(1875) 01 CAL CK 0001

Calcutta High Court

Case No: Special Appeal Nos. 207 and 222 of 1874

Dinobundhoo Bose	APPELLANT
Vs	
Haranchunder Ghose Rajcoomar Daas Vs Syud Emam Momtazooddeen Mohamed	RESPONDENT

Date of Decision: Jan. 15, 1875

Judgement

Sir Richard Couch, Kt., C.J., Kemp and Ainslie, JJ.
The referring order points out that this question may have to be considered with reference to both ss. 2 and 7 of Act VIII of 1859, but for the present it will be convenient to treat it as only involving the question under the first of these sections; and the first matter for consideration is whether proceedings under s. 53 of the Registration Act of 1866 are to be deemed a suit. The petition of the person seeking to recover on a specially registered bond duly verified in the manner required by law for the verification of plaints is to be filed in the Court which would have jurisdiction to try a regular suit on the obligation, and that Court is to make a decree, which is to be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.

2. The difference between this proceeding and an ordinary suit in which judgment is confessed is that in the first the confession, instead of being directly notified to the Court after a suit has been commenced, is recorded by an officer specially empowered by law to record it in anticipation of any proceedings in Court, and that the Court is specially empowered to act on such confession as soon as it is laid before it.

3. Special registration was first introduced by Act XVI of 1864; the language of s. 52 of that Act differs materially from the language of the later Act, and it may be doubted whether a proceeding, under s. 52 of Act XVI of 1864, could be held to be a suit. Under that section the obligation was to be enforced "without a suit," and there was no provision for making a formal decree--the obligation was to be enforced "as a decree in a suit," but

subject to any provisions contained in any law for the time being in force in relation to the enforcement without a suit of bonds or other obligations for the payment of money registered under s. 51. The change of expression must be taken to have been adopted advisedly, and that change supports the opinion that proceedings under s. 53 of Act XX of 1866 are in the nature of a suit. The fact that only certain portions of the CPC apply to proceedings under the Registration Act--see Gaur Mohan Das Vs. Ramrup Mazoomdar --is not material; for the substitution of a special procedure up to a decree for the ordinary procedure prescribed in the Code does not alter the nature of the transaction, which is, as in all ordinary suits, a prayer to a competent Court by a person having a claim against another to enforce that claim by the exercise of the authority of the Court. The claim to the money secured by the bond, and the following up of that claim by application to a Court, is a suit of a civil nature within the meaning of s. 1 of the CPC independently of any peculiarities in the mode of prosecuting it.

4. In considering the nature of proceedings under s. 53 of Act XX of 1866, we must look at the nature of the remedy obtainable thereunder, and for this purpose it is necessary to examine the effect of decrees for realization of debts made in ordinary suits. A decree under s. 53 is at least equivalent to a money-decree in on ordinary suit, and an examination it seems to us that there is no substantial difference between the effect of an ordinary money-decree on a mortgage-bond, and a decree on the same bond for recovery of the money due by sale of the mortgaged property. So that whether a decree for the money be made under s. 53, or in a regular suit, the remedy of the mortgagee is the same. When a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property, it becomes vested absolutely in the purchaser.

5. If the sale be under a decree for sale, it can do no more than this. There is, we think, no warrant for holding that, when a sale is under a decree for sale, it conveys the rights of both creditor and debtor; but that when it is in execution of a simple money-decree only, the rights of the debtor pass and the creditor retains his lien. The object of a sale of mortgaged property in execution of a decree is not to transfer the debt from the debtor to the purchaser of the mortgaged property, but to obtain satisfaction out of the security. Thus, whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the entire interest that he and the mortgagor could jointly sell.

6. It cannot be rightly contended that the mere taking of a money-decree extinguishes the creditor''s lien. There is a case of Sawruth Sing v. Bheenuck Sahoo [(3)], which seems to go to this length; see the passage beginning "now it appears to us," but these words are qualified by a passage further on, "we do not say," &c.; and the case of Ramchurn Lal v. Koondun Koomaree [(4)] is directly the other way. If then the lien be not extinguished by taking a money-decree, and if it continue an incident of the debt when it passes from a

contract-debt into a Judgment-debt,--See Syud Nadir Hossein v. Pearoo Thovijdarinee [(5)], (post, p. 482;) as the creditor cannot sell the property and retain the lien, it must continue in existence 80 for as may be necessary for the protection of the purchaser. An order for sale cannot conclude persona not parties to the suit, and without such order, in the absence of any third party interested in the property, a complete title passes by the sale in execution of the money-decree.

7. If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights. The decision of the Full Bench in Gupinath Singh v. Sheo Sahay Singh B.L.R., Sup. Vol. 72 is clear on this point. It seems to us that that decision does no more than declare this as a fundamental rule. The expression "he is simply in the position of an ordinary judgment-creditor in respect of his decree, and can only sell the rights and interests of his debtor," could not be intended to limit the decree-holder''s power of selling the rights conferred by his lien.

8. Reading these words with the context, they seem to us only to import that the subsequent incumbrancer cannot be concluded by any order made otherwise than in a suit to which he is a party; but as to whether this is to be brought by the first creditor or his assignee under the execution-sale, there is nothing said. The Judgment only deals with the case of a creditor himself seeking to enforce his lien, and who has not assigned it to another by a sale in execution.

9. The fact that property is mortgaged to one is no bar to a mortgage or sale of the equity, or right of redemption to another.

