

not being a sovereign body, might have been made liable by suit in cases in which such a remedy would not, without special enactment, be available either against the Crown or against any servant of the Crown as such; and that it was intended to give the same remedies, in some cases at least, against the revenues of India by suit against the Secretary of State which were formerly admissible against the East India Company. But whether this be the true view or not, it has nothing to do with the nature of a Crown debt; and no bearing, therefore, upon the construction of s. 62 of the Insolvent Act.

T. A. P.

*Appeal dismissed.*

Attorney for the appellant: Mr. G. Gregory.

Attorney for the respondent: The Govt. Solicitor (Mr. U. L. Upton.)

## APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Agnew.*

BUKSHI RAM PERGASH LAL (ONE OF THE DEFENDANTS) v. SHEO PERGASH TEWARI (PLAINTIFF).\*

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January 6.

*Limitation Act (XV of 1877), Sch. II, Art. 11—Civil Procedure Code (Act XIV of 1882), ss. 280, 283—Mortgages, Suit by, against mortgagor and third party who has intervened and obtained an order under s. 280, Civil Procedure Code—Execution of decree.*

Article 11, Sch. II of the Limitation Act (XV of 1877), refers only to suits contemplated by s. 283 of the Civil Procedure Code. Where, therefore, a mortgagee having obtained a decree on his mortgage, and caused the property to be attached was successfully opposed by a third party who intervened in his attempt to have the property sold, and an order was passed under s. 280 of the Code of Civil Procedure releasing the property from attachment, and when the mortgagee, more than a year after the date of that order, instituted a suit against such third party and his mortgagor, to have his lien over the mortgaged property declared, and to bring it to sale in execution of his decree alleging that the title set up by such third party was a fraudulent one, collusively created between the mortgagor and such third party with a view to deprive him of his rights, and asking to have the order passed under s. 280 set aside:

\* Appeal from Appellate Order No. 214 of 1885, against the order of J. Tweedie, Esq, District Judge of Shahabad, dated the 4th of May 1885, reversing the decree of Baboo Gopal Chandra Bose, Munsiff of Buxar, dated the 14th of June 1884.

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*Held*, that the suit was not barred by limitation under the provisions of Art. 11, Sch. II of the Limitation Act. The right that was in litigation in the proceeding under s. 280 was the right to attach and sell the property in dispute in execution of the decree which the plaintiff had obtained against the mortgagor, and so far as that right was concerned the present suit was barred, but so far as the other relief claimed in the present suit went that article did not apply and the suit was not barred.

THE facts of this case as stated in the plaint were as follows: On the 23rd Aghran 1278, Ram Dial Pandey, the father of the defendant No. 5, and defendant No. 6, executed a mortgage of the property in dispute in favor of the plaintiff. The plaintiff instituted a suit upon that mortgage and obtained a decree, directing the sale of the mortgaged property. Subsequent to that decree defendants Nos. 5 and 6, in collusion with defendants Nos. 1 to 4, caused the mortgaged property to be sold, and at such sale defendant Nos. 1 to 4 became the purchasers. The plaintiff in execution of his decree then attempted to have the property sold, but the defendants Nos. 1 to 4 intervened, and an order was passed on the 6th February 1882 in the execution proceedings releasing the property from the attachment put on it at the instance of the plaintiff.

The defendants Nos. 1 to 4 claimed to be entitled to the land by virtue of a purchase at a sale in execution of a mortgage decree upon a mortgage executed by the other defendants in their favor, and the plaintiff impeached that mortgage and all proceedings as fraudulent and collusive, and charged that they had been entered into merely to deprive him of his rights. In this suit, which was instituted on the 5th February 1883, he claimed to have those proceedings declared null and void, to have his lien in the property declared, and to have the order passed in the execution proceedings upon the intervention of the defendants Nos. 1 to 4 set aside.

Although the plaintiff alleged that the order complained of was passed on the 6th February 1882, it appeared that it was made on the 28th January.

Defendant No. 1 contested the suit and *inter alia* pleaded that it was barred by limitation. He contended that the suit was one brought under the provisions of s. 283 of the Civil Procedure Code, to establish a right which had been the subject-

matter of an order under s. 280, and therefore was one governed by the provisions of Art. 11, Sch. II of the Limitation Act (XV of 1877), and consequently that the suit was barred not having been brought within one year of the date of the order.

The Munsiff, relying upon the decision in *Raj Chunder Chatterjee v. Modhoosoodum Mookerjee* (1) adopted this view and dismissed the suit.

Upon appeal the District Judge reversed that decision and remanded the case for trial upon its merits, and the other issues raised by the defendant.

