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purporting to affect the whole 16 annas, was made, and allowed the defendant to take and hold unquestioned possession of the estate for more than eleven years, to deal as owner with the other incumbrances on this property by paying them off, and to be put to a very considerable expense in that way, we think that he ought not now to have even an opportunity of redeeming the property. What we shall do, therefore, will be to affirm the decree of the Court below and dismiss the plaintiff's suit. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

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June 10.

KRISTODASS KUNDOO AND ANOTHER (DEFENDANTS) *v.* RAMKANT ROY CHOWDHRY (PLAINTIFF).*

Practice—Joinder of Causes of Action—Civil Procedure Code (Act VIII of 1859), s. 7—Limitation Act (IX of 1871), sched. ii, art. 15—Mortgage Decree—Sale for Arrears of Revenue—Surplus Sale-Proceeds—Marshalling.

A mortgagee brought a suit against the mortgagor to have a declaration of his lien over the mortgaged properties, and obtained a decree. He afterwards brought another suit against certain attaching creditors of his mortgagor, to have a declaration of his lien over certain surplus moneys in the hands of the Collector, who, previous to the institution of the first suit, had sold certain of the mortgaged properties free of all incumbrances for arrears of Government revenue. *Held*, that the second suit was not barred under Act VIII of 1859, s. 7.

Held also, that the mortgage decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties.

Heera Lal Chowdhry v. *Janokeenath Mookerjee* (1) followed.

The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees.

The period of limitation prescribed by art. 15, sched. ii, Act IX of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.

* Appeal from Original Decree, No. 145 of 1878, against the decree of F. J. G. Campbell, Esq., Officiating Additional Judge of Chittagong, dated the 20th February 1878.

(1) 16 W. R., 222.

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THE facts of this case were as follows: On November 3rd, 1875, Ram Sunder Sen and Ram Chunder Sen mortgaged certain properties to Gonesh Misser on a bond containing a condition for payment of principal and interest within one year. The bond also contained the following stipulations:—

"We shall pay the Government revenue. If we do not "pay the Government revenue, and if, in consequence, all or any "of the mehals be sold by auction for realization of the Govern- "ment revenue, then you shall be competent to take the princi- "pal and interest that shall have been due to you from the Col- "lectorate from and out of the surplus sale-proceeds on the "strength of this deed of conditional sale. Neither we, nor our "heirs, shall be competent to take any objection to it, and no "objection, if taken, shall be legally valid. In case the proceeds "of the sale of the mehals in mortgage do not cover the amount "that shall have been due to you on account of principal and "interest, you shall be competent, to realise the principal and "interest by sale of our other properties, whether moveable or "immoveable."

Shortly afterwards the mortgagors neglected to pay the Government revenue on nine of the mortgaged properties, which were accordingly sold, under Act XI of 1859, free from all incumbrances.

The defendants in the present suit, who held money-decrees against the mortgagors, obtained orders from the Civil Court attaching the surplus sale-proceeds which remained as a deposit in the Collector's office to the credit of the mortgagors, their debtors.

On May 13th, 1876, the mortgagee applied to the Judge for an order releasing the surplus sale-proceeds from these attachments, on the ground that they were liable to satisfy his mortgage, and he asked to have evidence taken of his claim. The Judge held, on the authority of the case of *Brojonath Mitter* (1), that he had no jurisdiction to determine the priority of claims to money in deposit in the Collector's Court, and he declined to take any proceedings on that petition. The mortgagee then applied to the Collector for payment of this money,

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but this application was also rejected, and an order was passed on the 16th May 1876, that the money could "not be paid to any person other than the malik," probably meaning the mortgagors.

On January 9th, 1877, Gonesh Misser sued the mortgagors on his mortgage bond to recover the money due thereon, "by declaration of a lien" on the mortgaged properties, or, if that were not sufficient, from the other properties of the mortgagors; and a decree was passed on 5th February following, which declared that "the mortgaged properties stand subject to lien until the realization of the money."