10. The remedy of the mortgagee under a mere money-decree and under a decree for sale being identical so far as the parties to the suit are concerned, he cannot have a right to a second suit against the same parties to enforce what he has already obtained. Of course, there may be a right of suit remaining against third persons not parties to the first proceeding, but that in no way affects the question before us. The fact that a creditor taking a money-decree has already obtained as complete a remedy against the persons sued as he can have against them, appears to us very strong ground for holding, that proceedings under s. 53 of the Registration Act are as much suits as any other proceedings to which s. 1 and the rest of Act VIII of 1859 apply.

11. Inasmuch as the creditor who takes a specially registered mortgage bond may be said to have stipulated not only for a summary decree, but also for a right to have specific property sold for satisfaction of his debt if, by a decree made under s. 53 of the Registration Act, he could not get the full benefit of his contract, it might be doubted whether it would be a reasonable construction of the 2nd section of the Procedure Code to hold that he has exhausted his remedy by a proceeding under the first named section, but inasmuch as he does get the full benefit thereof as against the contracting parties, and there is nothing in the fact of his having taken a decree against them under that section to restrain him from proceeding against third persons by a separate suit, there

seems to be no ground for holding that the provisions of s. 2 of Act VIII of 1859 do not apply where the first suit is in the form of a proceeding under s. 53 of the Registration Act.

12. In this view of the case, it is unnecessary to consider the question under s. 7 raised by the referring order.

Jackson, J.

13. It will be convenient to deal in the first instance with the wit before the Subordinate Judge. That was on a bond containing an obligation to pay money and a simple mortgage. The nature of the suit to be brought on such an instrument is described in Macpherson on Mortgage (5th edition), p. 10; and if the plaintiff succeeds in such a suit, he obtains a decree for the money, with a declaration that he is entitled to have it satisfied by the sale of the land. Such a decree could not be had in a Court of Small Causes, nor could it be made under the 53rd section of the Registration Act.

14. But the lender had thought fit to protect himself still further by the form of special registration; and as it appears to be optional in the case of such bonds to proceed under s. 53, or by suit in the ordinary way, he had thus, as it seems to me, secured to him the choice of two remedies or modes of obtaining relief--either the common suit by which he could obtain complete relief, including the enforcement of his mortgage lien, but subject to the necessity of proving his case and to the incidents of appeal and the various delays of regular litigation, or the rapid procedure of s. 53, precluding appeal or even defence, but limited as to the relief afforded. He chose the latter and obtained a decree which completely exhausted his cause of action in so far as that arose out of the non-payment of the money and his right to recover it. And the contract-debt had thus, as it seems to me, merged or passed in rem judicatam, so that no further suit for the same debt could be maintained, and both on general principles and by the terms of s. 2 the matter was concluded. I have no doubt that, for the purposes of this discussion, the proceeding under s. 53 was a suit brought in a particular form, and regulated by a particular procedure. And the difference between the plaintiff"s position with such a decree, and what it would have been at the conclusion of a regular suit is this, that he would have, over and above the judgment for his money, a right created by the deed, but undeclared by the decree, to enforce that judgment by sale of the property mortgaged.

15. It is not necessary here to state precisely how the difference would affect the decree-holder, it is enough to say that he would be in a distinctly less favorable position as regards third parties. If the land continued in the hands of the debtor, it would probably make no difference at all, for he could always attach the land in execution, and the 11th section of Act XXIII of 1861 would prove abundantly efficacious for the decision of any question which might arise between debtor and creditor: As regards third parties, if the land had been intermediately alienated, it teems to me that the creditor would have a good cause of action against his borrower and the purchasers from that person, upon the separate contract to hold the land at his disposal for the satisfaction of his claim. For

these reasons I conceive that the decision of the Subordinate Judge and of the District Judge are both erroneous and ought to be reversed.

16. In the case before the Munsif, which is the subject of the second special appeal (No. 222), the plaintiff sought a fresh decree for the unsatisfied portion of his claim, as well as a declaration of his lien as against the alienees. Upon the considerations already stated, I am of opinion that the Munsif who granted only the latter prayer was right, and that the Judge who altered hit decree was wrong.

Markby, J.

17. I concur in thinking that the proceeding under s. 53 of Act XX of 1866 is a suit which terminates in a decree.

18. But it is said that, inasmuch as the creditor stipulated not only for a decree but for a right to sell specific property in satisfaction of his debt, it might not be a reasonable construction of the Statute to hold that he has exhausted his remedy by a proceeding under Act XX, s. 53, if under the decree so obtained, he cannot get the same right to sell the property as he could obtain in a regular suit.

19. I have had some doubt whether this argument sufficiently disposes of the question, what is the cause of action in the proceeding under Act XX, s. 53, and wherein does it differ from the cause of action in the suit now before us? But assuming that the difference in the remedy would take the case out of the rule of res judicata, still the question arises, could the plaintiff get any remedy in the present regular suit which he could not have got on his decree in the summary suit under Act XX, s. 53?

20. The plaintiff''s rights as decree-holder under s. 53, Act XX, are those of a bond-holder with security who has obtained a simple decree for his debt, or as it is generally called a money-decree. All he could get in the regular suit is a decree against the very same person, namely, his debtor, with the additional declaration, which is now very often inserted in the decree that the property comprised in the bond is to be sold in satisfaction of the debt. The question then is whether there is any difference between these two decrees.

