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which had not been determined in the suit or in the execution proceedings—there is no provision for what might actually, though not in name, become a prolonged civil suit; and the court of first instance, and in this we agree with Mr. Justice P. C. BANERJI'S views in *Ram Narain* v. *Umrao Singh* (1), should have referred the claimant to a civil suit.

If a civil suit was the proper course to be followed in the first instance, it is clear that the aggrieved party, if an order has in fact been improperly passed against him, will, having no right of appeal, have his remedy in a civil suit.

Holding, as we do, that the plaintiff has a right to sue, the rest is concluded by the finding on the facts by the lower appellate court that the later mortgages were barred by limitation. The court exercised a judicial discretion in weighing the evidence in regard to the endorsements of the payment of interest, and its finding is not open to attack in second appeal. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Dalal.

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DARBARI LAL AND ANOTHER (PLAINTIFFS) *v.* MAHBUB ALI MIAN AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), section* 140—*Mortgage—Surety for payment of money due under a mortgage—Question of priority between the holder of a subsequent mortgage and a surety who had not discharged the principal's debt in full.*

In the year 1896 one *KA* entered into a collusive arrangement with his wife whereby his immovable property was made over to her in satisfaction of her claim for dower. This arrangement was carried out by means of an arbitration

* First Appeal No. 310 of 1923, from a decree of Ganga Prasad Verma, Subordinate Judge of Shahjahanpur, dated the 17th of April, 1923.

(1) (1907) I.L.R., 29 All., 615.

and a decree in accordance with the award. A suit was, however, brought by *LP*, one of *KA's* creditors, to set aside this decree as a fraud on the creditors, and he obtained a decree in 1897. After this, *KA* and his wife jointly executed three mortgages, the first in favour of *LP*, the second in favour of another creditor *DL* and the third again in favour of *LP*. Whilst these three mortgages were outstanding, one *RB* became surety and paid off most of the money due under the three mortgages, excepting Rs. 12,500 due to *LP* and Rs. 1,500 due to *DL*. As security for these amounts, the widow and sons of *KA*, who had died some years previously, executed another mortgage in 1913.

Held on suit brought on this last mortgage—(1) that the widow had authority to execute it; *Chenvirappa* v. *Puttapa* (1), followed; and (2) that, inasmuch as the surety did not pay off the whole of the money that was owing to the creditors, but only part of it, the mortgagees' rights under the mortgage of 1913 took priority over her claims.

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

Dr. *Kailas Nath Katju* and Pandit *Madan Mohan Raina*, for the appellants.

Munshi *Kamla Kant Varma* (for him Munshi *Ambika Prasad*) and Maulvi *Mukhtar Ahmad*, for the respondents.

MEARS, C. J., and DALAL, J. :—This was a suit brought in the court of the Subordinate Judge of Shahjahanpur, to enforce a mortgage of the 16th of January, 1913, executed by the wife and sons of one Khurshed Ali Mian, deceased. The plaintiffs also alleged that they had preferential right to the payment of the moneys secured by their mortgage in priority to one Rani Barkat-un-nissa.

The learned Subordinate Judge decided that the mortgage was effective in so far as it concerned the share of the wife and of the two major sons, defendants Nos. 1 and 2. He also held with regard to Rani

(1) (1887) I.L.R., 11 Bom., 708.

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Barkat-un-nissa that she stood on an equal footing as regards her advances with the plaintiffs. The plaintiffs appealed from this decision, and the ground they took is that as between Khurshed Ali Mian and Musammat Latif-un-nissa, his wife, Latif-un-nissa was the owner of the entire property, and as such was competent to mortgage it. They alleged the further ground that the sons and daughters were not competent to question the validity of an award and decree now about to be mentioned.

