

procedure followed by this Court ever since this amendment was introduced in the Limitation Act.

The learned vakil for the appellants asks us to grant him time to show that he was prevented by sufficient cause from making the application within the six months allowed. We think this application should be granted. Let the appeal stand over for three weeks.

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FULL BENCH.

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April 17.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Aikman and
Mr. Justice Richards.*

DOST MUHAMMAD KHAN (DEFENDANT) v. MANI RAM (PLAINTIFF) AND
RAHMAT-ULLAH (DEFENDANT).*

Civil Procedure Code, section 411—Suit in formâ pauperis—Court fee—Property of defendant sold to realize court fee—Property sold subject to a mortgage—Rights of mortgagee.

Held that the sale, subject to a mortgage, of property belonging to the defendant in a suit brought *in formâ pauperis* for the purpose of realizing the court fee payable to Government by the plaintiff does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage. *The Collector of Moradabad v. Muhammad Daim Khan* (1) overruled. *Ganpat Futaya v. The Collector of Kanara* (2) distinguished.

THE facts of this case are as follows:—

One Rahmat-ullah executed a mortgage in favour of Ram Charan Das on the 15th of April 1895 purporting to hypothecate in it the whole of a certain house. The mortgagee subsequently instituted a suit to realise the amount of the mortgage, but, having ascertained that the mortgagor was only entitled to mortgage a $\frac{7}{16}$ share of the house, he confined his claim to that share and obtained a decree for sale on the 29th of June 1898. This decree was on the 7th of April 1899 transferred to the plaintiff Lala Mani Ram. Musammat Hafizan Bibi, a sister of the mortgagor, was entitled to a share in the house in question, and she on the 21st of January 1899 instituted a suit *in formâ pauperis* against her brother to have the mortgage set aside so far as regards

* Second Appeal No. 541 of 1904, from a decree of C. Rustomjee, Esq., District Judge of Allahabad, dated the 16th of March 1904, modifying a decree of Mr. H. David, Subordinate Judge of Allahabad, dated the 16th of December 1902.

(1) (1879) L. L. R., 2 All., 196. (2) (1875) L. L. R., 1 Bom., 7.

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her share in the house. On the 29th of July 1899 a decree was granted to her which directed that the court fee should be recovered from Rahmat-ullah. In execution of that decree a $\frac{7}{16}$ share in the house were sold subject to the mortgage executed by Rahmat-ullah in favour of Ram Charan Das and purchased by the defendant appellant Dost Muhammad Khan on the 2nd of May 1901. The plaintiff Lala Mani Ram then, as assignee of the mortgage of the 15th of April 1895, applied for sale of the mortgaged property. An objection to the sale was filed by the defendant appellant, who alleged that the property having been sold to him in the pauper suit against Rahmat-ullah could not be again sold. This objection found favour and was allowed, and hence the present suit for a declaration that the plaintiff is entitled to have the aforesaid shares in the house brought to sale. The first Court (Subordinate Judge of Allahabad) decreed the claim, but the lower appellate Court (District Judge of Allahabad) modified the decree of the Court below and directed that the defendant Dost Muhammad Khan should receive out of the proceeds of the sale Rs. 176, being the amount paid by him for the purchase of the house. The plaintiff submitted to this decree, but the defendant, Dost Muhammad Khan, not being satisfied with it appealed to the High Court.

The appeal originally coming on for hearing before a Bench of two Judges was laid before a full bench by order of the Chief Justice in view of the ruling in the Case of *the Collector of Moradabad v. Muhammad Daim Khan* (1).

Mr. M. L. Agarwala and Maulvi Rahmat-ullah, for the appellant.

Mr. B. E. O'Connor and Babu Lalit Mohan Banerji, for the respondents.

