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WAZIR
MUHAMMAD
KHAN
v.
GAURI DAT.

Kuar (1), the suit with respect to which our opinion is asked was cognizable by the Revenue Court, and was properly entertained by the second class Collector. Such being our view the Collector will proceed to hear and dispose of the appeal preferred to him.

APPELLATE CIVIL.

1882
April 20.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RASIK LAL (PLAINTIFF) v. GAJRAJ SINGH (DEFENDANT).*

Mortgage by conditional sale—Pre-emption—Limitation—Right to sue—Act XV of 1877 (Limitation Act), sch. ii, No. 120.

The limitation for a suit to enforce a right of pre-emption in respect of a mortgage by conditional sale is that provided by No. 120, sch. ii of Act XV of 1877, that is to say, six years (*Nath Prasad v. Ram Paltan Ram* (2) followed); and where the mortgagee by conditional sale is not in possession under the mortgage, and after foreclosure has to sue for possession, the right to sue to enforce a right of pre-emption accrues when he obtains a decree for possession.

The plaintiff in this suit claimed to enforce a right of pre-emption in respect of a four pies share in a village called Kusmara, which had been transferred to the defendant Gajraj Singh by the defendant Mauji Lal by conditional sale. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Siraj-ud-din* and Pandit *Ajulkhia Nath*, for the appellant.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the respondent.

The judgment of the High Court (STRAIGHT, J. and BRODHURST, J.) was delivered by

STRAIGHT, J.—On the 14th January, 1868, Manji Lal, defendant No. 2 and uncle of the plaintiff-appellant, executed a conditional sale-deed of a four-pie share of mauza Kusmara to Gajraj Singh, defendant No. 1. On the 29th September, 1873, notice of foreclosure was issued, and the year of grace expired on the 29th September, 1874. On the 28th July, 1879, Gajraj Singh brought a suit

* Second Appeal, No. 821 of 1881, from a decree of Major T. J. Quin, Deputy Commissioner of Jaloun, dated the 10th May, 1881, reversing a decree of Mirza Jafar Bakht, Extra Assistant Commissioner of Madhogarh, dated the 21st March, 1881.

(1) I. L. R., 1 All. 512.

(2) I. L. R., 4 All. 218.

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for possession of the four-pie share, on the strength of his foreclosure order, and his claim, having been decreed by the first Court and dismissed by the lower appellate Court, was ultimately decreed by this Court on the 20th May, 1880. This is the date on which the plaintiff-appellant in the present suit alleges his cause of action to have accrued. The case now under consideration was instituted on the 19th January, 1881, the plaintiff's allegation being that he is entitled by right of pre-emption to the four-pie share decreed to Gajraj Singh. The first Court decreed the claim, but the lower appellate Court, holding that the suit should have been brought within one year from the 29th September, 1874, when the year of grace expired, dismissed it.

A Full Bench ruling of this Court—*Nath Prasad v. Ram Paltan Ram* (1)—has already decided that art. 10, sch. ii of Act XV of 1877, is inapplicable to transactions of mortgage by conditional sale. In the present case there is nothing to show that Gajraj Singh has obtained physical possession of the four pies, nor indeed, if he had done so, would that make the limitation of one year above referred to any the more apposite, nor do we think that art. 144, as argued by the pleader for the appellant, has any application to the form of suit before us. The limitation must therefore be six years, as provided in art. 120, and the only question to be determined is, when did the plaintiff's right to sue accrue?

The view of the lower appellate Court that the suit should have been brought within one year from the 29th September, 1874, is obviously absurd, as the conditional vendee was out of possession and had to bring a suit for the purpose of obtaining it. It is true that the order of foreclosure, so far as it went, gave Gajraj Singh a title, but until he had it declared by a Civil Court, and possession in virtue of it decreed him, it was not clear, specially as in the present case he was resisted by his mortgagor. It seems to us therefore reasonable to hold that the plaintiff's right to sue accrued to him, when under the decree of this Court the title of Gajraj Singh was established, and he was placed in a position at any moment to obtain possession of the four-pie share in suit by putting his decree for possession into execution. Such being the view

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we take of the matter, the present suit was abundantly in time, and the appeal must be allowed. As the lower appellate Court disposed of the case upon the preliminary point of limitation, it must be remanded for trial on the merits under s. 562 of the Procedure Code. The costs of this appeal will be costs in the cause.

Cause remanded.

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May 1.

CIVIL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MAKUND LAL (DEFENDANT) v. NASIR-UD-DIN (PLAINTIFF).*

Small Cause Court suit—Claim for personal property and to set aside order disallowing objection to its attachment—Jurisdiction—Act XI of 1865, s. 6.

A suit to recover moveable property attached in execution of a decree and damages for its wrongful attachment, and to set aside the order disallowing an objection to its attachment, is not a suit cognizable in a Court of Small Causes.

THE plaintiff in this suit sued in the Court of Small Causes at Saháranpur for possession of a cart, which the defendant had attached as the property of one Nabi Bakhsb, his judgment-debtor, and damages for its wrongful attachment. He also claimed to have the order disallowing his objection to the attachment of the cart set aside. The defendant set up as a defence to the suit that the cart did not belong to the plaintiff, but to Nabi Bakhsb. The Small Cause Court Judge found that the cart belonged to the plaintiff, and that the plaintiff had not suffered any damage from the attachment of the cart; and accordingly gave the plaintiff a decree for the cart, dismissing the claim for damages.

The defendant applied to the High Court for the revision under s. 622 of the Civil Procedure Code of this decree, on the ground that the suit, being one against a decree-holder to establish a right to property attached in execution of his decree, was not cognizable in a Court of Small Causes.

Babu *Oprokush Chandar Mukarji*, for the defendant.

Pandit *Nand Lal*, for the plaintiff.

* Application, No. 47 of 1882, for revision under 622 of Act X of 1877 of a decree of Maulvi Maqúd Ali Khan, Judge of the Court of Small Causes at Saháranpur, dated the 25th August, 1881.