

application for the execution of a decree made under the provisions of s. 53 of Act XX of 1866, on the preliminary point of limitation. On an appeal being preferred to the High Court by the decree-holders, the Division Court referred the point of limitation to the Full Bench. The Full Bench held that the application was not barred by limitation (1), and the case was accordingly remanded by the Division Court to the Court of first instance for disposal on its merits.

Mr. *Colvin*, for the applicant.

Munshi *Sukh Ram*, for the opposite parties.

The judgment of the Court was delivered by

TURNER, O. C. J.—It is clear that, under the provisions of the Procedure Code, X of 1877, we have no power to give leave to appeal from the order of this Court directing a hearing on the merits, that order not being a decree but an interlocutory order; but it is argued that we have discretion to allow an appeal under the 31st clause of the Letters Patent. The case appears to be one in which, if we possessed the power, we should be inclined to exercise it, but we are of opinion that the provisions of that clause were by implication repealed by the Code and Act VI of 1874, which preceded the Code. The petitioner must apply for special leave or wait until this Court pronounces final judgment if the proceedings are brought before it. Each party to bear his own costs of this application.

Application refused.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MANIK SINGH (DEFENDANT) v. PARAS RAM (PLAINTIFF). *

Sale in Execution of Decree—Surplus Sale-proceeds—Lien—Act VIII of 1859 (Civil Procedure Code), s. 271.

Certain immoveable property was attached on the 13th April, 1876, in execution of two decrees, *viz.*, *M's*, dated the 15th January, 1876, which declared a lien created by a bond dated the 17th July, 1873, and *P's*, dated the 21st January, 1876,

* Second Appeal, No. 376 of 1878, from a decree of Maulvi Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 5th February, 1878, modifying a decree of Munshi Kishan Dyal, Munsif of Hathras, dated the 6th September, 1877.

(1) See *ante*, p. 538.

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which declared a lien created by a bond dated the 28th September, 1875. *M* had another decree dated the 11th November, 1875, declaring a lien on the same property created by a bond dated the 27th October, 1874. On the 2nd June, 1876, before the sale of the property, *M* applied for the attachment in the execution of that decree of the surplus remaining from the sale-proceeds after his claim under the decree dated the 15th January, 1876, was satisfied in full. The Court made an order in accordance with his application. *Held* that, under such circumstances, *M*, as the holder of the decree dated the 11th November, 1875, was entitled to share in the surplus sale-proceeds under the provisions of s. 271 of Act VIII of 1859, and further was entitled to share before *P*.

On the 15th January, 1876, one Manik Chand obtained a decree for money against two persons named Duli Chand and Jugal Kishore, which declared a lien on certain immovable property created by a bond dated the 17th July, 1873. On the 21st January, 1876, one Paras Ram obtained a decree for money against the same persons, which declared a lien on the same property created by a bond dated the 28th September, 1875. On the 13th April, 1876, the property was attached in the execution of both these decrees. At this time Manik Chand held a decree for money against the same persons, dated the 11th November, 1875, which declared a lien on the same property created by a bond dated the 27th October, 1874. On the 2nd June, 1876, he made an application to the Court in which he stated that the property was advertised for sale on the 20th June, 1876, in the execution of the decree dated the 15th January, 1876, and prayed that the surplus of the sale-proceeds remaining after the satisfaction of that decree might be attached in execution of the decree dated the 11th November, 1875, and be paid to him. On the 3rd June, 1876, the Court made an order directing the officer conducting the sale to attach in execution of the decree dated the 11th November, 1875, the surplus remaining from the sale-proceeds after the claim under the decree dated the 15th January, 1876, was satisfied in full. The property was sold on the 20th June, 1876. On the 22nd August, 1876, the Court ordered the claims of Manik Chand under the decrees dated the 15th January, 1876, and the 11th November, 1875, to be satisfied in full from the sale-proceeds, and the surplus remaining to be paid to Paras Ram under the decree dated the 21st January, 1876.

