

Before Mr. Justice Banerjee and Mr. Justice Rampini.

RAGHUNATH SAHAY SINGH AND ANOTHER (DECREE-HOLDERS) v. LAIJI SINGH AND OTHERS (JUDGMENT-DEBTORS).<sup>\*</sup>

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December 16.

*Limitation Act (XV of 1877), section 178—Application for execution of decree—Continuation of Application—Right to apply when accrued—Mortgage-decree—Application for resale in execution of decree—Judgment-debtors purchasing benami—Rights of mortgagee.*

Upon an application made on the 28th August 1891 for execution of a mortgage-decree, the mortgaged property was sold and the judgment-debtors purchased it *benami* at a low price. Thereupon the decree-holders made an application on the 12th November 1891, asking the Court to set aside the *benami* purchase and resell the property. The first Court found that the purchase was not *benami* and confirmed the sale on 12th April 1892, but the lower Appellate Court came to a contrary conclusion, and set aside the sale on the 22nd July 1892. The High Court in second appeal accepted the finding of the Appellate Court as regards the purchase being *benami*, but upheld the sale with the remark that the said property and any other property of the debtors might be sold in satisfaction of the mortgage-debt. This judgment was passed on the 4th August 1893. On an application for execution made on the 3rd December 1894, objections were raised on the ground of limitation and on the ground that the property was not liable to be sold again in execution of this decree.

*Held*, that the application of the 3rd December 1894 might be regarded as a continuation of the application of 12th November 1891 for resale of the property; and as the decree-holders were precluded by the first Court's finding of 12th April 1892 from asking for sale until it was reversed by the lower Appellate Court on the 22nd July 1892, and finally by the High Court on the 4th August 1893, the application was in time under Article 178, Schedule II., Act XV of 1877.

*Pyaroo Tuhobildarinee v. Nazir Hossein* (1), *Chandra Prodhan v. Gopi Mohun Shaha* (2), *Paras Ram v. Gardner* (3), *Kalyanbhai Dipchand v. Ghanasham Lal Jadunathji* (4), and *Chintamon Damodar Agashe v. Balshastri* (5), referred to.

<sup>\*</sup> Appeal from Appellate Order No. 192 of 1895, against the order of F. W. Badcock, Esq., District Judge of Bhagalpore, dated the 5th of March 1895, reversing the order of Babu Abinash Chunder Mitter, Subordinate Judge of Monghyr, dated the 2nd of January 1895.

(1) 23 W. R., 183.

(2) I. L. R., 14 Calc, 335.

(3) I. L. R., 1 All., 355.

(4) I. L. R., 5 Bom., 29.

(5) I. L. R., 16 Bom., 294.

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*Held*, also, that the previous sale under the mortgage decree was no bar to a fresh sale under the same decree. *Ram Awtar Singh v. Tulsi Ram* (1), *Otter v. Lord Vaux* (2), and *Lutf Ali Khan v. Futeh Bahadur* (3), referred to.

In this case a mortgage-decree for Rs. 3,837-14-0 was passed in favour of the appellants Raghunath Sahay Singh and Kishen Narain Singh in 1896. Application for execution was made on the 28th August 1891, and on the 9th November 1891 the mortgaged property was sold. The judgment-debtors purchased it themselves for Rs. 151 only in the name of a third person. On the 12th November 1891 the decree-holders made an application to the Subordinate Judge in whose Court the sale was held, objecting to the sale on the ground that the purchase was made *benami* by the debtors, and praying for a fresh sale of the property. The Subordinate Judge found that the purchase was not *benami*, refused the application, and confirmed the sale by an order dated the 12th April 1892. On appeal that order was reversed by the District Judge on the 22nd July 1892, the purchase was found to be *benami*, the sale was set aside, and a fresh sale was ordered. On second appeal the High Court held that the sale was not invalid by reason of the *benami* purchase, but that the decree-holders were at liberty to proceed against the property or any other property belonging to the judgment-debtors in case of deficiency in price. This judgment was passed on the 4th August 1893.