STANLEY, C. J.—The facts of this case may be shortly summarized. One Rahmat-ullah executed a mortgage in favour of Ram Charan Das on the 15th of April 1895 purporting to hypothecate in it the entire of a certain house. The mortgagee subsequently instituted a suit to realise the amount of the mortgage, but, having ascertained that the mortgagor was only entitled to mortgage a $\frac{7}{16}$ share of the house, he confined his claim to that

share and obtained a decree for sale on the 29th of June 1898. This decree was on the 7th of April 1899 transferred to the plaintiff Lala Manni Ram. Musammât Hafizân Bibi, a sister of the mortgagor, was entitled to a share in the house in question, and she on the 21st of January 1899 instituted a suit *in formâ pauperis* against her brother to have the mortgage set aside so far as regards her share in the house. On the 29th of July 1899 a decree was granted to her which directed that the court fee should be recovered from Rahmat-ullah. In execution of that decree a $\frac{7}{16}$ share of the house were sold and purchased by the defendant appellant Dost Muhammad Khan on the 2nd of May 1901. The plaintiff Lala Manni Ram then, as assignee of the mortgage of the 15th of April 1895, applied for sale of the mortgaged property. An objection to the sale was filed by the defendant appellant, who alleged that the property having been sold to him in the pauper suit against Rahmat-ullah could not be again sold. This objection found favour and was allowed, and hence the present suit for a declaration that the plaintiff is entitled to have the aforesaid shares in the house brought to sale. The first Court decreed the claim, but the lower appellate Court modified the decree of the Court below and directed that the defendant Dost Muhammad Khan should receive out of the proceeds of the sale Rs. 176, being the amount paid by him for the purchase of the house. I may mention that the property was sold to Dost Muhammad Khan expressly subject to the mortgage executed by Rahmat-ullah in favour of Ram Charan Das. The plaintiff submitted to this decree, but the defendant not being satisfied with it has preferred this appeal. His case is that the claim of Government in respect of court fees was a prior charge upon the house taking priority to all demands, including the claim of the mortgagor Ram Charan Das and his transferee, and that the sale having taken place to satisfy the court fees there could not be a second sale. This contention is based upon the authority of the case of *The Collector of Moradabad v. Muhammad Daim Khan* (1). In that case it was laid down by Pearson and Spankie, JJ., that the Government takes precedence of all other creditors and that this principle is not liable to an exception in the case of lien

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holders. In that case the Government caused certain property belonging to one Bulaki Das, the defendant in a pauper suit, to be attached with a view to the recovery by its sale of the amount of court fees payable by the plaintiff in the suit. This property was subsequently attached by the holder of a decree against the defendant which declared a lien on the property created by a bond. The property was sold in the execution of this decree, and it was held that the Government was entitled to be paid first in priority to the mortgagee out of the proceeds of the sale the amount of the court fees which the plaintiff in the pauper suit would have had to pay had he not been allowed to sue as a pauper. In this case the learned Judges purport to follow an earlier decision of the Bombay High Court in the case of *Gampat Putaya v. The Collector of Kanara* (1), which they say appears to be applicable to the case before them. That case appears to me to be no authority for the proposition laid down by the learned Judges. It merely decided that the Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of the court fee that would have been payable on the institution of the suit had the plaintiff not been a pauper. There is no doubt that under the provisions of section 411 of the Code of Civil Procedure the court fee payable in a pauper suit is a first charge on the subject matter of the suit and is recoverable by Government from any party ordered by the decree to pay the same, but it is not payable out of the property of a prior mortgagee of the party so ordered to pay. In the case before us, as also in the case of *The Collector of Moradabad v. Muhammad Daim Khan*, there was a prior mortgage subsisting over the property of the party who was liable to pay the court fee. I am at a loss to see how the Government's claim in respect of the court fee in such a case can be properly satisfied out of the property of the mortgagee who is in no way liable for its payment. The court fee is no doubt a first charge upon the interest of the mortgagor, but before the mortgagor is entitled to any benefit from the property mortgaged he must first satisfy the subsisting mortgage. It is the property alone of the mortgagor which is liable to satisfy the court fee. I am unable to agree with the view taken by the learned Judges who decided the case

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in this Court to which I have referred. It was in consequence of this decision that this appeal was sent by the Judges before whom it originally came to a larger Bench. I would dismiss the appeal in the present case as wholly untenable.

