

which the Court executing the decree could and should have determined; and I do not think that it can be said that this question was the one which the Munsif disposed of in his order. The question about which he appears to have been doubtful was the extent of the interest which a Hindu father by Hindu law could be held to possess in joint family property, and he refused to determine this because, as he expressly says, the extent of such rights cannot be determined in the miscellaneous department. So far he may be right, but he would not have been right if he had, as is suggested, refused to determine and had left open the question as to what property could be sold in execution of the decree he was executing, whether under it the sons' interests were saleable. The Munsif, considering that the extent of the father's right could not be determined in the miscellaneous department, limited the sale to the father's interest, leaving its extent to be afterwards determined. If he meant to do what is suggested by appellants' pleader his order does not express his meaning, and it would not have been a proper order. The language of the order and of the sale-certificate is plain, and under the latter the auction-purchasers can be held only to have bought Raj Kumar's interest. Raj Kumar may have, as a Hindu father, a power of dealing with his sons' interests, but that circumstance will not make those interests his own, so as to pass them by a sale which affects his own interests only. I think we should accept the plain language of the sale-certificate. I would dismiss the appeal with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

UMRAO LAL AND ANOTHER (DEFENDANTS) *v.* BENARI SINGH AND ANOTHER
(PLAINTIFFS).*

Instalment-Bond—Hypothecation—Declaratory decree—Res judicata—Act
1877 (*Civil Procedure Code*), s. 13.

In 1864 the obligee of an instalment-bond, in which certain immovable property was hypothecated as collateral security for the payment of the interest

* Second Appeal, No. 544 of 1880, from a decree of Maulvi Zai Subordinate Judge of Shahjahanpur, dated the 6th March, 1880, affirmed of Babu Becharam Chakarvarti, Munsif of Deoria, dated the 15th Decr

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brought a suit upon such bond "against Z and A (the obligors) and the property hypothecated in the bond, defendants," claiming to recover instalments which were due and unpaid, and a declaration of his right to recover instalments which were not due as they fell due. He obtained a decree in such suit for "the amount claimed" against the "two defendants." It was also provided in such decree that, "until the satisfaction of the entire amount of the bond, the plaintiff can realize the amount of each instalment by executing this decree." The obligee applied in execution of such decree to recover, by the sale of such property, which had passed into the hands of third parties after the passing of such decree, instalments which had become due after the passing of such decree and had not been paid. Such execution having been refused on the ground that such decree was a money-decree, the obligee brought a second suit upon such bond to recover such instalments by the enforcement of the lien therein created on such property.

Held that, although the enforcement of such lien was claimed in the former suit, yet, inasmuch as it was very questionable whether the Court was competent to grant the second relief claimed in that suit, *viz.*, a declaration of right to recover instalments which were not due in execution of a decree for instalments which were due, and the claim in the second suit was not the same as that in the former suit, the plaintiff asking for instalments said to be actually due, and not for a declaratory decree for instalments not due, the second suit was not barred by s. 13 of Act X of 1877.

On the 15th March, 1861, one Rudra Singh and one Ajaipal Singh gave one Mahtab Singh a bond for the payment of certain moneys by instalments, in which they hypothecated a share of a certain village as collateral security for such payment. In August, 1864, Mahtab Singh sued on such bond for the instalments which had become due thereunder and had not been paid, and for a declaration of his right to recover as they fell due the instalments which were payable thereunder. He claimed in that suit as against Rudra Singh and Ajaipal Singh "and the amindari property hypothecated in the bond, defendants." He obtained a decree in that suit in the following terms:—"The amount claimed, with costs, and interest at two rupees per cent. to be paid from the date of the institution of the suit till the date of payment, is decreed against the two defendants, the principal defendant to bear his own costs: until the satisfaction of the total amount of the bond the plaintiff can realize the amount of each instalment by the execution of this decree." He applied to recover in execution of this decree the amount of the instalments which had become due and had not been paid, by the sale of the land and sale of the share hypothecated in the bond. On

the share being attached Rudra Singh and Ajaipal Singh paid such amount. While the share was under attachment they hypothecated it as security for certain moneys which they had borrowed from one Umrao Lal and one Pitambar Das. The latter obtained a decree enforcing this hypothecation, in the execution of which the share was put up for sale, and was purchased by them. The legal representatives of Mahtab Singh subsequently applied to recover in the execution of the decree of 1864 the amount of instalments which had fallen due after the date of that decree and had not been paid, by the attachment and sale of the share. Thereupon Umrao Lal and Pitambar Das objected, and the Court executing the decree allowed their objections, holding that the decree was a mere money-decree, and that the decree-holders should enforce their lien on the share by suit, and removed the attachment. The legal representatives of Mahtab Singh consequently brought the present suit against the legal representatives of Umrao Lal and Pitambar Das and of the obligors of the bond of the 15th March, 1861, in which they claimed to recover on such bond the amount of ten instalments payable between September, 1866, and September, 1876, by the sale of the hypothecated share. The legal representatives of Umrao Lal and Pitambar Das set up as a defence to the suit that it was barred by the provisions of s. 13 of Act X of 1877, inasmuch as the enforcement of the hypothecation had been claimed in the former suit on the bond, and had not been granted. The Court of first instance held on the issue arising out of this defence as follows:

