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required in the interests of the public. The detention between the 25th of June, and the 2nd of July, 1913, was action not warranted by law. The error pointed out by this Court in *Empress v. Babua* (1), *In the matter of the petition of Daulat Singh* (2) and *King-Emperor v. Paimal Nai* (3) has been repeated in the present case, and as long as it continues to be repeated so long will persons whose cases should be promptly considered and decided be kept in custody while the police lay themselves open to the suspicion of ransacking the country round in order to justify the action they have taken. In the present case these persons were detained in custody for all but two months. Now if the police had got together the information before they proceeded to arrest Rameshwar and others, this case should easily have been decided well before the 24th of June, 1913. Let the record be returned.

Record returned.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

INDARPAL SINGH AND OTHERS (DEFENDANTS,) v. MEWA LAL AND OTHERS (PLAINTIFFS) AND PODAI TEWARI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order II, rule 2; order XXXIV, rule 14—Procedure—Suit by mortgagee for simple money decree against mortgagor—Subsequent suit for sale on mortgage not barred—Res judicata—Limitation—Acknowledgment.

Certain mortgagees sued for a simple money decree in respect of their mortgage debt, stating that they had relinquished their claim under their mortgage, and obtained a decree as prayed. The decree in this suit stated that "the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on." As, however, this decree was not satisfied, the plaintiffs, mortgagees, proceeded to put their mortgage into court and prayed for a decree for sale on it. *Held* that the former proceedings were no bar to the present suit.

THE plaintiffs in this case brought a suit for sale upon a mortgage executed on the 6th of September, 1895, by one Amir Singh, his four sons and his wife in favour of Mewa Lal and Lachmi Narain plaintiffs. Prior to the execution of

*First Appeal No. 204 of 1912 from a decree of Guru Prasad Dube, Subordinate Judge of Allahabad, dated the 13th of February, 1912.

(1) (1881) I. L. R., 6 All., 132.

(2) (1889) I. L. R., 14 All., 45.

(3) (1912) 10 A. L.J., 357.

that mortgage another mortgage had been executed in favour of the Akhara Panchaiti in 1893. A suit was brought by the prior mortgagees, and a decree was obtained by them under a compromise to which the present plaintiffs were also parties. After this compromise was made, the plaintiffs, on the 29th of March, 1900, brought a suit on the basis of their mortgage-deed for a simple money decree, and they did not seek to enforce their right to bring the mortgaged property to sale. In that suit a decree was passed in favour of the plaintiffs, but, as the amount of the decree was not paid, the plaintiffs brought the suit out of which this appeal has arisen to enforce the mortgage. Various pleas were set up in defence, but they were overruled by the court below and a decree was made in the plaintiffs' favour for sale of the mortgaged property. The decree, however, provided that the plaintiffs would not be entitled to a decree absolute for sale unless they relinquished all their rights under the money decree obtained by them.

The defendants appealed to the High Court.

Maulvi *Muhammad Rahmat-ullah*, for appellants.

The Hon'ble Dr. *Sundar Lal* and Babu *Benoy Kumar Mukerji*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises in a suit brought by the plaintiffs respondents for sale upon a mortgage executed on the 6th of September, 1895, by one Amir Singh, his four sons and his wife in favour of Mewa Lal and Lachmi Narain, plaintiffs. Prior to the execution of that mortgage another mortgage had been executed in favour of the Akhara Panchaiti in 1893. A suit was brought by the prior mortgagees, and a decree was obtained by them under a compromise to which the present plaintiffs were also parties. After the compromise was made, the plaintiffs, on the 29th of March, 1900, brought a suit on the basis of their mortgage deed for a simple money decree, and they did not seek to enforce their right to bring the mortgaged property to sale. In that suit a decree was passed in favour of the plaintiffs, but, as the amount of the decree was not paid, the plaintiffs brought the suit out of which this appeal has arisen to enforce the mortgage. Various pleas were set up in defence, but they were overruled by the court below, and a decree was made in the