Application for execution of this decree was made on 6th April 1877, by sale of the mortgaged properties, the nine properties which had been sold for arrears of revenue as already stated being excluded from this application, though they, with the other properties, were entered in the schedule attached to the decree.

Gonesh Misser, the original mortgagee, sold this debt, on 21st May 1877, to Ramkant Roy. He, as transferee judgment-creditor, attempted to attach the surplus sale-proceeds of these nine properties. Thereupon opposition was made by the present defendants, who had already obtained orders of attachment, and the Judge, on 11th August 1877, declined to take any action for the reasons recorded by his predecessor on 13th May 1876, which have been already stated. Ramkant Roy, on 29th August 1877, brought the present suit to set aside this order of the 11th of August, and to declare that the surplus sale-proceeds were subject to his mortgage lien.

Against the decree given to the plaintiff by the Additional Judge of Chittagong, two of the decree-holders, defendants, appealed.

Mr. *Bell* (with him Baboo *Chunder Madhub Ghose*) for the appellants.—The limitation applicable to this case is Act IX of 1871, sched. ii, art. 15. The suit is, under that article, barred by limitation. It is also barred under s. 7 of Act VIII of 1859: *Moonshee Buzloor Roheem* v. *Shumsoonissa Begum* (1) and *Ram-*

(1) 11 Moore's I. A., 551.

hurry Mondul v. *Mothoormohun Mondul* (1). Even if the suit does lie, the Court will compel the mortgagee to go against the other mortgaged estates and leave the surplus proceeds to the general creditors.

Mr. *P. O'Kinealy* (with him Baboo *Akhil Chunder Sen*) for the respondent.—Act IX of 1871, sched. ii, art. 15, does not apply here, because the Court refused to pass any order in the case, and because this is not a suit to set aside an order of the Civil Court: *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry* (2). Nor is the suit barred under Act VIII of 1859, s. 7, because the subject-matter and the parties in both suits are different. The decree against the mortgaged properties covers the surplus proceeds in the hands of the Collector, which must be taken to represent the properties themselves for all the purposes of the mortgage: *Heera Lal Chowdhry* v. *Janokeenath Mookerjee* (3); Macpherson on Mortgages, pp. 113, 234. The appellants are mere general creditors, and therefore the doctrine of marshalling does not apply.

The judgment of the Court (MORRIS and PRINSEP, JJ.), was delivered by

PRINSEP, J. (who, after stating the facts as above, continued):—The first objection is, that the suit is barred by limitation under art. 15 or art. 16, sched. ii, Act IX of 1871, because it has not been instituted within one year from the order of the Judge, dated 13th May 1876, or that of the Collector, dated 16th idem, rejecting the mortgagee's applications. We have, however, no doubt that these articles do not apply, inasmuch as in neither case was there any order passed adverse to the mortgagee's right after any adjudication thereof. The orders passed simply amounted to a declaration, that neither the Judge, nor the Collector, considered that he had jurisdiction to act as desired. The general law of limitation for suits to establish a right would, therefore, apply to the present suit, and under that law the suit is not barred.

(1) 20 W. R., 450. (2) I. L. R., 4 Calc., 610.
(3) 16 W. R., 222.

