

1885 .

QUEEN-  
EMPRESS  
v.  
BANDHU.

aside the orders of the Magistrate and the District Judge, he will stand acquitted. If he has not found bail and is in custody he will be at once released; if he has, no further order will be necessary.

*Conviction set aside.*

## APPELLATE CIVIL.

1885  
December 7.

*Before Mr. Justice Strajght and Mr. Justice Tyrrell.*

UDIT SINGH (PLAINTIFF) v. PADARATH SINGH AND ANOTHER  
(DEFENDANTS). \*

*Pre-emption—Mortgage by conditional sale—Act XV of 1877 (Limitation Act),  
sch. ii, No. 120—Time from which period of limitation begins to run.*

A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December, 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April, 1881.

In a suit for pre-emption in respect of the mortgage,—*hald*, with reference to art. 120, sch. ii of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April, 1881, declaring the conditional sale absolute and giving him possession. *Rasik Bal v. Gajraj Singh (1)* and *Prag Chaubey v. Bhajan Chaudhri (2)* referred to.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of a mortgage by conditional sale, dated the 23rd March, 1868, made by the defendant Chatarpal Singh to the defendant Padarath Singh. The mortgagee had applied under Regulation XVII of 1806 for foreclosure of the mortgage, on the 21st April, 1873, and the year of grace allowed by that Regulation had expired on the 24th May, 1874, and a proceeding by the District Court foreclosing the mortgage had been drawn up on the 8th December, 1875. He had subsequently sued to have the conditional sale declared absolute and for possession of the mortgaged property, and had obtained a decree on the 28th April, 1881, for the relief claimed. On the 20th November, 1883, he had obtained possession of the mortgaged property in execution of that decree. This suit was instituted on the 27th March, 1884.

\* Second Appeal No. 112 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gwalchpur, dated the 31st July, 1884, affirming a decree of Munshi Shiva Sahai, Munsif of Basti, dated the 5th May, 1884.

The defendant Padarath Singh, the mortgagee, set up as a defence that the suit was barred by limitation.

1885

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 UDI  
 SINGH  
 v.  
 PADARATH  
 SINGH.

The Court of first instance (Munsif of Basti) held that the suit was barred by No. 120, sch. ii of the Limitation Act, computing the period of limitation from the 8th December, 1875. It observed as follows: "It has been ruled in the following decisions that in cases of conditional sales the term of limitation for a pre-emptive suit should be calculated from the date of foreclosure—*Nath Prasad v. Ram Paltan Ram* (1) and *Ashik Ali v. Mathura Kandu* (2). The case last cited is similar to the present. I therefore, without disposing of the other issues, dismiss the plaintiff's claim with costs."

On appeal the lower appellate Court (Subordinate Judge of Gorakhpur) concurred with the Munsif that the suit was barred by limitation under art. 120, but computed the period of limitation from the 24th May, 1874, the date of the expiration of the year of grace.

The plaintiff appealed to the High Court, contending that the period of limitation should be computed from the date the mortgagee had obtained possession in execution of his decree.

Lala *Lulta Prasad*, for the appellant.

Mr. *Carapiet*, for the respondent.

STRAIGHT, J.—The article of the Limitation Law admittedly applicable to this case is art. 120, and the only question is, from what point are the six years to be held to commence. Now, although the final order for the foreclosure was made in December, 1875, Padarath Singh, the vendee, was compelled to bring a suit for declaration of his title and possession, and it was not until the 28th April, 1881, that he obtained a decree, under which possession was subsequently given him on the 30th November, 1883. For the reasons given by me in *Rasik Lal v. Gajraj Singh* (3), I think that the pre-emptor is entitled to contend that his full right to impeach the sale had not accrued until the validity of the sale, as between the vendor and vendee, had been established by a Court, for *non constat*, but that it might have been found invalid, in which

(1) I. L. R., 4 All. 213. (2) I. L. R., 5 All. 137.

(3) I. L. R., 4 All. 414.

1885

UDIT  
SINGH  
v.  
PADARATH  
SINGH.

case his cause of action would have disappeared. It is not necessary for me to discuss here whether I am prepared to adopt the view expressed by my brothers Oldfield and Brodhurst in the case of *Frag Chaubey v. Bhajan Chaudhri* (1); as taking the decree of the 28th April, 1881, as the starting-point, the present suit, which was started on the 27th March, 1884, is abundantly within time. In my opinion this appeal must be decreed, and the decrees of the lower Courts being reversed on the preliminary point on which they threw out the suit, the case will be remanded to the Munsif, under s. 562 of the Civil Procedure Code, for disposal on the merits. The costs hitherto incurred will be costs in the cause.

TYRBELL, J.—I agree in the views stated and the order made by my learned brother.

*Appeal allowed.*

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

THAKUR DAS (DECREE-HOLDER) v. SHADI LAL (JUDGMENT-DEBTOR)\*

*Execution of decree—Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.*

A decree, which was passed on the 8th December, 1881, in a suit on a simple mortgage-bond, contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February, 1885, the decree-holder applied for execution of the decree.

*Held* that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. ii of the Limitation Act, and not of art. 179, should be applied to the case, and the application for execution having been made within three years from the 8th April, 1882, when the right to ask for execution accrued, was not barred by limitation.

The decree of which execution was sought in this case, bearing date the 8th December, 1881, was made in a suit on a simple mortgage-bond. It contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by sale of the mortgaged property." The decree-holder applied for execution of the decree on the 17th February, 1885. The Court of first instance (Munsif

\* Second Appeal No. 72 of 1885, from an order of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 23rd June, 1885, affirming an order of Sayyid Zakir Husain, Munsif of Farukhabad, dated the 9th March, 1885.

(1) I. L. R., 4 All. 291.