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accept the judgement of the learned Additional District Judge as a finding that the money was borrowed on two bonds for the purpose of complying with the terms of one or more pre-emptive decrees. We think that in the absence of evidence to the contrary it must be assumed that these decrees were complied with and that the family acquired the property, the subject-matter of the pre-emptive decrees, by means of the money that was advanced on foot of the bonds. A pre-emptive decree provides that the decree-holder shall acquire the property therein mentioned provided he pays the purchase money within a time fixed. If he does not do so, his suit is to be dismissed with costs. It is very hard to say that such a decree with the liability that is attached to it is not a debt. It cannot be urged now that a creditor who has made honest and reasonable inquiry as to the object of the loan is bound to see to the application of the money he advances, and therefore the absence of a finding that the money advanced on foot of a bond was actually applied to the pre-emptive decrees is not fatal to the plaintiff's case. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

1910
November 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD FAYAZ ALI KHAN (DEFENDANT) v. KALLU SINGH AND ANOTHER (PLAINTIFFS.)*

Civil Procedure Code (1882), *section* 43—*Civil Procedure Code* (1908), *schedule I, order II, rule* 2—*Competence to give leave to omit remedies or split causes of action not limited by pecuniary jurisdiction of court—Suit for surplus collections made by mortgagee—Limitation—Act No. IX of* 1871, *schedule II, article* 105—*Act No. XV of* 1877, *section* 2, *schedule II, articles* 105, 109—*Act No. IX of* 1908, *schedule I, articles* 105, 109.

The competence of a court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the precuniary value of the relief in respect of which such leave is sought.

A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgaged property under article 105 of the second schedule to the Limitation Act of 1877 (schedule I to the Limitation Act of 1908) and there is no restriction as to the way in which the mortgagor may obtain possession. *Ram Din v. Bhup Singh* (1) discussed.

* First Appeal No. 227 of 1909, from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 31st of May, 1909.

(1) (1908) I. L. R., 30 All., 225.

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MUHAMMAD FAYAZ ALI KHAN *v.* KALLU SINGH.

THE facts of this case were as follows :—

The plaintiffs, mortgagors to a mortgage deed of the year 1850, brought a suit for redemption in the court of a Munsif in 1905. They divided their claim, having obtained the leave of the court to bring a separate suit for surplus collections alleged to have been made by the defendant mortgagee while in possession of the mortgaged property. The plaintiffs' suit for redemption was decreed on the 21st of May, 1908, and on the 21st of August of the same year they filed their suit for recovery of the surplus collections. The court of first instance (Subordinate Judge of Aligarh) decreed the claim. The defendant appealed to the High Court.

The Hon'ble Nawab *Muhammad Abdul Majid*, Maulvi *Ghulam Mujtaba* and Maulvi *Rahmatullah*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit brought by the plaintiffs respondents for surplus collections alleged to have been received by the defendant as mortgagee of the property of the plaintiffs. The mortgage was made in the year 1850, and a redemption suit was instituted in the year 1905. Before the hearing of the earlier suit an application was made to the Judge before whom the suit was pending, namely, the Munsif of Khurja, for liberty to bring a suit for recovery of surplus collections. This application was made pursuant to the provisions of section 43 of the Code of Civil Procedure of 1882, which corresponds with order II, rule 2, of the Code of 1908. The learned Munsif granted the applicants' prayer. The suit for redemption was decreed on the 21st of May, 1908, and on the 21st of August of the same year the suit out of which this appeal has arisen was instituted. The claim in respect of mesne profits is for a sum of Rs. 5,500. The court below gave a decree in the plaintiffs' favour, and against this decree the present appeal has been preferred.

Several points have been raised by the learned vakil for the appellant, with which it is unnecessary for us to deal. The first and main contention is, that the suit is not maintainable in view of the fact that the present suit was not cognizable by the earned Munsif who gave permission to bring the suit, the amount

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of the claim being in excess of his pecuniary jurisdiction. It is admitted that the suit for redemption was within the cognizance of the Munsif of Khurja and that he was competent to try that suit. But it is said that he was not competent to give the leave which is contemplated by section 43 of the Code of 1882. That section provides that "a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits, except with the leave of the court obtained before the first hearing to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted." We think that this rule contemplated that the leave to bring the subsequent suit should be obtained from the court before which the original suit was pending and that the Munsif of Khurja before whom the suit for redemption was pending was competent to give leave to bring the later suit. We have on the record the order of the Munsif granting that permission. It is dated the 12th of May, 1905. So far as we can see, no other court was competent to give leave to bring the second suit. The suit therefore out of which this appeal has arisen was not a suit brought contrary to the provisions of section 43, but a suit which the plaintiffs were authorized to bring under that section, they having obtained the permission of the Munsif of Khurja to omit the remedy in respect of which the present suit has been brought and sue for it thereafter. There is no force therefore in this contention.