21. The course of procedure in both cases after decree is precisely the same. The property must be attached and sold by the ordinary process of law in execution of the decree. The thing sold will be the same. A notion has, it is true, been started that only what is (as I consider inaccurately) called the debtor''s equity of redemption is sold under a money-decree, that is to say, that the property will be sold subject to the bond-holder''s lien. But it is agreed that that is not so, and that the purchaser takes all that the creditor as well as the debtor is able to convey: I may mention that the case of Erskine & Co. v. Dhun Kishen Sein 8 W.R., 291, which is sometimes relied on as a decision to the contrary, has been reviewed, and an entirely different conclusion arrived at by Loch and Mitter, JJ., who heard the case after the review was admitted.

22. As regards third persons not parties either to this or the former suit, the result is the same whether the property be sold under a money-decree, or under a decree declaring the lien. Their rights are not affected more or less in the one case than in the other. As against third parties, the declaration of the lien contained in the decree can have no operation whatsoever; they can only be affected by a declaration in a decree in a suit to which they have been made parties. If the rights of claimants to the property subsequent to the security-bond are in any way affected, it cannot be by reason of the declaration made in a suit to which they are no parties, it can only be by reason of the sale. Whether the rights of third parties are in any way affected by the sale or not, is not a matter which, as it appears to me, we are called upon to decide in the present case. There are decisions upon this point--Sheo Prosum Singh v. Brojoo Sahoo 7 W.R., 232 and Brajaraj Kisori Dasi Vs. Mohammed Salem ; and I should desire further consideration before holding that in no case the rights of third persons, created subsequent to the security, are in any way affected by a sale under the security-bond, that is to say, so far as it can be said to affect their rights that the whole property pledged should be turned "into money at the instance of the first pledgee. As a general principle" of law, I should be inclined to say that the right to sell the very thing pledged is inherent to the pledgee, and as a general rule I should also say that no claimants upon the property posterior to the first pledgee can interfere with this right, though, of course, they may have a right to redeem before sale; and they may have a very effectual claim on the surplus-proceeds, if there are any left after satisfying the first pledgee. In England the law has been somewhat slower than elsewhere in giving to the pledgee a right of sale, but neither in the English law nor in any other law, as far as I am aware, has there been any doubt that, if the pledgee can sell at all, what he sells is the property pledged: and it appears to me to be very doubtful whether it would not be undesirable both for pledgor and pledgee that there should be a sale of any thing else; because I think such a sale as seems to me to be suggested by three of my learned colleagues might lead to the property being sold at a very inadequate price, as it will be uncertain whether the purchaser is buying the property itself, or a mere right to hold it subject to some claim of third parties. All, therefore, that I wish to say in this case is that a money-decree against the debtor himself is neither better nor worse than a decree against the debtor himself which declares the lien. If, in order to get the fail benefit of his pledge, the bond holder has to sue third parties, there is nothing to prevent his doing so.

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(1) Before Mr. Justice Kemp and Mr. Justice E. Jackson.

Ootshub Narrin Chowdhry and Another (Plaintiffs) V. Chittra Recka Goopta and Another (Defendants).*

The 9th January 1872.

Act VIII of 1859, ss. 2 & 32--Act XX of 1866, ss. 52, 53, & 55--Mortgagee"s Lien.

A regular suit will lie for a declaration, that property mortgaged by a bond on which a simple money decree has been obtained by the mortgagee under the provisions of Act XX of 1866 continues liable for the decree, though in the hands of third persons.

Baboos Sreenath Doss and Bhogobutty Churn Ghose for the appellants.

Baboo Girija Sunkur Mozoomdar for the respondents.

The following judgments were delivered:--

Kemp, J.--In this case, the plaint has been rejected under s. 32 of Act VIII of 1859. That section enacts that "if, upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may, in any case, allow the plaint to be amended, if it appear proper to do so." In this case the Subordinate Judge of Furreedpore, Baboo Kali Kinkur Roy, has rejected the plaint on these grounds: His decision is a very short one:--"To-day this plaint was laid before the Court, and was inspected in the presence of plaintiff"s pleader, Baboo Bishtochurn Roy. Now, when a final decision is passed in execution of a decree by a Court on the evidence adduced by both parties under the authority given to it by s. 55, Act XX of 1866, there does not appear to exist any law or practice for bringing a fresh suit against such decision. As therefore the plaint does not disclose any proper cause of action, it is fit to be rejected under s. 32 of the Code of Civil Procedure. Ordered that this plaint be rejected, the plaintiffs bearing their own costs."

Against this order an appeal has been preferred on the ground, first, that the lower Court is wrong in holding that the Civil Courts have no jurisdiction in entertaining a suit for the enforcement of a lien on landed property mortgaged under a bond specially registered under the Registration law; and second, that s. 55 of Act XX of 1866 is no bar to the entertainment of the present suit.

There is much in this plaint which might be eliminated, and this, the pleader for the appellants, Baboo Sreenath Doss admits, but substantially the prayer of the plaint is to have the defendants, and more particularly the Goopta defendant, declared liable, and her property liable to sale for the liquidation of the debt secured by the bond of the 9th Jaisti 1274 (22nd May 1867), that is to say, to make the property pledged liable for the debt. The bond was specially registered under the provisions of s. 52, Act XX of 1866. Now s. 52 says, that "whenever the parties to an obligation shall agree that, in the event of the obligation not being duly satisfied, the amount secured thereby may be recovered in a summary way, and shall, at the time of registering the said obligation, apply to the Registering Officer to record the said agreement; the Registering Officer, after making such enquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by ss. 66 and 68, and such record shall be signed by him and by the obligor, and shall be copied into the Register Book No. 1 or No. 6, as

the case may be and shall be prima facie evidence of the said agreement."

