1921

SHEO MANGAL v. MUSAMMAT HULSA.

In our opinion the order of the court giving the plaintiff two months' further time to deposit the pre-emption money was without jurisdiction and it was passed against the consent of the vendees. On that day the vendees seemed prepared to waive their right to some extent and were ready to accept the amount provided the whole amount was paid to them. This, however, was not done, and we can by no stretch of language say that the vendees ever agreed to accept the whole amount within two months after the 13th day of July, 1919. They are, therefore, entitled to insist that, inasmuch as the plaintiff did not deposit the whole amount on that day they cannot now be compelled to accept it. In our opinion the effect of the default of payment made by the plaintiff was to dismiss his suit *in toto*, and he is, therefore, wrongfully in possession of the property. The vendees are entitled to a full restitution. We understand that the sum of Rs. 1,200 which had been deposited by the plaintiff and taken out by the vendees has already been re-deposited and that a further sum of Rs 380-15-0 is still lying in court. In these circumstances we are of opinion that the order of the learned District Judge granting the application was correct.

Having regard to the circumstances of the case and the peculiar attitude taken up by the vendees we direct that the parties should bear their own costs of the execution proceedings throughout. With this modification the appeal is dismissed.

Appeal dismissed.

1921

November, 8.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

RAM BRICHH RAI (JUDGMENT-DEBTOR) *v.* DEOO TIWARI (DECREE-HOLDER)*.

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 182 *(5), —Execution of decree—Limitation—Decree in part a mortgage decree and in part a simple money decree.*

In a suit against the members of a joint Hindu family based on a mortgage of the family property, it was found that a portion only of the mortgage debt was incurred for legal necessity. As to such portion as was supported by legal

* Second Appeal No. 144 of 1921, from a decree of Brij Nath Das, District Judge of Ghazipur, dated the 14th of July, 1920, confirming a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 22nd of July, 1919.

necessity the usual mortgage decree was passed against all the defendants. Simultaneously a simple money decree for the balance was passed against the two executants of the bond in suit. The decree-holder first executed the decree, so far as it was a decree for sale, and then, within three years of this, though more than three years from the date of the decree, applied for execution of the simple money decree partly by arrest of one of the judgment-debtors.

Held that the application was within time. *Dhirendra Nath Sarkar* v. *Nischintapore Company* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *M. Ishaq Khan*, for the appellant.

Babu *Saila Nath Mukerji*, for the respondent.

RYVES and GOKUL PRASAD, JJ. :—This appeal arises out of execution proceedings. The predecessor in title of the decree-holder (respondent here) advanced a sum of money to Ram Brichh Rai, the appellant, and another member of his family, who were adult at the time, on the mortgage of their joint family property. The money not having been repaid, a suit was brought against the two executants of the mortgage bond and the remaining members of the joint family consisting of their sons and grandsons. The court found that a certain portion only of money lent was required for legal necessity and it passed a decree against all the defendants, including the present appellant, for repayment of the mortgage money, passing an ordinary mortgage decree for that amount, stipulating that if the sum was not paid within the stated time the family property or a sufficient portion thereof should be sold to recover it. For the balance of the money lent a simple money decree was passed against Ram Brichh Rai and the other executant only. Admittedly within three years of that decree that portion of the decree which related to the family property was made final, and execution was taken out and the property was sold. Admittedly again, within three years of the date of the application for execution by sale of the family property this application was made to execute the simple money decree against Ram Brichh Rai by arresting him. Ram Brichh Rai objected on the ground that the decree had become time-barred as against him. This objection was overruled by both the courts; hence this appeal.

It is strenuously argued by Mr. *Ishaq Khan* that this decree really was two decrees, although written on one piece of paper,

(1) (1916) 36 Indian Cases, 398.

1921

RAM BRICHH RAI v. DEOO TIWARI,

and it was argued that execution of the mortgage decree could not keep alive the simple money decree against the appellant; and great stress was laid on the case of *Dhirendra Nath Sarkar* v. *Nischintapore Company* (1) reported in Indian Cases and apparently nowhere else. It seems to us, however, that that case is really quite different. There, the plaintiff brought a suit to recover from the defendant three separate sums of money due on three separate contracts of tenancy and he obtained a decree formally awarding him separate amounts with regard to the three tenancies. The plaintiff, in executing his decree, first of all applied to recover the specified sum awarded with regard to one particular tenancy. Subsequently he applied, after three years from the original decree, to execute his decree with regard to the money decreed with respect to another tenancy, and it was held that that application was time-barred, the reason being that in fact there were three separate suits consolidated and tried together and the result expressed on one piece of paper, but that in reality there were three separate decrees, each capable of execution quite independently of the others. Now in this particular case, as we have pointed out, all the defendants were included in the mortgage decree. All the defendants were, therefore, bound to pay that amount, and on failure to do so the family property which belonged to all of them was liable for sale. The remainder of the money was found due from two only of the defendants, who were liable not only for this amount but also for the amount which had been borrowed for legal necessity This circumstance seems to us to distinguish this case altogether from the Calcutta case already quoted, and the other cases, also, of this Court which have been referred to in argument. In all of them the decrees were passed against separate individuals. In this case the decree was passed against all the defendants with regard to part of the mortgage money and this, too, with regard to the same property. It seems to us that this was really one decree for the whole of the mortgage money, and this second application having been made within three years of the first application in which these persons were also parties, keeps the decree alive. We, therefore, think that the decision of the

(1) (1916) 36 Indian Cases, 398.

courts below must be affirmed, but as we do not agree entirely with the reasons given by the learned District Judge we make no order as to the costs of this appeal.

Appeal dismissed.

1921

RAM BRICHH RAI v. DEGO TIWARI

Before Mr. Justice Piggott and Mr. Justice Walsh.

MATHURA PRASAD (DEFENDANT) *v.* RAMESHWAR AND ANOTHER (PLAINTIFFS)*.

1921 *November*, 9.

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 158—*Rent-free grant in favour of an idol*—"*Two successors to the original grantee*"—*Whether successive priests in office can be deemed to be such successors.*

Where property is given rent-free to an idol at a particular shrine, as distinguished from the priest of the shrine, it is not open to the priest for the time being, after the lapse of a certain time, to claim the benefit of section 158 of the Agra Tenancy Act upon the ground that the property had been held by two or more successors to the original grantee. *Bharat Das* v. *Nandrani Kunwar* (1) referred to.

THESE were two appeals under section 10 of the Letters Patent. The facts out of which the matter for determination arose are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji* and Munshi *Bhagwati Shankar*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

PIGGOTT and WALSH, JJ.:—These are two connected appeals arising out of two connected suits which have been litigated together throughout. The appeals may be disposed of by a single judgment. The suits were filed in the court of an Assistant Collector. The plaintiff, as lambardar and proprietor of two specified plots of land, sued the defendant as a rent-free grantee of the same and, admitting himself not to be entitled to resume the grant, claimed assessment of rent on the same. The written statement, as is often the case, was somewhat loosely drawn up, but beyond all question the substantial defence on the facts was that the defendant being a rent-free grantee of the land in question, had held the same as such for more than fifty years and through at least two successors to the original grantee and was, therefore, entitled to be declared proprietor of the same and to be assessed to revenue but not to rent. This refers, of course, to the provisions of section 158 of the Tenancy Act (Local Act II of 1901). The Assistant Collector who tried the

* Appeal No. 12 of 1921, under section 10 of the Letters Patent.

(1) (1917) I. L. R., 39 All., 689.