The present suit was brought by Paras Ram to recover from Manik Chand a portion of the money paid to him under this order

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on the ground that the plaintiff, as an attaching creditor, was entitled to have his claim under the decree dated the 21st January, 1876, satisfied in full. The Court of first instance dismissed the suit, holding that the defendant's claims under the decrees dated the 15th January, 1876, and the 11th November, 1875, ought to be satisfied in full in preference to the plaintiff's claim under his decree. On appeal by the plaintiff the lower appellate Court gave him a decree for the amount which had been paid to the defendant under the order of the 22nd August, 1876, in satisfaction of his claim under the decree dated the 11th November, 1875, on the ground that neither attachment nor sale had been made under that decree.

The defendant appealed to the High Court against the decree of the lower appellate Court.

Babus Oprokash Chandar Mukarji and Jogindro Nath Chaudhri, for the appellant.

Munshi Humun Prasad and Pandit Bishambhar Nath, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—The sale was made on the 20th June, 1876, in execution of the defendant appellant's decree dated 15th January, 1876, which declared a lien created by a bond dated 17th July, 1873, in pursuance of an attachment made by him on 15th April, 1876, on which date the plaintiff, respondent, also attached the same property in execution of his decree dated 21st January, 1876, which declared a lien dated 28th September, 1875. Both Courts are agreed that it was proper that the defendant appellant's decree above-mentioned should first be discharged out of the sale-proceeds. Defendant appellant had another decree dated 11th November, 1875, declaring a lien on the same property created by a bond dated 27th October, 1874; the Court of first instance held that this decree should also be discharged out of the surplus sale-proceeds in preference to that of the plaintiff, respondent; the lower appellate Court held otherwise for the reason stated in its judgment, *viz.*, that neither attachment nor sale had been made under the decree of 11th November, 1875.

But it appears that on 2nd June, 1876, the defendant preferred a petition to the Court praying that, as the property on which

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his decree of 11th November, 1875, declared his lien was about to be sold in execution of his decree dated 15th January, 1876, the surplus sale-proceeds might be attached for the purpose of being applied to the satisfaction of the decree of 11th November, 1875, and that an order was passed on 3rd June, 1876, in accordance with the petition.

Under the circumstances we are of opinion that the decree-holder of 11th November, 1875, was entitled to share in the sale-proceeds, under the provisions of s. 271 of Act VIII of 1859, as one who had prior to an order for distribution, before the sale even, taken out execution of his decree against the same judgment-debtor and not obtained satisfaction thereof, and as his lien as well as the decree which declared it were prior in date to the lien and decree held by the plaintiff, was entitled to share before him.

We therefore decree the appeal with costs, modifying the lower appellate Court's decree so far as it modified that of the Court of first instance, and restoring the latter in its entirety.

Appeal allowed.

APPELLATE CIVIL.

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Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

MERCER (JUDGMENT-DEBTOR) v. NARPAT RAI AND ANOTHER (DECREE-HOLDERS).*

Execution of Decree—Military Officer—Stat. 40 Vict. c. 7 (Mutiny Act, 1877), s. 99.

Where, with reference to s. 99 of the Mutiny Act, a decree for money made against a military officer serving in India directed that the judgment-debt should be stopped out of a moiety of such officer's pay, held that the decree-holder could not obtain satisfaction of the decree by attachment of such officer's moveable property (1).

THE judgment-debtor in this case was an officer belonging to Her Majesty's Royal Artillery serving in Allahabad. The decree,

* Miscellaneous First Appeal, No. 27 of 1878, from an order of J. W. Quinton, Esq., Judge of Allahabad, dated the 2nd May, 1878.

(1) In *Bansi Lal v. Mercer*, H. C. R., N. W. P., 1875, p. 331, it was held that, where no provision had been made in a decree for the stoppage of the pay of a military officer, the pay of such officer could not be attached in the execution of the decree in the hands of the Paymaster.