Then s. 53 goes on to say:--"With in one year from the date on which the amount becomes payable, or, where the amount is payable by installments, within one year from the date on which any installment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864, or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the installment sought to be recovered." Then there is a provision as to the stamp which is to be used and as to the verification of statements; then it is enacted that--"On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court. Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

Then s. 55 enacts:--"After decree, the Court may, under special circumstances, set aside the decree, and, if necessary, stay or set aside execution: but there shall be no appeal against any decree or order made under s. 53, s. 54, or this section," that is to say, s. 55.

It appears that the plaintiffs obtained in the first instance a decree on this specially registered bond against both the defendants, Chittna Recka Goopta and Oomakant Mozoomdar. The Goopta defendant prayed for a review of judgment, but her application was rejected; and the plaintiffs executed their decree under the provisions of the latter portion of s. 55. Upon this, the Goopta defendant again appeared as an objector and the Court released her from liability under the decree under the provisions of s. 55. The plaint goes on to say that, in dissatisfaction with the order, the plaintiffs appealed to the Zilla Judge, and the Judge rejected the appeal, holding that, under the provisions of s. 55, no appeal would lie. The pleader for the appellants, Baboo Sreenath Doss, admits that this was a right decision, and that no appeal lies from an order under s. 55 but the main contention in this case is whether, although under s. 55 the Goopta defendant has been released from liability under the decree, a regular gait will not lie for the purpose for which this suit has been mainly brought, stripping it of all surplus-age, namely, to enforce the lien of the plaintiffs under the bond as against the property pledged.

As against the defendant Oomakant Mozoomdar, it is clear that the Subordinate Judge was wrong in rejecting the plaint, because there has been no order with reference to him under s. 55 of Act, XX of 1866. The pleader for the respondents is forced to admit that there are no rulings of this Court governing the present case, and that it is a new point; and the rulings quoted by him appear to us (to have no application whatever to this case.

The first is the case of Jugti Sahoo 6 W.R., Mis., 121. In that suit, in which L.S. Jackson, J., was sitting alone, this point did not arise; he was pressed to give an opinion upon it,

but distinctly refused to give one. The other case cited was that of Kristo Kishore Ghose v. Brojonath Mozoomdar 6 W.R., Civ. Ref., 11, present, Peacock, C.J., and L.S. Jackson, J., in which case these learned Judges held, that in applications to the Court under s. 53, Act XX of 1866, the Court ought not to summon the defendant, the intention of the Act being that the applicant should merely, on production of the obligation and the record duly signed, obtain a decree for the sum mentioned in the petition, or any less sum which may appear to be due with interest and costs, and that it was competent to the Court, under s. 55, on a representation by the judgment-debtor after decree, to set aside the decree, and stay or set aside execution.

Therefore, as admitted by the pleader for the respondents, there are really no decisions of this Court touching on this point.

It appears to us clear that the plaintiff is entitled to institute a regular suit, which he has done, to have the question tried whether the property pledged in this bond is liable for the debt covered by the bond. All that s. 55 enacts is that the Court may, under special circumstances, set aside the decree obtained in a summary way by proceedings under the provisions of Act XX of 1866 and those sections of it which apply to specially registered bonds, and that there shall be no appeal against such orders; but s. 55 does not enact that a party shall not be entitled to bring a regular suit, as the plaintiffs have done in this case, to follow the property pledged to them, and to make the said mortgaged property liable for the debt.

As against the defendant Oomakant Mozoomdar, against whom the plaintiffs have obtained a money-decree there can be no doubt that they are entitled to being a suit to follow and make the property pledged liable for the debt; and as against the other defendant, the female defendant Chittra Recka Goopta, although under s. 55 of Act XX of 1866, the has, under special circumstances, been declared entitled to have the summary decree against her set aside and execution stayed, and although there is no appeal against such an order there is nothing in the law to prevent the plaintiffs from bringing a regular suit to establish the fact that the Goopta defendant and her property are liable under the bond.

In this view of the case, we think that the Subordinate Judge was wrong in refusing to try this case.

We reverse his order, and remand the case for him to try it on the merits. Costs to follow the result.

E. Jackson, J.--The Subordinate Judge, in this case, has rejected the plaint, under s. 32, Act VIII of 1859, holding that it does not disclose any proper cause of action. I understand that he means by that to refer specially to the words of the plaint which ask the Court to set aside the miscellaneous orders passed under s. 55 of Act XX of 1866, and to have the present defendants declared liable under the former decree. So far, I think, there may be

something in the order of the lower Court rejecting the plaint on the ground that there is no cause of action. There may be no cause of action to set aside these orders, but it does net follow that the plaintiffs cannot now bring a suit to have the defendants and the property pledged declared liable under the bond. It may be a question hereafter how far the former decision may bind the parties, but I am unable to say that, as the case stands, there is no cause of action.

The orders passed under s. 55, Act XX of 1866, bare to my mind the effect of altogether setting aside the decree which a person could, under the provisions of s. 53 of that Act, have obtained in a summary way. S. 55 allows the Court which is executing the decree to stay execution, or to set aside execution altogether, but it does not appear to me that the effect of this is to prevent the plaintiffs from seeking their remedy in a regular suit; and although there is no appeal against an order passed under s. 55 there is nothing in the section to say that the plaintiff is precluded from urging his rights in a regular suit.

I, therefore, concur in reversing the order of the lower Court, and remanding the case for trial on its merits.

*Regular Appeal, No. 190 of 1871, from a decree passed by the Subordinate Judge of Furreedpore, dated the 19th May 1871.

(2) Before Mr. Justice Loch and Mr. Justice Mookerjee.

The 5th May 1871.