In the year 1896 Khurshed Ali Mian was the owner of the property in dispute. He was in embarrassed circumstances, and by arrangement with his wife she put forward a claim to her dower. The matter was submitted to arbitration, and under the terms of the award the immovable property, the subject-matter of this suit, was transferred to her in extinguishment of her claim to dower. This award was dated the 6th of July, 1896. On the 18th of August of the same year a decree in terms of the award was passed by the Subordinate Court, and mutation in favour of the wife followed. Lalta Prasad was a creditor. He did not believe in the genuineness of these proceedings and commenced a suit for a declaration that they were in fraud of creditors; and, on the 6th of May, 1897, obtained a decree. On the 20th of November, 1897, the husband and wife joined in a mortgage to Lalta Prasad, and again on the 14th of June they executed a simple mortgage for Rs. 3,000 in favour of Darbari Lal, the present plaintiff. On the 10th of August, 1899, they executed a second mortgage in favour of Lalta Prasad. Khurshed Ali Mian died in 1905, and in October, 1906, a considerable sum of money being outstanding, Rani Barkat-un-nissa became surety and paid off all the moneys due under the three

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mortgages with the exception of Rs. 12,500 due to Lalta Prasad, and Rs. 1,500 due to Darbari Lal. The mortgage in suit was created to pay off these two sums.

Two points arise in this appeal. If we are of opinion that as between Khurshed Ali Mian and Latif-un-nissa the latter was the owner of the entire property by virtue of the decree of the 18th of August, 1896, collusive though it was, then the plaintiff is entitled to succeed as against the only two respondents who are appealing. They are, respectively, Musammat Hasina Begam and Musammat Farmudi Begam. The appellants assert that this statement is a correct representation of the law and, further, that the two appellant daughters cannot question the validity of the decree passed in favour of their mother against their father. We are of opinion that both these points are well founded, and we have been guided to that decision by the principles laid down in the case of *Chenvirappa* v. *Puttapa* (1). We are of opinion that once Khurshed Ali Mian permitted a decree to pass against him, in so far as he and his representatives were concerned, he was not thereafter able, as against his wife, to assert the invalidity of such decree. That decree was, however, open to be impeached by a creditor; and it was, as we have said, in fact successfully impeached. In our opinion the legal effect of the decree was, as between husband and wife, to invest in the wife the property mentioned in the award, and in the terms of the award. It follows from that that she had a right to execute the mortgage in suit in the year 1913. We are, therefore, of opinion that on this point the appeal succeeds.

Now as regards the position of Rani Barkat-un-nissa, it is unfortunate that she is not represented in

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this appeal. But even if she were, we are of opinion that no authority could have been cited to us which would support the decision of the Subordinate Judge, or destroy the contention of the plaintiffs that in the circumstances of the case their mortgage is entitled to priority. The point is a very short one. Musammat Barkat-un-nissa in the year 1906 stood surety. She thereby acquired certain well-known rights. One of such rights, incidental to the position of a surety, is that if the surety is called upon to pay the principal's debt and does in fact pay the whole of it, the surety is entitled to step into the shoes of the creditor, and to have for his own benefit any rights which the creditor happens to have against the debtor. Section 140 of Act No. IX of 1872 makes it perfectly clear that these rights accrue to a surety when the surety has done "all" that he was liable to do. Now in this case it is conceded that Rani Barkat-un-nissa did not pay the whole of the indebtedness that existed between the creditor and the principal debtor, but a part only, and, therefore, she was nothing more than a creditor having a claim upon the principal debtor. She acquired none of the rights of either Lalta Prasad or Darbari Lal under any of the documents in question. Therefore the plaintiffs' rights acquired by them under the mortgage of the 16th of January, 1913, took, in our opinion, priority over the claims of Rani Barkat-un-nissa. In this respect also we think the appeal succeeds.

We, therefore, modify the decree of the lower court and decree the claim as prayed. We give to the plaintiff the costs of the appeal in so far as they relate to the issues raised by the respondents Nos. 5 and 8.

Appeal allowed.