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The defendants, who are the mortgagors and members of their family, have preferred this appeal, and the first contention raised on their behalf is that in view of the provisions of order II, rule 2, of the Code of Civil Procedure, the plaintiffs are not entitled to maintain this suit. This contention has, in our opinion, been rightly repelled by the court below. The answer to it is furnished by the provisions of order XXXIV, rule 14, of the Code. That rule provides that if a decree is obtained under a mortgage, the property comprised in that mortgage will not be sold in execution of such a decree unless the mortgagee obtains a decree for sale of the property, but order II, rule 2, shall be no bar to the maintenance of a suit for sale. It cannot be contended that the first suit brought by the plaintiffs for a money decree could not be maintained. It is true that order II, rule 1, provides that all suits should be so framed as to afford ground for final decision upon the subjects in dispute, and to prevent further litigation concerning them. The penalty for not following the directions contained in that rule is provided by rule 2. Ordinarily, if rule 1 was violated rule 2 would preclude the plaintiff from beginning a second suit, but in the case of a mortgage we have the distinct provision in order XXXIV, rule 14, which permits of a suit being brought for sale upon the mortgage in spite of the provisions of order II, rule 2. Therefore it is manifest that the rule last mentioned is no bar to the present suit. It is urged that the bar is afforded by the fact that in the plaint in the previous suit the plaintiffs stated that they relinquished their right to enforce the mortgage. If this statement be regarded as an agreement releasing their rights as mortgagees that agreement, being without consideration, cannot be enforced. The mere averment in the plaint that the plaintiffs gave up their right under the mortgage for the purpose of that suit cannot be regarded as an extinguishment of the mortgagee rights.

It is next contended that section 11 of the Code of Civil Procedure is a bar to this suit. The matter now in dispute was never

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directly or otherwise in issue between the parties in the former suit, and it was not a matter which could have formed the ground of attack for the relief claimed in that suit. Therefore, in our opinion section 11 or any of the explanations to that section has no application to the present case.

The next contention was that the present claim was barred by limitation. As to this we may only point out that in the written statement filed in the previous suit the mortgage in question was admitted. So that there was an acknowledgment of liability under the mortgage before the expiry of the prescribed period of limitation, and a fresh start for the computation of limitation accrued to the plaintiffs from the date of the acknowledgment. In the written statement mentioned above the allegations in the plaint were admitted, including an allegation as to the mortgage and the amount payable under the mortgage being due, and the only contention raised was that the stipulation as to interest was hard and unconscionable. We think that the court below came to a right conclusion in holding that the claim was not time barred. The acknowledgment, having been made by the manager of the joint Hindu family, was in our opinion binding on the other members. It is not suggested that there was any fraud or collusion in connection with the acknowledgment.

The next contention is that in the money decree which was passed in the former suit the Court stated that "the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on." This provision in the decree we understand to mean that under the decree which was passed by the court the decree-holders would have no right to bring the mortgaged property to sale; that is to say, that the mortgagees would not be allowed to violate the provisions of section 99 of the Transfer of Property Act. The Court evidently thought it possible that the plaintiffs might try to put the property to sale contending that they had relinquished their right to enforce the mortgage, and therefore, it considered it desirable that it should be clearly provided in the decree that they would not be allowed to do so. We do not think that the Court intended to order or ordered that there should never be a suit for sale of the mortgaged property.

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A further contention was raised that the plaintiff should not be allowed interest at a higher rate than that allowed by the decree to which we have referred. As to this we may mention in the first place that no such contention was raised either in the court below or in the memorandum of appeal to this Court. Further, as the plaintiffs are entitled to sue upon their mortgage they have a right to claim interest at the stipulated rate up to the date fixed for payment. This part of the defendant's case is as untenable as the rest.

As to the costs of the previous suit in regard to which a contention was put forward on behalf of the appellants, we may observe that the plaintiffs will not be entitled to recover those costs, having regard to the terms of the decree passed in this case by the court below. The costs of the present suit were incurred by the plaintiffs because the appellants did not discharge the money decree which was passed against them, and the plaintiffs have, therefore in our opinion, been rightly awarded the costs of the present litigation.

We accordingly dismiss the appeal with costs. We extend the time for payment for six months from this date. Interest at the stipulated rate will run to the extended date. No further interest will be allowed after such date.

Appeal dismissed.

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March, 11.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir
Pramada Charan Banerji.*

ABDUL AZIZ AND OTHERS (DEFENDANTS) v. MASUM ALI AND
OTHERS (PLAINTIFFS).*

*Committee for collection of subscriptions to rebuild a mosque—Neglect of
treasurer to pay his own subscription and to collect other subscriptions promised—
Treasurer not legally liable.*

A movement having been set on foot for re-constructing a mosque, A and J promised to subscribe Rs. 500 each. A was appointed treasurer of the committee for collecting subscriptions. J gave a cheque for his promised subscription of Rs. 500, but owing, first, to some defect in the endorsement, and later on to its having become out of date, it was never cashed. The mosque also was never re-constructed. A having died, his heirs were sued by the members of the committee for the amount of the unpaid subscriptions. *Held*, that neither A nor his heirs were liable for payment of the money.

* Second Appeal No. 1586 of 1912 from a decree of H. M. Smith, District Judge of Agra, dated the 7th of September, 1912, modifying a decree of Kalka Singh, Subordinate Judge of Agra, dated the 26th of September, 1910.