In the Matter or the Petition or Hurry Mohun Paramanick.*

Act VIII of 1859, s. 7--Mortgage''s Lien--Limitation--Interest in land--Multi-furiousness.

Section 1 of Act VIII of 1859 does not bar a suit for a declaration that property in the defendant''s possession is subject to the mortgagee''s lien, on the ground that such property was part of the property mortgaged, and was not included in a previous suit against other parties for other portions of the property mortgaged.

Mr. Rochfort for the petitioner.

The judgment of the Court was delivered by

Loch, J.--We think that there are no grounds for admitting this special appeal.

It has been urged before as that the suit has been brought under the provisions of s. 7, Act VIII of 1859.

It appears that the plaintiff in this case has recovered a money-decree against Durgaprasad Chatterjee, who had mortgaged certain property to him. After obtaining this money-decree, he appears to have found out that this property under mortgage was in

the hands of another person, named Bepin Behary; and, in 1864, be proceeded against that other person, in order to enforce his lien upon the lands which that person had purchased, and obtained a decree against him, and in execution sold the property. He then brought a suit and got a decree against the present (defendant, the petitioner before us, who is alto purchaser of some of the lands mortgaged to the plaintiff, and it is here now pleaded that the plaintiff was bound, when he brought the fanner suit against Bepin Behary, to have included the whole of the property as it stood when it was mortgaged to him by Durgaprasad Chatterjee.

We think that though such a suit might have been heard, and not been dismissed for multi-furiousness, yet the plaintiff, in the course he took in following the property belonging to his debtor upon which he had a lien into the hands first of one purchaser and then of another acted in perfect conformity with law. He was not bound to bring one suit for the whole of that property which was held by different parties under separate title deeds. He had a right first to bring one property to sale, and, if the proceeds of sale were sufficient to meet his debt, further proceedings against the debtor''s property in the hands of other parties would he unnecessary; but if the proceeds of that sale were not sufficient to liquidate his debt, he had a right to go against the rest of the mortgaged property in the hands of other purchasers from the vendor.

We think, therefore, that this objection raised before as against the judgment of the lower Appellate Court is not good.

The second plea raised is as to the point of limitation; and here the petitioner fails to make good his case. He argues that the plaintiff is net entitled to a period of twelve years for preferring his suit, but only to six years.

As this however is a suit for enforcing an interest in land, we do not see why twelve years'' limitation should not apply. And we think that the petitioner''s counsel is wrong in pleading that the plaintiffs cause of action should commence from the date of the plaintiff''s obtaining his decree. The cause of action in this case should be reckoned from the date on which he met with opposition on the part of the person in possession and his bring the property to sale for the liquidation of the remainder of his debt.

We think it unnecessary to refer to the question of fraud, to which the pleader for the petitioner has referred, as she lower Appellate Court has stated that that plea was given up. We reject the application.

* Application for admission of special appeal from a decision of the additional Judge of Nuddee, dated the 24th January 1871, affirming a decree of the Subordinate Judge of that district, dated the 29th August 1870.

(3) Before Mr. Justice Kemp and Mr. Justice Glover.

The 16th December 1869.

Sawruth Sing and Another (Defendants) v. Bheenuck Sahoo and Others (Plaintiffs).*

Mortgagee"s Lien--Money-Decree.

A mortgagee who obtains a simple money-decree upon a bond by which property is mortgaged to him as a collateral security, does not retain his lien on the property mortgaged after it has passed into the hands of third persons.

Mr. R.T. Allan and Baboo Roopnath Banerjee for the appellants.

Baboo Doorga Doss Dutt for the respondents.

The judgment of the Court was delivered by

Kemp, J.--These cases were remanded by this Court on the 14th April 1869, with directions to the Subordinate Judge to decide upon the bona fides of the deed of sale proffered by the plaintiff. The reply of the Subordinate Judge is now before the Court in the shape of a report under s. 354 of the Code of Civil Procedure, and the result of the enquiry by the Subordinate Judge is that the deed of sale under which the plaintiff claims is a bona fide transaction. The second point taken in special appeal is that the purchaser of the decree which had been obtained by, the mortgagee Ishuree Singh against Gunesh Sahoo, still retains a lien over the property pledged in the mortgage bond.

With regard to this objection, it may be as well to state shortly the position of the parties. It appears that Gunesh Sahoo, on the 3rd of February 1866, borrowed a certain sum on a mortgage bond from Ishuree Singh and Nunkoo Singh a suit was brought upon this mortgage bond by the mortgagees on the 18th of November 1865, who obtained a simple money-decree, and neither asked for nor received any decree declaring the mortgage property liable to be sold in satisfaction of their bond. The present defendants bought the share of Gunesh Sahoo in the family property on the 14th September 1867. Whilst the proceedings in the case of Ishuree Singh and Nunkoo Singh were pending, Gunesh Sahoo sold the disputed property to the plaintiff Bheenuck on the 31st January 1866.

Now, it appears to us that at the date of this sale the property of Gunesh was virtually unburdened; no doubt there had been upon it originally a mortgage lien in favor of Ishuree and Nunkoo Singh; but that lien, if it were not altogether done away with, was at all events rendered infructuous by the proceedings of the mortgagees in 1866, before the date of the sale to Bheenuck, when they chose to waive the right of selling the property pledged in satisfaction of their mortgage bond, and to receive instead a simple money-decree. It was contended by Mr. Allan for the special appellant that the purchaser of a money-decree of this description still retains the lien, which the original mortgagee had over the property, inasmuch as he bought the rights of these mortgagees, and these mortgagees could have brought a suit irrespective of their money-decree to have that decree satisfied oat of the property pledged in the bond; and in support of this contention, we have been referred to a decision in the case of Prahlad Misser Vs. Udit Narayan Sing

. With regard to this precedent, it is enough to say that in that case the decree was obtained upon mortgage bond, and that it ordered the mortgaged property to be sold in satisfaction of the mortgage debt.

