

1883  
 EMPRESS OF  
 INDIA  
 v.  
 AMAR NATH.

to avoid the arrest thereunder directed to be made. For these reasons I would hold that the arrest of Babu Amar Nath without a warrant would be illegal ; and in the strange condition of the record in this respect there is no evidence that he was arrested legally, but rather strong presumptions to the contrary.

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 February 2.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodburst.*

SOBHA PANDEY (DEFENDANT) v. SAHODRA BIBI (PLAINTIFF) \*

*Act XV of 1877 (Limitation Act), sch. ii, No. 91—Suit for cancellation of instrument—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 39.*

The plaintiff, alleging that he was the proprietor of certain land ; that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1 ; and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued ; claimed " that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings."

*Held* that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, sch. ii. of the Limitation Act, 1877, would apply, (which relates to suits of the nature of those referred to in s. 39 of the Specific Relief Act), but rather one for a declaratory decree.

THE plaintiff in this suit alleged in his plaint that he was the proprietor and in possession of a one anna four pies share of a certain village, although defendant No. 2, his deceased brother's widow, was recorded as proprietor ; that defendant No. 2 fraudulently mortgaged the share to defendant No. 1 ; that such mortgage was invalid as defendant No. 2 had no power to make the same ; that defendant No. 1 applied for mutation of names by virtue of the mortgage, but the application was refused on objection taken by him, plaintiff ; that defendant No. 1 applied to foreclose the mortgage, and having obtained foreclosure, sued defendant No. 2 for possession of the share ; that he, plaintiff, was made a defendant in this suit on his own application ; that such suit was dismissed, by reason of the foreclosure proceedings not having been valid ; and that defendant No. 1 had made a second application for foreclosure against him, plaintiff, and defendant No. 2,

\* Second Appeal No. 318 of 1882, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 1st May, 1882, reversing a decree of Maulvi Hafiz Rahim, Munsif of Bansgaon, dated the 20th December, 1881.

and notice of foreclosure had issued. The plaintiff, on these allegations, claimed "that, the mortgage-deed being set aside, the share be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings." The suit was defended by defendant No. 1 only, who set up as a defence that the share in dispute was the property of defendant No. 2, and that the suit was barred by limitation. The Court of first instance dismissed the suit on the ground that it was barred by limitation. On appeal by the plaintiff the lower appellate Court held that the suit was within time and gave him a decree.

In second appeal the defendant contended that the suit was barred by limitation, being governed by No. 91, sch. ii. of the Limitation Act, and the period of limitation provided by that article having expired.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Munshi Hanuman Prasad*, for the respondent.

The Court (OLDFIELD, J., and BRODHURST, J.) made the following order of remand :

OLDFIELD, J.—We are of opinion that the suit is not barred by limitation. We understand the claim to be not so much to have the instrument itself delivered up and cancelled as to have it declared ineffectual in respect of the plaintiff's right in the property, and to have his right declared, and to have the proceedings now taken to foreclose declared not to affect his right in the property. It is not a suit strictly for cancelment or setting aside an instrument to which the limitation in No. 91, sch. ii. of the Limitation Act will apply, which are suits of the nature of those referred to in s. 39 of the Specific Relief Act, but it is rather a suit for a declaratory decree, and is not barred by limitation. (After observing that the lower appellate Court had failed to determine the issues properly arising in the case, and stating those issues, the learned Judges proceed to direct that they should be tried by the lower appellate Court).

*Case remanded.*

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