Against that decision the defendant now appealed to the High Court.

The view taken by the lower Appellate Court appears sufficiently from the judgment of the High Court.

Baboo *Abinash Chundra Banerjee*, and Baboo *Raghu Nandan Pershad*, for the appellant.

Munshi *Mahomed Yusuf*, for the respondent.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows :—

This is an appeal against the order of the District Judge of Shahabad remanding the suit to the Court of first instance which had dismissed it, on the ground that it was barred by limitation under Art. 11 of Sch. II of the Limitation Act. The Judge was of opinion that the suit was not so barred. The plaintiff alleged that defendants Nos. 5 and 6 executed a mortgage in his favor in the month of Aughran 1278, hypothecating the land in suit as collateral security for the money taken under the mortgage deed; that he obtained a decree against defendants Nos. 5 and 6, and in execution of it attached the property in dispute. It appears that before the property in dispute was so attached it had been sold in execution of a decree obtained by defendants Nos. 1 to 4 against defendants Nos. 5 and 6, and purchased by the decree-holders themselves, *viz.*, defendants Nos. 1 to 4.

Upon the plaintiff proceeding to sell the attached property

(1) I. L. R., 8 Calc., 395.

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defendants Nos. 1 to 4 intervened, and under s. 280 of the Civil Procedure Code an order was passed by the execution Court releasing the property in dispute from attachment.

The present suit was brought by the plaintiff mainly against defendants Nos. 1 to 4, making defendants Nos. 5 and 6 also defendants to establish his right under the mortgage, and to obtain an order for the satisfaction of that mortgage, by the sale of the hypothecated property on the ground that his mortgage was prior in date to the purchase of the defendants Nos. 1 to 4, and also upon other grounds mentioned in the plaint.

The present suit was admittedly brought more than one year after the date of the order which was passed in favour of the defendants Nos. 1 to 4, under s. 280 of the Code of Civil Procedure.

Upon these facts the Court of first instance dismissed the suit, as barred by Art. 11 of the schedule to the Limitation Act. That article says: "By a person against whom an order is passed under ss. 280, 281, 282, or 335 of the Code of Civil Procedure, to establish his right, or to the present possession of the property comprised in the order."

The District Judge has overruled the plea of limitation based upon this article, on the ground that the present suit is not one to establish the plaintiff's right to the property comprised in the order, because the District Judge thinks that the decrec-holder has no right to the property which he can establish.

Although we agree in the result, *viz.*, that the present suit is not barred under Art. 11, we are unable to take the same view which the District Judge has taken of the article in question. That article refers to suits which are contemplated under s. 283 of the Code of Civil Procedure which says: "The party against whom an order, under ss. 280, 281, or 282, is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." Now, under this section, the decree-holder, who fails in a proceeding between himself and a claimant, under s. 280 of the Code of Civil Procedure, may institute a suit to establish his right to the property which he claimed in the proceeding before the execution

Court, *viz.*, the right to attach and sell the property which was claimed by the claimant in satisfaction of his decree. That is, in our opinion, the correct construction of Art. 11 which refers only to suits contemplated by s. 283.

That being so, the question which calls for decision in this case is, whether the present is a suit which comes within the purview of s. 283. It seems to us that the suit contemplated by s. 283 is a suit which may be brought by the unsuccessful party in a proceeding under ss. 280, 281 or 282 to establish a right to the property in dispute, which right was the subject-matter of litigation in the execution proceedings.

Now, in this case, the right which was in dispute in the proceeding under s. 280 is not the right under which the present suit has been brought, and that is quite clear from this consideration, *viz.*, that even if the execution Court had found the right upon which the present suit is brought, established, it could not give effect to it under s. 280. On the other hand, even if that Court had been satisfied of the existence of the right upon which the present suit is brought, it would have been bound, under s. 280, to release the property, because it was established that the property in dispute which was sought to be attached was then in the possession of the defendants Nos. 1 to 4. The right that was in litigation in the proceeding under s. 280 was therefore a right to attach and sell the property in dispute in execution of the decree which the plaintiff had obtained against defendants Nos. 5 and 6. So far as that right is concerned, the present suit is barred, but as regards the other right upon which the plaintiff has brought this suit, *viz.*, that he held a mortgage prior in date to the purchase of the defendants Nos. 1 to 4, and that the purchase of the defendants Nos. 1 to 4 was not real, the present suit is not barred under Art. 11 of the Limitation Act. We therefore agree with the District Judge, though upon different grounds, that the present suit is not barred by Art. 11 of Sch. II of the present Limitation Act.

We dismiss the appeal with costs.

H. T. H.

*Appeal dismissed.*

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