In this case the decree was a simple money-decree, and therefore the precedent quoted is in no way in point. On the contrary, it appears to us that the principle laid down by the Full Bench in the case of Gupinath Singh v. Sheo Sahay Sing B.L.R., Sup. Vol., 72 applies to the matter now before us. In that decision it is laid down that a party to whom a property is pledged for a debt, if he contents himself with a simple money-decree against his debtor, cannot execute his decree against the property pledged to the prejudice of a subsequent bond fide purchaser. He may enforce his lien by separate action against the party in possession of the property pledged to him; but he cannot execute his money-decree against the property in the hands of the subsequent purchaser. We do not say that such a remedy does not exist to the special appellant in this case, but it is quite clear that, up to this time, he has made no endeavor to follow it, and has never sued to have it declared that the property was liable to be sold in satisfaction of the mortgage debt. It seems too much to say that a party, who having obtained a money-decree for a mortgage debt, has still the power to sue to have that decree satisfied by declaring that the mortgaged property is liable to sale, can keep that right hanging over his judgment-debtor for an indefinite period of time; and, if he does not choose to exercise that right himself, can sell that right to another a year afterwards. But however this may be, in the present case no attempt has ever been made to pursue such a right, and the point taken by the special appellant"s pleader does not therefore arise. It appears to us, therefore, that this special appeal must be dismissed with costs.

* Special Appeal, Nos. 1620, 1621 of 1868, against a decree of the principal Sudder Ameen of Zilla Sarun, dated the 11th March 1868, affirming a decree of the Munsif of Pursa, dated the 29th April 1867.

(4) Before Mr. Justice Phear and Mr. Justice E. Jackson.

The 12th May 1869.

Ramchurn Lall (Plaintiff) v. Koondun Koom Aree and Another (Defendants).*

Mortgagee"s Lien--Money-Decree--Kitsbandi--Form of Decree.

A kistbandi, or arrangement to pay by installments the amount of a decree obtained upon a bond, does not effect an extinction of the original debt or the mortgagee"s lien upon property mortgaged to him by the bond.

By deed of conditional sale, dated January 1863, the second defendant Ramprasad sold certain immoveable property to the plaintiff, who foreclosed in February 1866, and then brought the present suit for possession. He was opposed by the defendant Koondun Koomaree, who claimed to have a lien on the property by virtue of a mortgage dated the

25th Kartik 1259 (9th November 1852). It appeared that default having been made by Ramprasad in payment of her mortgage debt, Koondun Koomaree instituted a suit, and on the 16th September 1861, obtained a simple money-decree against him, in execution of which the plaintiff alleged that some, if not all, of the mortgaged properties had been sold. However, the decree appeared to have been never fully satisfied, for on the 7th July 1863, a kistabandi was entered into between Koondun Koomaree and Ramprasad , whereby the latter in addition to the properties already mortgaged to Koondun Koomaree, pledged certain other properties (also comprised in the plaintiff''s, deed of conditional sale) as security for the amount of the decree. Koondun Koomaree now claimed a lien for the original debt on all the properties included in the kistbandi. The plaintiff, on the other hand, contended that not only did the kistbandi amount to a satisfaction of Koondun Koomaree''s decree of the 16th September 1861, but that it also extinguished the original debt.

The Subordinate Judge held that Koondun Koomaree had a lien on the properties originally mortgaged, but not on those subsequently pledged by the kistbandi.

The Subordinate Judge''s decision being affirmed by the Judge on appeal, the plaintiff preferred the present appeal to the High Court.

Baboos Debendro Narain Bose and Kali Kishen Sen for the appellants.

Baboo Kali Mohun Doss for the respondents.

The following judgments were delivered:--

Phear, J.--I think that both the lower Courts are right in the view they have taken as to the lien of Koondun Koomaree: On the 17th of July 1863 it is certain that this lady had a right of recourse to the property in question for the purpose of realizing her debt. At the same time she had a decree against Ramprasad for the same debt which she could satisfy by attachment and sale of any other property belonging to him. On that day she entered into a kistbandi with her judgment-debtor, by which probably she deprived herself of the right of execution of the money decree against Ramprasad , viz., in consideration of the other properties pledged by the terms of the kistbandi, she gave up her right to attach and sell in execution of that decree any property of Ramprasad which she might be able to lay hold of.

It has been urged that the kistbandi was not only a satisfaction of the decree in the way I have just mentioned, but also effected an extinction of the original debt, and so ipso facto did away with Koondun Koomaree''s lien.

I do not think this is so. I think her right of recourse to the property pledged by the bond of Kartik 1259 (9th November 1852) was not affected by the decree of September 1861, and was not lost by this lady''s giving up her rights under that decree. If this be so, nothing has occurred since July 1863 to affect the lien.

The foreclosure of February 1865 cannot put the plaintiff in a better position as to this lien than he was in January 1863 when ho took the conditional sale, and at that time undoubtedly the property which he bought was subject to Koondun Koomaree"s lien and her right to realize her bond debt out of it.