“As regards the second issue it appears that the plaint in suit instituted by Mahtab Singh in the Court of the S Amin of Budaun has been destroyed. It is the decree on which is left from which it can be ascertained what Mahtab Singh's claim was. On referring to the decree I find that property in dispute was made a defendant in that case. There was no prayer for the enforcement of the lien. The property was therefore not the subject of the claim but the thing on which the claim was made. This course was quite irregular. An inanimate thing cannot defend a suit. I am of opinion making the property a defendant was a useless and mea

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proceeding and cannot be considered as a prayer for the sale of that property. It is to be observed that my learned predecessor has taken the same view of the case. I hold that no claim was made in that case for enforcing the lien on the property in dispute in this case. Even if it be granted that enforcement of the lien was sought in that case, still I think the claim against the property related to those instalments only which were then due and not to the unexpired instalments. As regards the unexpired instalments, the claim was merely for a declaration of the plaintiff's right to recover the amounts thereof when they became due, and no present relief was sought. Indeed, a claim for recovery of the amount not due could not have been made; the declaration of right was asked for simply to obviate the necessity of proving the execution of the bond in any future suit. The decree of the Sudder Amin also shows that the *amount claimed* was the sum of the expired instalments; the decree was made in the following terms:—"The amount claimed, with costs, and interest, &c., is decreed against the two defendants, &c., and until the satisfaction of the *total amount of the bond*, the plaintiff can realize the amount of each instalment by the execution of this decree." Whether the decree was properly made or not is a question on which an expression of my opinion is not needed in this case. It is clear that the Sudder Amin considered that the amount claimed was the total of the expired instalments only. His decree recognizes the existence of a part of the bond-debt even after the passing thereof. For these reasons, I hold that, in regard to the amount claimed, no relief was sought against the mortgaged property in the former case." In the event the Court of first instance gave the plaintiffs a decree, which, on appeal by the legal representatives of Umrao Lal and Pitambar Das, the lower appellate Court affirmed. Those persons thereupon appealed to the High Court, holding that, although the decree in the former suit had not annulled the hypothecation, by making the hypothecated property in that suit a defendant, the obligee had claimed the enforcement of the hypothecation, and therefore could not claim it again under the provisions of s. 13, Act X of 1877.

2. *Dillon* and *Munshi Sukh Ram*, for the appellants.

Pandit *Nand Lal*, for the respondents.

The following judgments were delivered by the Court :

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SPANKIE, J. — The first plea on the face of it would seem to have some weight, but when all the circumstances of the case are considered its force disappears. When the former suit was instituted in 1864 it was not unusual, when a party sued to recover a debt by enforcement of a lien on immoveable property, hypothecated as security for the payment of the same, to make the land a defendant. This course was followed in the suit from which the one before us has originated. There were in that suit two obligors who were made defendants. These defendants had hypothecated the property mentioned in the bond as security for the payment of the sum borrowed. Looking at the terms of the decree in 1864 (the plaint itself unfortunately remains no longer a portion of the record), it seems certain that the plaintiff then, now represented by his sons, the plaintiffs in this suit, was attempting to enforce payment of certain expired instalments by proceeding against the obligors of the bond, and the property hypothecated by them and in their possession. The claim was against “Zorawar Singh and Ajaipal Singh and the zamindari property in mauza Lalwa hypothecated in the bond defendants.” The relief sought was the recovery of those instalments of which the term had expired, and also a declaration of right to recover, as they fell due, instalments, the terms of which had not yet expired. The decree dated 15th August, 1864, decreed the amount claimed with costs and interest at 24 per cent. from the date of institution of the suit till date of payment against the two living defendants. It was added that “until the satisfaction of the entire amount of the bond the plaintiff can realize the amount of each instalment by executing this decree.” There does not appear to have been any decree against the property hypothecated in the bond: so far then it was a money-decree that the father of the present plaintiffs obtained, and he succeeded in realizing for the judgment-debtors the sum due upon the expired instalments.

What the present plaintiffs seek is to enforce their lien in satisfaction of the sum now due in consequence of default in paym

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of instalments not due when the decree of 1864 was made, but which the Court declared the plaintiff entitled to recover as they fell due by executing the decree then given to him, which he tried to do, but execution against the property was refused on the ground that the decree of 1864 was simply a money-decree.

