

that the case must be remanded for trial on its merits as it is not barred by limitation, being governed, not by art. 80. but by art. 116, sch. ii, Act XV of 1877, as found by the Court of first instance.

Cause remanded.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

BAHRAICHI CHAUDHRI (DEFENDANT) *v.* SURJU NAIK AND
ANOTHER (PLAINTIFFS.)*

Mortgage—Decree enforcing Lien—Suit against purchaser to enforce decree—Act X of 1877 (Civil Procedure Code), s. 43

The obligee of a bond for the payment of money, in which certain property was mortgaged as collateral security, sued the obligor for the money due on such bond, claiming the enforcement of such mortgage. At the time the suit was brought such property was in the possession of a third person, who had purchased it at a sale in execution of a money-decree against the obligor of such bond. The obligee did not make the purchaser a defendant to the suit. He obtained a decree in the suit for the sale of such property. Being resisted in bringing it to sale by the purchaser, he sued the purchaser to have it declared that such property was liable to be sold under his decree. *Held* that such second suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

On the 21st January, 1878, the defendant in this suit purchased the rights and interests of six brothers in an eight annas share of a village called Kukrali, which were put up for sale in execution of a decree for money dated the 1st February, 1877. Of these six brothers three had, prior to the date last mentioned, given a bond for money to the plaintiffs in this suit, hypothecating their rights and interests in such share. On the 8th November, 1878, the plaintiffs in this suit brought a suit on such bond against the obligors and obtained a decree thereon against them and the hypothecated property. They subsequently caused the eight annas share in Kukrali to be attached in execution of this decree. The defendant objected to the attachment and sale of such share, and his objections were allowed. Thereupon the plaintiffs brought the present suit against the defendant to have it declared that such share was liable to be sold in execution of their decree. Both the lower Courts gave the plaintiffs a decree.

* Second Appeal, No. 378 of 1881, from a decree of R. F. Saunders, Esq., Judge of Gorakhpur, dated the 7th January, 1881, affirming a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 22nd July, 1880.

1881

KHENNI
v.
NASIR-UD-DIN
AHNAD.

1881
December 14.

1881

BAHRAICHI
CHAUDHRI
v.
SURJU NAIK.

In second appeal by the defendant it was contended on his behalf that the suit was not maintainable, regard being had to the provisions of s. 43 of Act X of 1877, as the plaintiffs should have included in the former suit brought by them on their bond the present claim against the defendant, who had purchased the hypothecated property, and should have made him a defendant in that suit; and that the plaintiffs were only entitled to bring to sale the interests of the obligors of their bond in the share in question, and not the entire share.

Pandit *Ajudhia Nath* and Maulvi *Mehdi Hasan*, for the appellant.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondents.

The Court (OLDFIELD, J., and BRODHURST, J.) made the following order remanding the case to the lower appellate Court to determine the extent of the interests in the share in question of the obligors of the bond:—

OLDFIELD, J.—The first contention in appeal is that the suit is not maintainable with reference to the provisions of s. 43, Act X of 1877. The argument is that the plaintiff should have included in his claim in the suit brought against his obligors the present claim against defendant, who had purchased the hypothecated property, and should have made him a defendant.

The contention is quite untenable. All that s. 43 says is that “every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.” His cause of action in the former suit arose under the bond and gave a claim against the obligors only, and there was no necessity to make any other persons defendants. The present claim against the defendant, who purchased the interests of the obligors in the hypothecated property, is a distinct claim in respect of a distinct cause of action.

The second plea is, however, valid. The plaintiff obviously has only a right to bring to sale the interest held by his obligors in the eight annas. It is contended that the eight annas share belongs to the six brothers, and that the plaintiff’s obligors have only a four anna interest out of the said eight annas. The lower appellate Court must determine the amount of interest which the plaintiff’s obligors

held. We remand the case for trial of this issue and allow ten days for objections to be made to the finding and will then dispose of the other pleas taken in appeal.

1881

BAHRAICHI
CHAUDHRI
v.
SURJU NAIK.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BHUREY MAL (DEFENDANT) v. NAWAL SINGH (PLAINTIFF).*

1882
January 13.

Pre-emption—Co-sharer joining relatives with him in claiming right—Effect on co-sharer's right—Stranger.

A co-sharer of an estate, who has a right of pre-emption, does not, merely by joining with himself members of his family, who are not co-sharers in such estate, in a suit to enforce such right, defeat such right. *Manna Singh v. Ramadhin Singh* (1) distinguished.

THE plaintiffs in this suit claimed possession as mortgagees of a certain share in the thoke of a mahál called Multan, basing their claim upon the *wajibularz*. That document provided that, in the event of a co-sharer desiring to sell or mortgage his share, he should offer it in the first instance to his "brothers;" secondly, to "near cousins"; thirdly, to co-sharers in his thoke; and, fourthly, to co-sharers in the mahál; after which he might offer it to strangers. The mortgage in respect of which the plaintiffs claimed was one by the widow of Sahuria, the deceased proprietor of the share in question. She had given a possessory mortgage of the share to the defendant Bhurey Mal. The latter was a co-sharer in thoke Multan, but was not a blood relation of Sahuria. The plaintiffs, Bahal Singh, Dal Singh, and Nawal Singh, were severally a second cousin, a third cousin, and a fifth cousin of Sahuria. Nawal Singh was the only plaintiff who was a co-sharer in thoke Multan. The Court of first instance gave the plaintiffs a decree for possession of the share in question as mortgagees. On appeal by the defendant Bhurey Mal, the lower appellate Court held that the plaintiffs Bahal Singh and Dal Singh should not have been included in this decree, as though near cousins of Sahuria, within the meaning of the *wajibularz*, they were not co-sharers in thoke Multan, and therefore had not, under that instrument, a preferential right to that of the defendant Bhurey Mal. Holding, however, that the plaintiff Nawal

* Second Appeal, No. 224 of 1881, from a decree of K.M. King, Esq., Judge of Saharanpur, dated the 16th February, 1881, modifying a decree of Maulvi Kazim Ali, Munsif of Shamli, dated the 30th September, 1880.

(1) See *ante*, p. 252.