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The main objection pressed on us by Mr. H. Bell, who appears as counsel for the appellants, is, that this suit is barred by s. 7, Act VIII of 1859, because in his suit against the mortgagors, the mortgagee, knowing that these nine properties had been sold for arrears of revenue, did not apply to have the surplus sale-proceeds declared subject to his mortgage lien, but merely asked for and obtained a decree against the mortgaged properties. Mr. Bell contends that, as the mortgagee did not ask for all the relief to which he was entitled, he cannot now sue for the balance of his claim; that the surplus sale-proceeds are distinct from the mortgaged properties, which by the decree have been charged with the debt; and that, if he could not bring a second suit against the mortgagors, he cannot bring one against the present defendants, the creditors of the mortgagors who have obtained orders of attachment in execution of decrees held by them. He relies principally on the case of *Moonshee Buzloor Roheem* v. *Shumsoonissa Begum* (1) and on *Ramhurry Mondul* v. *Mothurmohun Mondul* (2), but the fallacy of this argument appears to us to lie in the fact that the judgment-debtors, mortgagors, have not made, and indeed could not make, any opposition to the execution of the mortgage decree on the surplus sale-proceeds. The cause of action in the present suit is certainly distinct from that in the first suit. In that suit the mortgagee sought to establish his mortgage-debt and his lien on the mortgaged properties, and to obtain an order of the Court enforcing it, and the cause of action was the default of the mortgagors to make payment within the stipulated time. The cause of action in the present suit is the opposition of certain creditors to the satisfaction of the mortgage-decree out of money which represents the balance due to the mortgagors after payment of Government revenue on nine of the mortgaged properties sold under Act XI of 1859, in consequence of their default. If the mortgagee had, in the suit to enforce the terms of the mortgage bond, attempted to obtain a lien on this money, it would have been necessary either to make the present defendants parties to that suit, or to bring the present suit, before he

(1) 11 Moore's I. A., 551, see 603 & 605.

(2) 20 W. R., 450.

could obtain a decree binding on the present defendants. But in such a case the present defendants might reasonably complain that they were not concerned in the cause of action, the default of the mortgagors; that the claim to the money was one dependent entirely on the manner in which execution of the mortgage-decree was taken out; that, when this matter arose, they would be prepared to defend their rights, and that, therefore, they should be dismissed from the suit. Such an objection would, in our opinion, be irresistible. To use the words of their Lordships of the Privy Council in the case already quoted: "The correct test is, whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit" (1). Applying this test we have no doubt that the cause of action in the two cases are distinct.

But besides these grounds we are of opinion that the objection must fail for another reason. In the case of *Heera Lal Chowdhry* v. *Janoheenath Mookerjee* (2), the High Court (Norman, Offg. C. J., and L. S. Jackson, J.), declared, that "it has been long settled by decisions from the time of the late Sudder Court, in consonance with reason and justice, that when mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery. It is clear in fact that the money, the proceeds of sale, which had been substituted for the land mortgaged, became subject to the lien to which the land which it represented was subject."

The Court, in that case acting on this principle, required a creditor, who had, in execution of a money-decree against the mortgagor, attached such surplus sale-proceeds, to refund that money to the mortgagee. The cases decided in the Sudder Court, to which reference has been made in this judgment, are quoted in Macpherson on Mortgages, 6th edition, p. 234.

Taking the surplus sale-proceeds as representing the nine mortgaged estates which had been sold for arrears of revenue, the decree obtained by the mortgagee declaring his lien on them

(1) 11 Moore's I. A., at p. 605. (2) 16 W. R., 222.

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and other estates would be the same as declaring a lien on that money; and as I have before pointed out, a declaration of a lien on that money expressly would not be binding against the present defendants, who would be entitled to show, if they could do so, that that money was not subject to any such lien, but had been rightly attached in satisfaction of their decrees. This, under the rule laid down in *Brojonath Mitter's case* (1), could not be determined except in a separate suit such as has now been brought.

Mr. H. Bell next contends that, as a Court of Equity, we should compel the mortgagee to execute the decree first on the other mortgaged properties, but we can find no authority for such a course. The defendants are holders of ordinary money-decrees, and have no special claim on our consideration, such as to require us to interfere with and limit the undoubted rights of the mortgagee. He has an easy way of realizing the money due to him, and he is entitled to take advantage of it. The defendants can proceed to execute their decrees against other properties. It is thrown out by Mr. Bell, that these properties may be subject to other incumbrances. If that be so, there is still more reason for our refusing to require the mortgagee, plaintiff, to proceed against these properties, for the defendants, creditors on no security, cannot ask to have the advantage of the prior mortgage held by the plaintiff, so as to enable them to obtain their money to the detriment of these incumbrancers, and more particularly without giving them an opportunity of resisting such an order.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 13 W. R., 301.