The application for execution out of which this appeal arose was made on the 3rd of December 1894, and was for resale of the mortgaged property in satisfaction of the balance of the mortgage debt. The judgment-debtors objected to the application on the grounds that it was barred by limitation, and that the decree could not again be enforced by the sale of the mortgaged property. The first Court overruled both these objections, but on appeal the District Judge gave effect to them and refused the application. He observed :—

“ I think it quite clear that limitation cannot run from April 12th, 1892, on the authority of the ruling in *Kristo Coomar Nag v. Mahabat Khan* (4), and

(1) 5 C. L. R., 227.

(2) 2 K. and J., 650 ; 6 De. G. M. and G., 638.

(3) I. L. R., 17 Calc., 32.

(4) I. L. R., 5 Calc., 595.

no other application has been pointed out to me beyond that of August 28th, 1891.

“As the property mortgaged has once been sold as such, I do not think it can again be sold as mortgaged property, and that the finding of the High Court means that it is liable to sale in the same way as unmortgaged property would be liable. For that purpose, a full decree under section 90 of the Transfer of Property Act would be necessary.”

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The decree-holders appealed to the High Court.

Dr. *Ras Behari Ghose* and *Babu Tarit Mohan Das* for the appellants.

*Moulvi Mahomed Yusuf* and *Babu Digambar Chutterjee* for respondents.

Dr. *Ras Behari Ghose*.—The present application is not barred by limitation. It comes under Article 178 of the Limitation Act and is in time as time began to run some time after 1892. Execution was impossible so long as the Sub-Judge's order was not reversed and no resale could be held or applied for. Starting on Limitation (Ed. 1895) p. 349. The present application may also be viewed as a continuation of the original application dated 12th November 1891. *Kalyanbhai Dipchand v. Ghanasham Lal Jadunathji* (1), *Chandra Prodhan v. Gopi Mohun Shaha* (2), *Chintamon Damodar Agashe v. Balshastri* (3), *Issuree Dasse v. Abdool Khalak* (4), *Paras Ram v. Gardner* (5), *Kewal Ram v. Khadim Husain* (6), *Thakur Das v. Shadi Lal* (7). The application is also saved from being barred because the decree-holders took steps in aid of execution. [BANERJEE, J.—The language used in Art. 179, clause 4 of Schedule II of the Limitation Act is “the date of applying to the proper Court.”] “Proper Court” means the Court having jurisdiction to deal with the matter of execution, and not merely the first Court. [BANERJEE, J.—The Appellate Court only asks the first Court to do its duty.] The case cited by the lower Court deals with a different matter.

On the question whether the decree-holders are disentitled from pursuing their mortgage rights, the mortgagors cannot get

(1) I. L. R., 5 Bom., 29 (34).

(2) I. L. R., 14 Calc., 385

(3) I. L. R., 16 Bom., 294.

(4) I. L. R., 4 Calc., 415.

(5) I. L. R., 1 All., 355.

(6) I. L. R., 5 All., 576.

(7) I. L. R., 8 All., 56.

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rid of their liability under the mortgage by buying the property. *Otter v. Lord Vauv* (1). The mortgagors cannot say that they hold the property free of the incumbrance.

Moulvi *Mahomed Yusuf* for the respondents.—The present application cannot be regarded as a continuation of the former proceedings; Rs. 151 was then set off against the decretal amount and those proceedings came to a close. The application of 12th November 1871 was not an application for execution, and was made without notice. The order was under section 311 of the Procedure Code. The final decree of the High Court restored the order of the first Court which confirmed the sale. There could not be another sale in this execution. [Dr. *Ras Behari Ghose* referred to *Lutf Ali Khan v. Futtah Bahadur* (2)]. The application also asks for sale of other properties, and in that respect it is not a continuation of the former application. The purchaser obtained a complete title. *Emam Momtasoodeen Mahomed v. Raj Coomar Doss* (3), *Jaleeram v. Chunder Coomaree Dossee* (4). Section 88 of the Transfer of Property Act also goes to show that a second sale could not be held. This is not a question for determination in execution of the decree; a separate suit should be brought to enforce the right to re-sell if it exists.

