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or making the application within such period. We are asked to hold that the expression "appeal" includes an application for leave to appeal *in forma pauperis*. It would be straining the language of the section if we put that construction upon it. In section 12 an application for leave to appeal as a pauper is expressly included, whilst it is excluded from section 5. This view has been held in the case of *Lakshmi* v. *Ananta Shanbaga* (1) and of *Parbati* v. *Bhola* (2). In those cases no special application was made to discharge the order which had been made out of time.

It must be borne in mind that under section 4 of the Limitation Act, the Court is bound when an application is out of time to dismiss it, even although the point may not be raised by the other side. I think, however, that there ought to have been a special application made to set aside the orders admitting the application; and we only allow the preliminary objection upon the undertaking of the respondent to present a petition before Wednesday next, the 10th instant, asking for the discharge of these orders.

I do not, however, wish to exclude the appellant from appealing if he choose to proceed in the ordinary way, and not as a pauper, though he is much out of time. We can, however, extend the time for appealing; and if by Wednesday next he puts in the court-fee on the memorandum of appeal, we will hear the case on the merits.

GEIDT, J. I concur.

30 C. 794 (=7 C. W. N. 609).

[794] APPELLATE CIVIL.

UPENDRA CHANDRA MITTER *v.* TARA PROSANNA MUKERJEE.*

[20th May, 1903.]

Revenue Sale—Act XI of 1859, *s.* 9—*Act I of* 1845—*Mortgagee—Part-proprietor—Mortgage lien—Transfer of Property Act* (*IV of* 1882) *s.* 72—*Cesses—Personal decree—Contract Act* (*IX of* 1872) *s.* 70—*Misjoinder—Civil Procedure Code* (*Act XIV of* 1882) *s.* 578.

A mortgagee of a share of an estate, who was also a part-proprietor deposited in the Collectorate revenue and cesses payable by the defaulting mortgagor to save the property from being sold:—

Held, that on general principles of justice, equity and good conscience, the mortgagee is entitled to have the amount paid by him on account of revenue, added to the amount of the original lien.

Nugender Chunder Ghose v. *Sreemutty Kaminee Dossee* (3) relied upon, *Kinu Ram Das* v. *Mozaffer Hosain Skaha* (4) distinguished.

Held, also, that the mortgagee is entitled to a personal decree against the mortgagor for the amount paid on account of cesses, regard being had to s. 70 of the Contract Act (IX of 1872).

Smith v. *Dinonath Mookerjee* (5) referred to.

[(1) Revenue sale law, s. 9. Foll. 31 Cal. 975. Ref. 38 I. C. 232=1 Pat. L. J. 589; 17 I. C. 45=16 C. L. J. 148: 19 C. L. J. 156=13 I. C. 144.
(2) C. P. C., s. 90. Ref. 2 C. L. J. 602.]

APPEAL by the defendant, Upendra Chandra Mitter.

The plaintiff, Tara Prosanna Mukerjee, sued the defendant on two mortgage bonds. The first bond was dated the 17th April 1894, by which the defendant borrowed from the plaintiff Rs. 7,000, on the

*Appeal from Original Decree No. 200 of 1899, against the decree of Kedar Nath Mozumdar, Subordinate Judge of Burdwan, dated Jan. 13, 1899.

(1) (1879) I. L. R. 2 Mad. 230.
(2) (1889) I. L. R. 12 All. 79.
(3) (1867) 11 Moo. I. A. 241; 8 W. R. (P. C.) 17.
(4) (1887) I. L. R. 14 Cal. 809.
(5) (1885) I. L. R. 12 Cal. 218.

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mortgage of his share in zemindaries lot *palaspai* and lot *Sarpara* and certain other properties. The second bond was dated the 10th February 1896, by which the defendant borrowed a further sum of Rs. 5,600, on the mortgage of the properties covered by the first mortgage and some other properties. The plaintiff alleged that, besides the aforesaid sums, he had to pay certain registration expenses and to pay into the Collectorate on different dates several amounts on account of the revenue and [795] cesses due from the defendant for the estates mortgaged, aggregating in all to Rs. 1,877 6, these payments being made to save the said estates from being sold; and he submitted that, in the circumstances, he was entitled to add these sums to the amount of the original lien. The plaintiff accordingly prayed for a mortgage decree for the sum of Rs. 19,734-12-7¼ gundas on the usual terms.

The points urged in defence were, amongst other things, that the suit was not maintainable on account of misjoinder of different causes of action; that the plaintiff was guilty of bad faith and undue influence in respect of the alleged loan transactions; that the whole of the consideration money did not pass; and that as regards the alleged payments on account of revenue and cesses, assuming that the payments were made, they must be considered as voluntary, and the sums paid could not be made a charge on the mortgaged properties, specially as the plaintiff himself and the Maharaja of Burdwan were co-sharers of lot *Palaspai*, which the said Maharaja at any rate would have saved from sale.