The next contention addressed to us by the learned vakil for the appellants is that article 109 and not article 105 of schedule II to the Limitation Act of 1877 (schedule I to the Act of 1908) is applicable to the case. In 1871 Act No. IX of 1871 came into force, and in article 105, of the second schedule appended to that Act, provision was made for the recovery by a mortgagor of surplus collections received by the mortgagee after the mortgage had been satisfied, the period of limitation being three years from the date of receipt, i.e., the receipt of the collections. This Act was in force up to the passing of Act No. XV of 1877 which came into operation on the 1st October, 1877. Article 105 of the second schedule to that Act prescribed a period of three years' limitation for a suit for surplus collections to date from the time when the mortgagor re-enters on the mortgaged property. The same provision in

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regard to limitation is contained in article 105 of the recent Act, Act No. IX of 1908. In section 2 of Act No. XV of 1877, it is prescribed that nothing therein contained shall be deemed to revive any right to sue barred under Act No. IX of 1871, or under any enactment thereby repealed. It has been contended before us, as we have said, that the article applicable to this case is article 109 and not article 105 of the Acts of 1877 and 1908, and reliance has been placed upon a ruling of a Bench of this Court in the case of *Ram Din* v. *Bhup Singh* (1). In that case the plaintiffs, who were usufructuary mortgagors brought a suit for redemption on the ground that the mortgage debt had been satisfied from the profits of the mortgaged property. In that suit the plaintiffs did not claim any surplus profits, nor did they obtain, as in this case, leave of the court to bring a subsequent suit for surplus profits. It was held by Mr. Justice AIKMAN and Mr. Justice KARAMAT HUSAIN that the suit was barred by the provisions of section 43 of the Code of Civil Procedure of 1882. Mr. Justice AIKMAN in his judgement remarked :—"In my opinion this article must not be construed so as to conflict with the provision of section 43 of the Code of Civil Procedure and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption." In that case the suit did conflict with the provisions of section 43 of the Code of Civil Procedure, and therefore is unlike the suit which is now under consideration, in which there is no conflict between section 43 of the Code of Civil Procedure of 1882 and article 105 of the Limitation Act. But the learned Judges who decided that case go on to remark that article 105 must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption. In the circumtances of that case this is merely an *obiter dictum* and we are not bound by it. We may say, however, that we are unable to accept the *dictum* so expressed. We are of opinion that if permission to bring a subsequent suit for surplus profits has been given in accordance with section 43 of the former Code of Civil Procedure or order II, rule 2, of the present Code, there being no conflict between the provisions of the

(1) (1908) I. L. R., 30 All., 225.

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articles and the provision of the section and order respectively, there is no reason why article 105 of the Limitation Act should not apply as it is expressed in terms to do. The language of the article precisely meet the case before us. In a suit by a mortgagor after the mortgage has been satisfied as in this case, a suit to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgaged property. Article 109 does not apply to a case of the kind. There is no restriction as to the way in which the mortgagor may obtain possession, and we see no grounds for holding, as did the learned Judges in the case above referred to, that it only applies to cases in which the mortgagor has obtained possession otherwise than by means of a redemption suit. We are of opinion that the suit is maintainable and that the only article which can apply is article 105. Article 109 is applicable to a different state of things. It contemplates a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant, and not a suit by a mortgagor for surplus collections.

Another point has been raised by the learned vakil for the appellants, and that is, that under Act No. IX of 1871, limitation ran from the date of the receipt of the surplus collections, and that this provision was in no way affected by the provisions of Act XV of 1877, which altered the period from which limitation began to run. As we have said section 2 of the Act of 1877 prescribes that nothing therein contained should revive any right which had been barred under the earlier Statutes. We think that this contention is well founded, and that the plaintiffs are not entitled to recover surplus profits which were received prior to the 1st of October, 1874. To this extent the argument addressed to us must prevail. The learned advocate and vakil for the respective parties have calculated what sum should be allowed in respect of the surplus collections for the period prior to the 1st of October, 1874, and they are agreed that Rs. 500 represents the amount of the surplus collections for that period.

These are the only matters which have been discussed before us. We allow the appeal in so far that we reduce the amount

decreed to the plaintiffs by a sum of Rs. 500. In other respects the decree of the court below will stand. We direct that the parties shall pay and receive costs in proportion to failure and success in both courts.

Appeal allowed.

APPELLATE CRIMINAL.

1910
November 22.

Before Mr. Justice Richards and Mr. Justice Tudball.

EMPEROR, v. KADIR BAKHSH.*

Act No. XLV of 1860 (Indian Penal Code), section 409—Criminal Misappropriation—Evidence—What prosecution has to prove.

On a charge under section 409, of the Indian Penal Code it is not necessary for the prosecution to prove in what manner money alleged to have been misappropriated has actually been disposed of by the accused. If it is shown that money entrusted to the accused was not accounted for nor returned by him in accordance with his duty, if unspent, it lies on the accused to prove his defence.

THE facts of this case were as follows:—The accused was a process-server attached to the court of the Munsif of Fatehabad. On the 25th September, 1909, he was given a number of summonses for service together with the sum of Rs. 26-8-0, for diet money of the witnesses to be served. The summonses were returnable by the 5th October. On the 13th October he was given another batch of summonses, returnable on the 22nd November, together with Rs. 18 for diet money. The summonses were not returned on the due dates nor was any report made by the accused as to their service, or non-service, nor was the money returned. On demand being made the accused afterwards returned the summonses unserved, but did not even then refund the diet money, merely saying that it was lost. He never made any report either to the police or to his superior officer of the loss of the money and failed to give any satisfactory explanation of this omission. Subsequently he refunded the whole of the amount. He was prosecuted under section 409 of the Indian Penal Code. His defence was that he had been robbed of the money. The trying Magistrate found him guilty and sentenced him to six months' imprisonment. On appeal the Sessions Judge was of opinion that the prosecution had failed to establish the charge and

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* Criminal Appeal No. 680 of 1910 against an order of Muhammad Ishaq Khan, Sessions Judge, Farrukhabad, dated the 30th of April, 1910.