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that it fully recognises the law to be that the usufructuary mortgagee cannot, whilst his possession remains undisturbed, convert such usufructuary mortgage into hypothecation, or seek foreclosure or sale by an action such as this.

We are, therefore, of opinion that the suit and the relief prayed for in it were unmaintainable, and that the Courts below should have dismissed the suit altogether.

This view renders it unnecessary for us to consider the second point which has been pressed before us by Mr. *Mulho Prasad*, namely, whether or not a sub-mortgagee, such as the present plaintiff may possibly be under the terms of the deed of the 11th November, 1875, could, in any case, be entitled to maintain such an action. We are anxious to say that we express no opinion upon the matter, and because, taking the case on behalf of the respondent, she has no right for maintaining an action for bringing the property to sale.

For these reasons we decree the appeal, and setting aside the decrees of both the Courts below, dismiss the suit *in toto* with costs in all the Courts.

*Appeal allowed.*

*Before Mr. Justice Straight.*

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January 23.

GIRDHARI AND OTHERS (DECREE-HOLDERS) v. SITAL PRASAD (JUDGMENT-DEBTOR). \*

*Limitation—Execution of decree—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Civil Procedure Code, s. 315—Act XV of 1877 (Limitation Act), sch. ii, No. 178.*

A suit by a judgment-debtor whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June, 1884. On the 11th June, 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money.

*Held* that the limitation applicable was that provided by art. 178 of sch. ii of the Limitation Act (XV of 1877); that the right to apply accrued on the passing of

\* Second Appeal No. 357 of 1888 from a decree of Manvi Shah Ahmad-ullah, Subordinate Judge of Muzpuri, dated the 22nd December, 1887, confirming a decree of Munshi Girraj Kisher Datt, Munsif of Etah, dated the 5th November, 1887.

the High Court's decree, and the application was therefore not barred by limitation; but that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs.

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THE facts of this case are stated in the judgment of the Court.

Munshi *Juala Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondent.

STRAIGHT, J.—This is a second appeal in execution from an order of the Subordinate Judge of Mainpuri, dated the 22nd December, 1887, in affirmance of an order of the Munsif of Etah made in reference to an application of the appellants for a refund of certain purchase-moneys, which they had paid in execution of a decree. It appears that one Ram Gopal held a decree against one Khiali Ram, and in execution of that decree the decree-holder first of all brought to sale the zamindari rights of Khiali Ram in the particular village. The proceeds of that sale were insufficient to fully satisfy the decree; and on a subsequent date the rights and interests of Khiali Ram in the *sir* attaching to his zamindari were put up for sale and purchased by Girdhari, Kallu and Kundan, the appellants, upon the 21st November, 1881, and the sale was confirmed in their favour. Subsequently Khiali brought a suit in the Civil Court to have it declared that the *sir* rights purchased by the appellants were incapable of sale under the law, and that they had bought no more than a bag of wind. He succeeded in the first Court, which apparently made some order in its decree directing a return to the appellants, who were defendants in that suit, of the purchase-money paid in respect of the sale which was declared to be a void sale. Ultimately the case came in second appeal to this Court before my brothers Oldfield and Brodhurst; and on the 13th June, 1884, they passed a decree sustaining the decision of the first Court declaring the sale to be void and illegal; but they modified the decision of the first Court in so far as it directed in execution of that decree the return of the purchase-money to the appellants. On the 11th June, 1887, the appellants applied under s. 315 of the Civil Procedure Code to the Court which passed the original decree against Khiali Ram and ordered the sale of the 21st November, 1881,

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for the refund of the purchase-money, which they had paid for the *str* right. It may also be mentioned that the appellants had then instituted a suit to recover from the decree-holder the amount of the purchase-money paid by them, but that suit was, so I am informed, dismissed upon the ground that it was not maintainable, because the remedy provided by law was by an application in the execution department.

The question now is, what article of the limitation law is applicable to the present application for refund. Certainly not art. 172, because that is concerned with the application to set aside the sale on a particular ground, which this application is not. There is no other article that I can find in terms specifically applicable; it therefore seems to me that it falls within the general category provided for by art. 173, and that limitation must be taken to count from the date the appellants had accrued to them a right to make their present application. I think in this case I am taking a reasonable view when I say that until it was specifically declared by this Court in affirmance of the decision of the lower Courts that the sale of the 21st November, 1881, passed no saleable interest to the appellants—the auction-purchasers at a sale at that date,—it cannot be said that a right to apply for a refund accrued to them.

Under these circumstances I do not think that the application of the appellants of the 11th June, 1887, was barred by time, and accordingly reversing the decisions of the Courts below, I direct that the Munsif of Etah restore this application to his file of pending applications and dispose of it according to law. But looking to the very great delay that there has been on the part of these appellants, and to the fact that they waited till within two days of the expiry of the three years from the date of the decision of this Court, I should certainly not allow them any costs in this matter. Each party will pay their own costs.

*Appeal allowed.*