It appears to me, therefore, that this lady"s lien still subsists, and the plaintiff has no right to possession, except possession subject to that lien I have been slightly embarrassed by the actual form of the decrees of the lower Courts. It appears to me that they might have been simpliciter in the shape of decrees for possession subject to the lien of Koondun Koomaree. But I am told that the form which they have actually taken is due to the circumstance that some, if not all of the property, subject to Koondun Koomaree"s lien, has been sold in execution of the decree of 1861, and that consequently that property is no longer in the hands of any of the defendants. However this may be; I think the decree of the lower Court should be modified so as to make it a decree for possession of so much of the land as may be in the possession of the defendants, subject only to the lien of Koondun Koomaree.

Although I think that the decree of the lower Appellate Court should be thus modified, the amendment is not material as between the parties, and I think that the appellant must pay the costs of the respondents in this appeal.

E. Jackson, J.--I also think that the decree of this Court should pass as just stated by Phear, J. I also think that the lien of Koondun Koomaree on the property subsisted notwithstanding that she had obtained only a money-decree, and notwithstanding that in place of that money-decree she had accepted an installment bond. In this suit, therefore, in which she has put forward her lien, she is entitled to a declaration of the validity of that lien as against the plaintiff"s title to possession. The plaintiff"s decree therefore should be for possession of the property subject to this lien.

The respondents will get their costs from the appellant.

* Special Appeal, No. 2126 of 1868, against a decree of the Judge of Zilla Bhangulpore, dated the 6th May 1868, affirming a decree of the Subordinate Judge of that district, dated the 14th May 1866.

(5) Before Mr. Justice Kemp and Mr. Justice Pontifex.

The 28th February 1873.

Syud Nadir Hossein (one of the Defendants) v. Pearoo Thovildarinee (Plaintiff).*

Striking Execution off Proceedings - Money-decree--Mortgagee"s Lien--Assignment of Judgment-debt--Sale of Property on which there is a Lien--Act XIV of 1859, s. 20--Act VIII of 1859, s. 270.

The striking off of an execution-proceeding affects only the files of the Court and the application for sale, and does not interfere with the continuance of any attachment under the decree which is executed.

A simple decree for money upon a bond by which immoveable property is mortgaged, carries with it a lien upon the property mortgaged, and that lien continues as an incident to the debt when it panes from a contract-debt into a judgment-debt, and it continues when such judgment-debt is subsequently assigned to a purchaser.

An attachment under a money-decree on a mortgage bond and a mortgage lien cannot co-exist separately in the property hypothecated, and such an attachment most be treated when existing as an attachment for enforcing the lien. And if property subject to such lien is sold in execution of a decree while it is under attachment under the decree up on the mortgage bond, the lien existing upon the property is transferred from the property to the purchase-moneys, and thereupon the property becomes thenceforth discharged, from the lien. If after the rejection of a claim preferred by the mortgagee, or person claiming the lien, no regular suit is brought under s. 270 of Act VIII of 1859 to enforce the lien, that lien is lost, and the decree becomes thenceforth a mere money-decree discharged from any incidental lien.

In order to keep a decree alive, s. 20 of Act XIV of 1859 does not require more than some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt. The proceeding need not be by a person legally and rightfully entitled to the decree.

The Advocate-General, offg. (Mr. Paul) (with him Baboo Bhebance Churn Dutt) for the appellant.

Mr. Woodroffe (with him Baboos Sreenath Doss and Bhuggobutty Churn Ghose) for the respondent.

The judgment of the Court was delivered by

Pontifex, J.--On the 28th Aghran 1268 (12th December 1861), Mirza Mahomed Ali Beg borrowed Rs. 8,000 from the Mohunt Ramdassjee; and secured the same by a registered bond of that date, under which 15■ annas share of Pergunna Pultapore in the Collectorate of Maldah was hypothecated. On the 2nd of March 1864, the Mohunt filed a plaint against Mirza Mahomed in the Court of the Principal Sudder Ameen of Moorshedabad, and therein stated that he instituted the suit for the recovery of Rs. 11,650-14 from the mortgaged property and from other moveable and immoveable properties, as well as from the defendant. Mirza Mahomed, by his answer filed the 6th of April 1864, admitted the amount of the claim, but begged for time. This was refused by the Principal Sadder Ameen of Moorshedabad, who, by his decree dated the 14th of April 1864, ordered "that the suit be decreed, and that the plaintiff recover from the defendant the amount of the claim with interest."

It has been contended that this decree was a mere money-decree to which the mortgage lien did not and could not attach, inasmuch as the Moorshedabad Court had no jurisdiction to affect land situate in the Collectorate of Maldah.

On the 4th of May 1864, the Mohunt applied under s. 285 of Act VIII of 1859 for a certificate for executing the decree in the Civil Court of Zilla Dinagepore within the jurisdiction of which Maldah was situate. On the 20th of May 1864, a certificate was ordered to be forwarded to the Judge of that zilla, and on the 10th of June 1864, the Mohunt petitioned the Principal Sudder Ameen of Dinagepore, stating that he had executed the decree, and praying that the amount decreed with costs and interest might be ordered to be realized by sale at auction of the right and interest of the judgment-debtor in the zamindari. Under the proceedings in execution, not only the 15■ annas share of Pergunna Pultapore, but also another property called Pergunna Bansdaub, had been attached and directed to be sold. Mirza Mahomed, on the 9th of September 1864, petitioned that Pergunna Bansdaub should be released from attachment and sale on the ground that he held it as trustee under a wasiatnama dated the 1st Baisakh 1266 (13th April 1859). This wasiatnama it will be necessary to direct our attention to presently; but in passing, it may be well to notice that it was produced and relied upon as early as the 9th September 1864 as a subsisting instrument of trust under which the judgment-debtor was trustee. On the 13th of September 1864, an order was made on Mirza Mahomed''s petition stopping the auction-sale; but on the 13th of December 1864, the Mohunt preferred a petition suggesting that the sale of Bansdaub might stand over, but praying that the gale of the 15■ annas share of Pultapore might be proceeded with; and by an order of the same date, the auction-sale of Pultapore was directed to take place. In this order it ''is Stated that the whole 15■ annas of Pultapore had been attached, and that it was unnecessary to attach it again. The date fixed for Bale was the 4th of May 1865. Subsequently to such attachment, the property was attached by Poran Bibee, a judgment-creditor of Mirza Mahomed, under a decree of 1865.