Dr. *Ras Behari Ghose* in reply.—The question of re-sale is one for decision under section 244 of the Civil Procedure Code. The sale is good, but still the mortgagors cannot plead non-liability. They were not under a disability to buy, but they were not entitled to say that they had got rid of the incumbrance.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

This appeal arises out of certain execution proceedings. The appellants, who are the holders of a mortgage decree, applied for the execution of their decree by the sale of the mortgaged property. The judgment-debtors opposed the application on two grounds, namely: *first*, that execution was barred by limitation; and, *second*, that the mortgaged property having once been sold

(1) 2 K. and J., 653; 6 De. G. M. and G., 638.

(2) I. L. R., 17 Calc., 23 (32).

(3) 14 B. L. R., 408; 23 W. R., 187.

(4) 12 B. L. R., Ap., 7.

in execution of the decree could not be sold again. The first Court overruled these objections and ordered that execution should proceed. On appeal by the judgment-debtors, the lower Appellate Court has reversed the first Court's decision, and disallowed execution.

In second appeal it is contended for the decree-holders, *first*, that the lower Appellate Court is wrong in holding that execution is barred by limitation ; and, *secondly*, that the lower Appellate Court is wrong in holding that the previous sale was a bar to any further sale.

The facts of the case, which are necessary to be referred to for the purposes of this appeal, are shortly these : The decree now sought to be enforced was passed in 1890. The first application for sale was made on the 28th of August 1891, and the mortgaged property was sold in execution and purchased for Rs. 151. (the decree being for a very much larger amount) by the judgment-debtors *benami* in the name of a third person (as has now been conclusively found). Thereupon on the 12th of November 1891 (that is, three days after the sale) the decree-holders applied to the Court by which the sale had been held for cancelment of the sale on the ground of the judgment-debtors having purchased the property *benami* and for resale. That Court having refused the application on the 12th of April 1892, the decree-holders appealed to the District Judge, and the Judge on the 22nd of July 1892 cancelled the sale and ordered resale, holding that the judgment-debtors having purchased the property *benami* there was no real sale of the property. The Judge's order, however, was reversed by this Court in second appeal on the 4th of August 1893, the learned Judges who heard the second appeal being of opinion that the mere fact of the judgment-debtor having purchased the property did not make the sale an invalid sale, and that the decree-holders were competent to sell the property and any other property of the judgment-debtors in satisfaction of the mortgage debt. The present application is dated the 3rd of December 1894, and by it the decree-holders seek to sell the mortgaged property in order to realize the unsatisfied portion of the decree. It should be here stated that the suit upon the mortgage having been brought more than six years after the debt became due,

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satisfaction can be obtained only by the sale of the mortgaged property, the personal remedy against the debtor being barred by limitation. See *Ramdin v. Kalka Persad* (1), *Miller v. Runganath Moulick* (2).

Those being the facts of the case, the first question for consideration is whether the present application is barred by limitation. We are of opinion that it is not. Though the present application is made more than three years after the date of the decree and of the last application for execution, it may be regarded as a continuation of the application of the 12th of November 1891, which was clearly in time, and in which in addition to the prayer for cancellation of the execution sale, the decree-holders also prayed for a resale of the mortgaged property; and as the decree-holders were precluded from asking the Court to grant this last-mentioned prayer, until the bar placed in their way by the adverse decision of the first Court, dated the 12th of April 1892, to the effect that the purchase at the former execution sale was not made by the judgment-debtors *benami*, was reversed by the decision of the Appellate Court on the 22nd of July 1892, and finally by the decision of this Court in second appeal on the 4th of August 1893, they were quite in time (under Article 178, Schedule II, Act XV of 1877) in making their present application for resale on the 3rd of December 1894. The view we take is amply supported by the decisions of this Court and of the High Courts of Allahabad and Bombay, and we need only refer to the cases of *Pyaroo Tuhobildarinee v. Nazir Hossein* (3), *Chandra Prodhan v. Gopi Mohun Saha* (4), *Paras Ram v. Gardner* (5), *Kalyanbhai Dipchand v. Ghanasham Lal Jadhunathji* (6), *Chintamon Damodar Agashe v. Balshastri* (7).

