. L. R., 353.

the representatives of their deceased father, Jugut Kishore, his co-mortgagee.

The defendants pleaded, amongst other things, that the suit would not lie for want of parties, inasmuch as the representatives of the co-mortgagee had not been made plaintiffs, and that the plaintiff had only sued for his share of the mortgage-debt; that the plaintiff having once obtained a decree for the recovery of the money due on the mortgage bond, a second suit to recover the money and enforce his lien would not lie; and that the suit was barred by limitation and also under s. 13 of Act X. of 1877.

The Court of first instance held that the plaintiff having once taken a money-decree upon the mortgage, under s. 53 of Act XX of 1866, could not again obtain a decree for the money due on the mortgage; that the debt due to the plaintiff on the mortgage had been changed from a contract-debt into a judgment-debt, and that he could therefore only sue to establish his right to sell the mortgaged properties for the satisfaction of the judgment-debt due to him; and that as the decree which the plaintiff had obtained under Act XX of 1866 was barred by limitation and the debt had ceased to exist, the plaintiff had no cause of action.

The Court also found that the suit being brought to enforce the payment of only a part of the mortgage-debt, it was badly framed and would not lie, and that the plaintiff, instead of suing only for his share of the debt, should have sued for the whole debt, and if his co-mortgagee, or in this case the representatives of his co-mortgagee, declined to join in the suit, he should have made them co-defendants and asked that the Court should make them co-plaintiffs in the suit.

The suit was accordingly dismissed with costs.

The lower Appellate Court, on appeal, confirmed the decree of the Court of first instance both on the ground that a suit for only a portion of a mortgage-debt would not lie, and also on the ground that the plaintiff had exhausted his remedies in the former suit and consequently could not maintain the present suit.

Against this decree the plaintiff now preferred a special appeal to the High Court.

1883

CALLY NATH
BUNDO-
PADHYA
v.
KOONJO
BEHARY
SHAHA.

1883

CALLY NATH
BUNDO-
PADHYA
v.
KOONJO
BEHARY
SHAMA.

Bahoo *Rash Behary Ghose* appeared on behalf of the appellant.

Baboo *Durga Mohun Dass* for the respondents.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—The facts found in this case are as follows:—

The disputed property was mortgaged to the plaintiff and the father of defendants 4 and 5 in Pous 1273 (December 1866). They obtained a summary decree under the the Registration Act XX of 1866 in May 1868.

The property was again mortgaged to defendants 1 and 2 in March 1869. They sued on their mortgage-bond, obtained a decree, sold the property in execution, and bought it themselves in December 1874.

The plaintiff now sues the first and second defendants to enforce his share of the mortgage-debt against the property in their hands, joining the fourth and fifth defendants as the representatives of his co-mortgagees.

The District Judge affirming the Munsiff has dismissed the suit on two grounds:

First, he has held that the plaintiff's suit is improperly framed, and that he cannot sue for his share of the mortgage-debt. We think it very doubtful whether, on the construction of the mortgage-deed, this is so, whether the transaction was not several rather than joint; but it is not necessary to decide this.

The District Judge has held, secondly, that the plaintiff had exhausted his remedies in the former suit, and cannot sue again. This proposition is, we think, too broadly stated. The law applicable to the matter depends upon the effect of two Full Bench decisions, both of which are binding upon us.

In *Syud Emam Momtazooddeen Mahomed v. Raj Coomar Dass* (1), a mortgagee, who had obtained a summary decree under the Registration Act XX of 1866, afterwards brought a suit to enforce his lien upon the mortgaged property in the hands of the mortgagor. The Court, having pointed out

(1) I. L. R., 7 Cal., 714; S. C., 9 C. L. R., 353.

that the effect of the summary decree was the same as that of a money-decree in an ordinary mortgage-suit, held that the plaintiff had not, by obtaining a personal decree, forfeited his lien upon the land, but that he must enforce it in execution, and could not maintain a suit for the purpose.

1888
 GALLY NATH
 BUNDO-
 PADHYA
 v.
 KOONJO
 BEHARY
 SHAHA.

In *Jonmenjoy Mullick v. Dossmoney Dossee* (1), the plaintiff had obtained a money-decree against his mortgagor. After the decree the mortgagor sold the mortgaged property, and it was held that the plaintiff might enforce his lien by suit against the property in the hands of the purchasers.

These two cases establish that there is a difference in the procedure applicable between the case where the property is still in the hands of the mortgagor and the case where it has passed to a purchaser, the lien being enforceable in the one case by execution, in the other by suit.

But we do not see how the right can be more extensive in the one case than in the other.

It would be contrary to ordinary principles, we think, to hold that the mortgagee acquires a greater right by reason of the mortgagor's alienation, and that the purchaser takes subject to a greater burden than the debtor himself.

In the present case, the plaintiff has allowed his decree against the debtor to be long since barred by limitation, and has therefore lost all right to proceed by execution against the property in the hands of his debtor. We think he has no better right to proceed by suit against the property in the hands of the purchaser.

The appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R., 7 Calc., 714; S. C. 9 C. L. B., 353.