The learned Subordinate Judge overruled the objections of the defendant and decreed the suit in full.

The appeal to the High Court, preferred by the defendant, was valued at Rs. 6,000 only.

Babu *Mahendra Kumar Mitra* (Babu *Surendra Chandra Bose* with him) for the appellant. My points are (*i*) the suit is not tenable owing to misjoinder of causes of action, the claim on mortgage being joined to claims of different descriptions; (*ii*) that a part of the consideration money for the second mortgage bond was not paid; (*iii*) that the plaintiff being a co-sharer of lot *Palaspai*, the sums paid by him as Government revenue are not recoverable as additions to the mortgage debt; and (*iv*) that at any rate the amount paid by the plaintiff on account of cesses is not recoverable as mortgage debt, as the liability to pay cesses is a personal liability.

[It being pointed out that the second point was not taken in the grounds of appeal, it was disallowed.]

As to the third point, as a co-sharer, the plaintiff is not entitled to the benefit of the last clause of sec. 9 of Act XI of 1859, as that section excludes co-sharers. The remedy of a co-sharer is [796] to apply for exemption from sale under s. 18 of the Act: see *Jusoda Dassee* v. *Matungince Dossee* (1). Whatever conflict there was, was set at rest by the Full Bench case of *Kinu Ram Das* v. *Mozaffer Hosain Saha* (2). See also *Seth Chitor Mal* v. *Shib Lal* (3).

As to the fourth point, see *Shekaat Hosain* v. *Sasi Kar* (4). A mortgagee cannot be affected by a sale under the Cess Act: see sec. 99, last clause of Act IX of 1880 (B. C.).

(1) (1869) 12 W. R. 249
(2) (1887) I. L. R. 14 Cal. 809.
(3) (1892) I. L. R. 14 All. 273.
(4) (1892) I. L. R 19 Cal. 783.

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Dr. *Rash Behari Ghose* (Babu *Nalini Ranjan Chatterjee* with him), for the respondent, referred to the remarks of Sir John Edge in *Seth Chitor Mal* v. *Shib Lal* (1), at pp. 280 and 287, and submitted that as that was a case of a co-owner who had no interest in the lands in suit, the remarks were *obiter dicta*. The dictum of the Privy Council in the case of *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (2) was explained in the Full Bench case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (3) to be limited to the case of a mortgagee, so that, apart from the provisions of sec. 9 of Act XI of 1859, a mortgagee was entitled to a lien for the sum advanced by him for payment of revenue, on general principles of justice, equity and good conscience. Reliance was also placed on the cases of *Imdad Hasan Khan* v. *Badri Prasad* (4), *Periasna Servaigaran* v. *Marudainayagam Pillai* (5), and *Leslie* v. *French* (6).

Babu *Mahendra Kumar Mitra*, in reply, submitted that in the case of *Imdad Hasan Khan* v. *Badri Prasad* (4), the mortgagee was in possession and could come in under s. 72 of the Transfer of Property Act. That was not so in the present case. The Madras case cited was also of a mortgagee in possession. If the Legislature had thought that there should be lien in any other case, it would have so declared in express terms: see Transfer of Property Act, s. 72. The Privy Council case of *Nogender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (2) was under the old law, *i. e.*, Act I of 1845, which contained no provisions for creating a lien in favour of a mortgagee for Government [797] revenue paid. Since then there has been a legislative enactment, *i.e.*, Act XI of 1859, which should be treated as exhaustive. The case of *Leslie* v. *French* (6) did not recognise the doctrine of salvage lien in general.

BANERJEE AND PARGITER, JJ. In this appeal, which arises out of a suit brought by the plaintiff-respondent to recover a certain sum of money which is made up of loan advanced upon mortgage bonds, registration expenses and moneys paid on account of Government revenue and road and public works cesses due in respect of the mortgaged property, four points have been urged before us on behalf of the defendant-appellant—

(*i*) That the suit was not maintainable by reason of misjoinder of causes of action;

(*ii*) That the payment of Rs. 500, which was disputed, had not been proved;

(*iii*) That the plaintiff being a part-proprietor of the estate, a share of which was mortgaged to him, was not entitled to the benefit of section 9 of Act XI of 1859; and

(*iv*) That the amount paid on account of cesses could not be added to the mortgage debt and recovered by the sale of the mortgaged property.