Execution not being in our opinion barred by limitation, the next question for consideration is whether the previous sale under the mortgage decree is a bar to a fresh sale under the same. We are of opinion that this question also should be answered in the

(1) I. L. R., 7 All., 502.

(3) 23 W. R., 183.

(5) I. L. R., 1 All., 355.

(2) I. L. R., 12 Calc., 389.

(4) I. L. R., 14 Calc., 385.

(6) I. L. R., 6 Bom., 29.

(7) I. L. R., 16 Bom., 294.

negative. It is true that it has been conclusively held by this Court in the former proceedings that the previous execution sale was a valid sale, but that cannot prevent a resale of the property when it has been found equally conclusively in the same proceedings that the purchasers at the sale were the judgment-debtors themselves. The mortgage-decree remains unsatisfied except as to a small part, and the mortgaged property still remains the property of the judgment-debtors, the mortgagors ; and is it open to them to set up their purchase at the execution sale for a price which is far below the amount of the mortgage debt as a bar to the mortgagees' right to realize their dues by the sale of the property ? We think clearly not. Our decision rests upon the broad principle of equity that the mortgagor, while still retaining the mortgaged property for himself, cannot by any act of his other than actual payment of the mortgage debt get that property freed from the charge which he himself has created. We need not here go so far as this Court was asked to go in *Ram Awtar Singh v. Tulsi Ram* (1). The principle of equity that we apply is no novel principle. It is closely allied to the principle which the Court of Chancery enforced in *Otter v. Lord Vaux* (2), where it held that a mortgagor, by his purchase from the first mortgagee under a power of sale, could not defeat the title of the second mortgagee, and which the Judicial Committee affirmed in the case of *Lutf Ali Khan v. Futteh Bahadur* (3). Their Lordships said : " The sale to the appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage."

It was urged for the respondents that granting that the mortgagee has the right to sell the property, he cannot enforce that right in execution of the decree he has obtained, but he must proceed by a separate suit. To this objection the answer is simple. Section 244 of the Code of Civil Procedure enacts

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(1) 5 C. L. R., 227.

(2) 2 K. and J. 650 ; 6 De G. M. and G., 638.

(3) I. L. R., 17 Calc., 32.

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that all questions arising between the parties to a suit relating to the execution, discharge or satisfaction of the decree should be determined by the Court executing the decree and not by a separate suit, and there can be no doubt that the question raised before us is one of that description.

We are therefore of opinion that the application of the decree-holders for the resale of the mortgaged properties is not barred in any way, and that this appeal should be decreed, the order of the lower Appellate Court reversed, and that of the first Court overruling the objection of the judgment-debtors restored with costs. Execution will proceed as prayed by the sale of the mortgaged property.

S. C. C.

*Appeal allowed.*

## ORIGINAL CIVIL.

*Before Mr. Justice Sale.*

1896  
 Jan. 3 & 9.

MALLOMED ALI (PLAINTIFF) v. WAZID ALI (DEFENDANT).

*Practice—Commission to examine witnesses—Non-attendance of Witnesses—Mode of enforcing attendance—Code of Civil Procedure (Act XIV of 1882), sections 399 and 400 and Schedule IV, No. 156.*

On an application to the High Court to authorise a Commissioner to issue process for the purpose of compelling the attendance of witnesses before him :

*Held*, that the Commissioner should return the commission to the High Court. The High Court may then send the commission to a Civil Court within the local limits of whose jurisdiction the witnesses to be examined reside.

In this suit a Commission was issued by the High Court to examine witnesses residing in the District of Bakharganj. The Commissioner issued notices to the witnesses to attend before him, but they did not appear. He thereupon wrote, informing the High Court that the persons to be examined under the Commission had disregarded a notice to appear before him.

Mr. *Chakravarti* for the plaintiff.

Mr. *T. A. Apcar* for the defendant.

Mr. *Chakravarti* applies on affidavit for an adjournment and requests the Court to authorise the Commissioner to issue process