It is urged that, as the claim in 1864 was to enforce a lien against hypothecated property, the present claim is barred by s. 13, Act X. of 1877. The then plaintiff obtained a money-decree only, and should have appealed, or applied for a review of judgment.

I approve the reasons given in a somewhat similar case by a Bench of this Court,—Special Appeal No. 1323 of 1876, dated the 17th February, 1877, in which the hypothecated property had been made a defendant, for allowing the suit to be heard upon the merits, although the plaint had been so carelessly framed as to describe the land as a defendant. Here, as in that case, the suit had been brought to enforce the lien, and it was defended on that assumption. But although I regard the claim in 1864 as one to enforce a lien, I do not think that s. 13, Act X of 1877, bars the present claim. I am disposed to regard the second part of the claim for a declaration of right to recover unexpired instalments, by execution of the decree against the defendant for money due on account of expired instalments, as one which the Court should not have entertained. It seems to me very questionable whether the Court had the power to grant such relief in one and the same decree. But if it had the power, the decree-holder did not succeed in getting the relief granted to him, except as regards the sum found to be due, which was discharged in execution of the decree. The present claim is not the same as that formerly brought. The plaintiffs do not ask for any declaratory decree as to unexpired instalments, but come into Court to recover sums said to be actually due and to do so by enforcement of their lien upon the property of their debtors. The action of the Court in execution of the decree of 1864 has forced them to bring the present suit, and they ask for something distinctly different from what was sought in the former suit in respect of these instalments, and I would therefore overrule the first plea in this appeal. (The learned Judge then proceeded to determine the other grounds of

appeal, but it is not material for the purposes of this report to set out the judgment on those grounds).

STUART, C. J.—In expressing my concurrence in the opinion of my colleague, Mr. Justice Spankie, on all the material pleas in this appeal, and in his order by which he proposes to dismiss it and affirm the decree of the lower appellate Court with costs, I desire to notice the very extraordinary circumstance that the land mentioned in the plaint was, by and of itself, as such, and without any stated connection with or relation to any living person, made a defendant in the original suit. Such a proceeding is with all gravity set out in the first reason of appeal and before us as a ground for the plea of *res judicata*. This was altogether unintelligible to me, and it was the first time since my connection with this Court that I had met with such an absurd eccentricity as I must call it, yet I am gravely assured that such at one time was the practice of the old Sudder Court, and my honorable colleague informs me that it was not an unusual practice. I can only say that I am very sorry to hear it, and that the Sudder Court allowed itself to be affected by such a strange fancy. Any such absurdity cannot of course be countenanced by this Court, and I trust the present case is the last I shall meet with in which such a ridiculous plea is attempted. As well might it be maintained that in any other suit the material thing, be it a stick or a stone, which is the subject of judicial inquiry, on the pleas of the parties, might be made a defendant.

We were referred at the hearing to a precedent (not reported)—Special Appeal No. 1323 of 1876, (Pearson, J. and Oldfield J.), dated the 17th February 1877—by which it was attempted to be shown that this practice of making inanimate matter, such as land, living, acting, and pleading disputants in a law suit, received some countenance from the judgment in that case, but I am glad to observe that, on the contrary, it was emphatically reprobated, for the judgment distinctly states :—“It appears that in the plaint the hypothecated land was described as defendant, and that the plaintiff sued to recover the debt claimed from all the defendants, that is to say, from the land as well as from the persons impleaded. It is a matter of surprise that the pla-

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was admitted without amendment, and shows that sufficient care is not exercised in the examination of plaints.”

In the present case there was the less reason for having recourse to such a fiction, seeing that the land is now and was at the institution of the suit in the hands of the defendants.

The judgment of the lower appellate Court is affirmed, and the present appeal is dismissed with costs.

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December 4.

Before Mr. Justice Spankie and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF SRIMATI PADDO SUNDARI DASÍ.*

Act XXVII of 1860, ss. 5, 6—Certificate for collection of Debts—Security—Appeal.

No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate, under Act XXVII of 1860, lies under that Act to the High Court. *In the matter of the petition of Rubmin (1) followed.*

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu *Dwarkanath Banarji*), for the appellant.

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

SPANKIE, J.—A certificate under Act XXVII of 1860 was applied for by Srimati Paddo Sundari Dasi, and an order was made in her favour. But in consequence of the Judge's requirement that she should deposit security to the full value of Company's paper (Rs. 20,000) belonging to the estate of the deceased Prasanno Chandar Singh, whereas the applicant was merely permitted to draw the interest, and security to cover that would have been sufficient, the certificate did not issue. The applicant, Srimati Sundari Dasi, has filed an appeal from the Judge's order. It, however, appears that there is no appeal from the order of the Judge in respect of the amount of security to be

* First Appeal, No. 123 of 1880, from an order of W. C. Turner, Esq., Judge Agra, dated the 26th May, 1880.