As to the first point, it is sufficient to say that the amount at which the appeal is valued makes it incompetent to the appellant to raise it.

As to the second point, it not being raised in the memorandum of appeal, we did not think it fit to allow it to be urged, having regard to the clear finding on the point by the Court below.

(1) (1892) I. L. R. 14 All. 273.
(2) (1867) 11 Moo. I. A. 241; 8 W. R. (P. C.) 17.
(3) (1887) I. L. R. 14 Cal. 809.
(4) (1898) I. L. R. 20 All. 401.
(5) (1899) I. L. R. 22 Mad. 332.
(6) (1883) L. R. 23 Ch. D. 552.

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The third point is not altogether free from doubt.

It is contended by the learned vakil for the appellant that as section 9 of Act XI of 1859 excludes the case of a proprietor of a share of an estate in arrear when providing for the receipt of money as a deposit in the early part of the section, the concluding portion of the section which provides for a mortgagee making a deposit under the section acquiring a lien on the share of the [798] estate protected must be held to be inapplicable to the case of a mortgagee who is also a part-proprietor; and as the plaintiff is admittedly a part-proprietor of the estate, he is not entitled to any lien under the section. We are of opinion that this contention is so far correct that section 9 does not entitle the plaintiff to claim a lien on the mortgaged property for sums paid by him on account of Government revenue. But it has been argued by the learned vakil for the plaintiff-respondent that though section 9 of Act XI of 1859 may not give a mortgagee, who is also a part-proprietor, the benefit of the lien spoken of in the concluding part of the section, it does not disentitle him to any such lien if on general principles of justice, equity and good conscience he is entitled to it. So far, we think, this contention on behalf of the respondent is correct. Section 9 of Act XI of 1859 evidently does not negative it. Is the mortgagee who is also a part-proprietor entitled, according to the general principles of justice, equity and good conscience, to the benefit of any such lien, or does the fact of his being a part-proprietor of the estate disentitle him to the benefit of the lien which he would otherwise have been entitled to as a mortgagee? We are of opinion that this question should be answered in favour of the plaintiff-respondent. For the contention of the plaintiff that he is entitled to such a lien finds support in the following dictum of their Lordships of the Privy Council in the case of *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (1), where their Lordships say:—

"Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid."

It is argued for the appellant that this dictum of their Lordships, which was laid down in a case decided with reference to Act I of 1845, which was the sale law then in force, must be taken to be modified in its operation by reason of the Legislature [799] having subsequently changed the law and made an express provision in section 9 of the present Sale Law Act, XI of 1859.

We are unable to accept this argument as correct. If section 9 of Act XI of 1859 applies to the case, the plaintiff has the lien he claims under that section. If it does not apply to the case, it cannot be said that the Legislature has made an express provision for the case, which makes the general principles laid down in the dictum quoted above inapplicable to it. The only way in which the change in the law as made by section 9 of Act XI of 1859 could be said to be operative in restricting or qualifying the principle laid down in the dictum of the

(1) (1867) 11 Moo. I. A. 241; 8 W. R. (P. C.) 17.

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Privy Council quoted above would be by saying that section 9 of the Sale Law by excluding the case of a part-proprietor from its operation intends to deprive a mortgagee, who is also a part-proprietor, of the lien which he would otherwise have had. But, as we have said above, this effect cannot be attributed to section 9. That being so, we think the dictum quoted above is an authority for the view we take. It has been said that that dictum has been interpreted by a Full Bench of this Court in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) to be inapplicable to the case of a part-proprietor. That, no doubt, is so; and if the lien in this case had been claimed by the plaintiff only as a part-proprietor of the estate protected, the decision of the majority of the Full Bench in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) would have been a complete answer to such a claim. But as it is, the plaintiff claims the lien not as a part-proprietor, but as a mortgagee; and the judgment of the majority of the learned Judges in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) leaves the case of a mortgagee claiming a lien untouched. That being so the case does not stand in the way of the plaintiff's claim succeeding. We may add that according to the English law also, the case of a mortgagee claiming the benefit of the lien for payments made by him to protect the mortgaged property has been considered to stand upon an exceptional footing: see the case of *Leslie* v. *French* (2). And the view we take is in accordance with that taken by the Madras High Court in the case of *Perianna Servaigaran* v. *Marudainayagam Pillai* (3).

[800] It is argued that the Transfer of Property Act, section 72, by declaring that a mortgagee in possession can charge the mortgaged property for payments made by him on account of Government revenue raises an implication that a mortgagee not in possession has no such right. We do not see that that follows. We do not think that there is anything in the Transfer of Property Act which militates against the view we take. For the foregoing reasons we are of opinion that the contention raised upon the third point on behalf of the appellant must fail.