AIKMAN, J.—I am also of opinion that this appeal must fail. One Musammat Hafzan Bibi brought a suit *in forma pauperis* against her brother Rahmat-ullah and other relations for a declaration of her rights to certain property. She won that suit, and a decree was passed against Rahmat-ullah, who was ordered to pay the cost. Under section 411 of the Code of Civil Procedure, when a plaintiff in a pauper suit succeeds, the Court has to calculate the amount of court fees which the plaintiff would have had to pay had he not been permitted to sue as a pauper. This amount is declared to be a first charge on the subject matter of the suit, and the section further provides that it shall be recoverable by Government from any party ordered by the decree to pay the costs in the same manner as costs of suit are recoverable under the Code. The amount of court fee payable by Hafzan Bibi on her plaint, had she not been allowed to sue as a pauper, was Rs. 241. In order to recover this amount the Government, as it was entitled to do, proceeded to attach and sell certain house property belonging to the defendant Rahmat-ullah. That house property was previously under mortgage. At the sale, at the instance of Government, it was declared that the sale was to be made subject to the incumbrance previously created by Rahmat-ullah. Before the pauper suit the mortgagees had sued Rahmat-ullah on their mortgage and got a decree for sale of Rahmat-ullah's interest in this house property. This mortgage decree was assigned to the plaintiff Lala Mani Ram. When he proceeded to execute his decree he was resisted by Dost Muhammad Khan who had purchased Rahmat-ullah's rights in the house property at the sale held at the instance of Government to recover the amount due to Government for court fees. The appellant Dost Muhammad Khan bought the property for Rs. 176. His objection was sustained and the assignee of the mortgage decree has brought the suit out of which this appeal arises for a declaration that he is legally entitled to have the share of Rahmat-ullah valued at Rs. 2,000 sold in execution of

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the mortgage decree. The suit was decreed by the first Court. On appeal the learned District Judge varied the decree by directing that when the property was sold in execution of the mortgage decree Dost Muhammad Khan should be entitled to receive Rs. 176 out of the proceeds of the sale. With the propriety of this modification of the first Court's decree, we are not now concerned, as the plaintiff Lala Mani Ram has submitted to it. The defendant Dost Muhammad Khan comes here in second appeal and contends that the decree declaring the plaintiff's right to have the property sold under the mortgage decree is erroneous, inasmuch as the property having once been sold in satisfaction of a Crown debt cannot be sold again. There is no doubt that the ruling relied on, namely, *The Collector of Moradabad v. Muhammad Daim Khan* (1) supports the appellant's contention, but with all deference to the learned Judges who decided that case, I am of opinion that the view which they took is manifestly wrong. In support of their decision they relied on a decision of the Bombay High Court, in the case of *Ganpat Putaya v. The Collector of Kanara* (2). When that decision is referred to, it is clear, as the Chief Justice has pointed out, that it in no way supports the view taken by the learned Judges who decided the case reported in I. L. R., 2 All., 196. The decision of this latter case might work the gravest injustice if it were followed. No doubt the Crown as creditor takes precedence of all other creditors. But in my opinion the learned Judges who decided the case in I. L. R., 2 All., erred in saying that this principle is not liable an exception in the case of lien holders. Save when otherwise provided by law, the Crown can only sell such rights as the person indebted to it possesses. In certain cases Government is declared to have a first charge on property. For instance when a plaintiff has brought a suit *in forma pauperis* and wins that suit the Government claim for the amount of court fees which would have been payable on the suit is declared by law (section 411, Code of Civil Procedure) to be a first charge on what the plaintiff has won by the suit. And that is only fair, for, had the plaintiff not been allowed to sue as a pauper, the plaintiff would not have succeeded in getting anything. Again the Land Revenue.