As to the fourth point, no doubt the plaintiff is not entitled to claim any lien on account of payments made for road and public works cesses. Such payments were made, not to protect any interest of the plaintiff which might otherwise have been imperilled, a sale for road and public cesses not passing more than the right, title and interest of the judgment-debtor. But though that is so and though the amounts paid on account of cesses must therefore be excluded from the mortgage decree, the plaintiff is entitled to a personal decree against the mortgagor for such amounts, regard being had to the provisions of section 70 of the Contract Act. The view we take is in accordance with that taken by this Court in the case of *Smith* v. *Dinonath Mookerjee* (4).

No doubt the inclusion of this claim in a suit upon a mortgage bond does involve a misjoinder of causes of action, but, as we have already said, it is not open to the appellant to raise this objection. It is a defect which is cured by section 578 of the Code of Civil Procedure, and the Court below having made a decree for the amount, we shall allow the decree to stand subject to the modification indicated above, namely,

(1) (1887) I. L. R. 14 Cal. 809.
(2) (1883) L. R. 23 Ch. D. 552.
(3) (1899) I. L. R. 22 Mad. 332.
(4) (1885) I. L. R. 12 Cal. 213.

that the decree shall be a personal one and not form any part of the mortgage decree granted to the plaintiff.

The result then is that, subject to the modification indicated above, the decree of the Court below will be affirmed and this appeal dismissed with costs.

Appeal dismissed.

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30 C. 801 (=7 C. W. N. 810.)

[801] APPELLATE CIVIL.

DINENDRA NARAIN ROY *v.* TITURAM MUKERJEE.*

[12th June, 1903.]

Compensation—Apportionment of compensation money—Landlord and Tenant—Land Acquisition Acts (I of 1894 and XVIII of 1885)—Rent fixed in perpetuity—Bengal Tenancy Act (VIII of 1885) s. 50, sub-s. (2).

In apportioning compensation money, awarded under the Land Acquisition Act, between the landlord and the tenure-holder, the Court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on the one hand, and that of the tenant on the other, and to divide the sum awarded between them in accordance with these values. Where the rent is fixed in perpetuity the landlord is not entitled to more than the capitalized value of his rent.

Gordon Stuart and Co. v. *Maharajah Mohatab Chunder Bahadoor* (1), *Raye Kissory Dassee* v. *Nilcant Day* (2), *Godadhar Dass* v. *Dhunput Sing* (3), *Dunne* v. *Nobo Krishna Mookerjee* (4), *Rajah Khetter Kristo Mitter* v. *Kumar Dinendra Narain Roy* (5) and *Shama Prosunno Bose Mozumdar* v. *Brakoda Sundar Dasi* (6) considered.

[Foll. 5 C. L. J. 662; Ref. 13 C. L. J. 415=10 I. C. 163; 5 C. L. J. 48 N.; 40 Cal. 64; 36 Mad. 395; 16 C. L. J. 209=17 I. C. 168; Rel. on; 20 I. C. 263.]

APPEAL by claimant No. 1, Kumar Dinendra Narain Roy.

This appeal arose out of a land acquisition case in which compensation to the amount of Rs. 20,057 odd was awarded by Government for a plot of land acquired in the suburbs of Calcutta for the purpose of constructing a public street. The land acquired consisted of three holdings, Nos. 119, 119A and 119B, within the Government estate, Panchannagram.

The first claimant, Kumar Dinendra Narain Roy, was the superior tenant under Government. The second claimant was a tenant under the first, and claimed to possess a permanent, heritable and transferable tenure at a fixed rental. The third claimant held under a lease from the second claimant; the lease was [802] given to one Aprokash Mookerjee and others, and they conveyed their rights to the Roller Mills Co., who built a large flour mill on the aforesaid holdings, but the plot of land acquired had not been built upon. The land acquired was partly *busti* and partly tank, and was occupied by some temporary tenants.

The first claimant denied the permanent right as claimed by the second claimant, and asserted that the latter was only a tenant-at-will.

The Court below found that the second claimant was a permanent tenure-holder, and that his rent was fixed. It held that the value of the landlord's (claimant No. 1) interest was the capitalized value of the

* Appeal from Original Decree No. 309 of 1900, against the decree of F. E. Pargiter, District Judge of 24-Perganas, dated Aug. 21, 1900.

(1) (1863) 1 Marsh. 490.
(2) (1878) 20 W. R. 370.
(3) (1881) I. L. R. 7 Cal. 585.
(4) (1880) I. L. R. 17 Cal. 144.
(5) (1897) 3 C. W. N. 202.
(6) (1900) I. L. R. 28 Cal. 146.