(1) (1879) I. L. R., 2 All., 196. (2) (1875) I. L. R., 1 Bom., 7.

Act, *vide* section 141 of Act No. III of 1901, declares that in the case of every mahal the revenue assessed thereon shall be the first charge on the entire mahal, and following upon this, section 161 of the same Act provides that when a mahal is sold for arrears of revenue which have accrued due upon it, it shall be sold free of all incumbrances. But when any property of the defaulter, other than the mahal upon which the revenue is due, is sold to recover that revenue, the proviso to section 162 lays down that the provisions of section 161, namely, as to the sale free of all incumbrances, shall not apply to such sale. When the Government executed the decree against Rahmat-ullah, it could only sell such rights in the house as he had the time of sale, and the purchase by the appellant was, as was indeed expressly declared at the time of sale, subject to the previous incumbrance. I have no hesitation therefore in holding that the case of *The Collector of Moradabad v. Muhammad Daim Khan* was wrongly decided and that there is no force whatever in this appeal. I agree in thinking that it should be dismissed.

RICHARDS, J.—This appeal was referred to this Bench in consequence of the decision in the case of *The Collector of Moradabad v. Muhammad Daim Khan*. It would seem to me that but for that decision there would be no difficulty whatever in the case. Section 411 of the Code of Civil Procedure, dealing with suits *in forma pauperis*, provides as follows:—“If the plaintiff succeed in the suit, the Court shall calculate the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, and such amount shall be a first charge on the subject matter of the suit and shall also be recoverable by the Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable under this Code.” Musammat Hafizan Bibi, having sued *in forma pauperis*, and succeeded, Government were entitled to a first charge on the proceeds of that suit. They were also entitled to proceed against the defendant in that suit, inasmuch as the decree made him liable for the plaintiff's costs. We have nothing here to do with the Government's right to a first charge on the proceeds of the suit. We are not dealing with any property which was recovered in the suit. Government, however, in exercise of the

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further right given them by section 411 proceeded to execute the decree to the extent of the court fees against the property of Rahmat-ullah. Rahmat-ullah was in possession of the house in question, but subject to a mortgage which he had already created in favour of the assignor of the plaintiff. In effect we are asked to say that this decree in favour of Government can be executed against property which Rahmat-ullah had not. All that could be sold in execution of the decree was the house subject to the mortgage. As a matter of fact at the time of the sale the mortgage in favour of the assignor of the plaintiff was duly notified and Government only asked for execution subject to the mortgage. Government had no charge whatever on the property of Rahmat-ullah. All they had was the rights of a preferred creditor, that is, a creditor taking priority over all other unsecured creditors. It seems to me that it is quite clear that this appeal ought to be dismissed. It is unnecessary for me to deal with the case of *The Collector of Moradabad v. Muhammad Daim Khan*. I entirely agree with the remarks made by the other members of the Court.

By the Court.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

1907
April 20,

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkill.

RAN SINGH AND OTHERS (DEFENDANTS) v. SOBHA RAM (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of sons in respect of a mortgage executed by the father—Exemption of sons' interest—Subsequent suit against sons for share of debt payable by them—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 147, 132, 120.

Certain joint ancestral property was mortgaged by the head of the family first in 1832 and again in 1893. Subsequently the second mortgagee redeemed the first mortgage. The second mortgagee then sued to recover the amount due on both mortgages by sale of the mortgaged property, and obtained a decree in March 1895 and an order absolute for sale on the 25th of October 1897. To this suit the sons and grandsons of the mortgagor were not made parties. The sons and grandsons of the mortgagor sued for and obtained a decree exempting their interest in the mortgaged property from the operation

* First Appeal No. 193 of 1905, from a decree of Pandit Girraj Kishore Datt, Subordinate Judge of Moradabad, dated the 18th of December 1904.