In Falgun 1271 (February, March 1865), the Mohunt had entered into a contract for the sale of the decree of the 14th of April 1864 to Meer Hossein, but the Mohunt refusing to complete, Meer Hossein instituted a suit for specified performance in the Court of the Principal Sudder Ameen of Moorshedabad, who, on the 23rd of December 1865, confirmed the purchase by Meer Hossein-In the meantime and before snob contract had been completed, and during the pendency of the suit for specific performance, the 15■ annas of Pultapore, had been sold on the 29th April 1865 in execution of Poran Bibee''s decree, and had been purchased in the name of Korshed Begum, a near relative of Mirza Mahomed, and according to the appellant with the trust funds held udder the wasiatnama; but according to the respondent with the money of Mirza Mahomed himself.

It would seem that, on the application of the Mohunt or Meer Hossein, it was at first ordered that the sale-moneys should remain under attachment on the ground that the property had been first-attached by the Mohunt; but upon application by Poran Bibee to release such attachment on the allegation that the execution case of the Mohunt had

been struck off, the sale-moneys were released from attachment. The execution case of the Mohunt had in fact been struck off after the sale under Poran''s execution, on the 4th of May 1865, by order of the Principal Sudder Ameen of Dinagepore, because the fees of the peon for promulgation of auction-sale had not been paid. But such striking off would only affect the files of the Court and the application for sale, and would not interfere with the continuance of the attachment.

On the 12th June 1865, Meer Hossein applied by petition to the Principal Sudder Ameen of Moorshedabad, stating that the execution case of the Mohunt had been struck off, because during the pendency of the specific performance suit, the Mohunt had been enjoined from carrying it into effect, and asking that the sale-money might be retained until the specific performance suit was disposed of, insisting that the first attachment being under the Mohunt''s decree, that decree must have priority and be satisfied out of the sale-money. The Principal Sudder Ameen of Moorshedabad on the same day, after stating that the objection could not be made in that Court, but must be preferred in the Court which made the sale, ordered that the petition should be rejected.

The decree of Poran Bibee had originally been passed in the Moorshedabad Court, which also had passed the decree of the Mohunt. The former decree had been sent for execution to the Sudder Ameen of Maldah and the latter to the Principal Sudder Ameen of Dinagepore. The sale under Poran''s decree had been executed by the Court at Maldah.

On the 30th of June 1865, Meer Hossein presented a petition to the Sudder Ameen of Maldah, stating the result of his petition to the Moorshedabad Court, and asking that the sale-moneys which were then in the Maldah Collectorate might be retained, notwithstanding that a cheque for the same had been given to Bibee Poran. The Sudder Ameen of Maldah, on the 1st of July 1865, held that, is consequence of the execution case having been struck off, the attachment by the Mohunt was annulled, and therefore rejected the petition. Against such rejection Meer Hossein appealed to the Judge of Dinagepore, who, on the 9th of December 1865, dismissed the appeal on the ground that he had no jurisdiction, as no appeal could, lie. The result was that the sale-moneys were paid out to Poran Bibee. Daring these proceedings the specific performance suit between Meer Hossein and the Mohunt remained undecided, and it is one of the points to be determined in this appeal, whether these proceedings by Meer Hossein, while only entitled by contract to the decree of the 14th April 1864, were sufficient to keep such decree alive under s. 20, Act XIV of 1859.

The respondents having obtained a decree against Meer Hossein, on the 29th of Jane 1867, applied for the auction-sale of Meer Hossein''s right and interest in the decree obtained by the Mohunt, dated the 14th of April 1864, against Mirza Mahomed. By a sale certificate dated the 1st of February 1869, which recites that the decree of the 14th of April 1864 had been executed by one Bibee Moneerun in Zilla Maldah in No. 172 of 1868 and further recites that the auction applied for by the respondent took place on the 29th of

January 1869, it was certified that the respondent herself had become the purchaser of the said decree, and that all Meer Hossein''s right and interest therein had passed to her.

It would appear from a petition of the appellant, dated the 21st of July 1868, to the Court at Moorshedabad'' and from the 5th paragraph of his written statement, that prior to the 2nd of April 1868, Meer Hossein had transferred the decree of the 14th of April 1864 to his mistress, the said Bibee Moneerun, benami with the object of preserving it from decree-holders against himself, and that Bibee Moneerun, with a view to realize the amount due under the transferred decree, had, on the 2nd April 1868, applied to the Court of Moorshedabad for notices to be issued under s. 216 of Act VIII of 1859, and notices having been accordingly issued that the appellant filed his petition of objection thereto.

The appellant in his written statement alleges that Moneerun''s application for execution was refused on the 4th of May 1868, but that date is inconsistent with his own petition of objection presented on the 21st July 1868, and also with the petition of Meer Hossein, dated the 8th of November 1868, to the same Court, in which Meer Hossein stated a sale by deed by him to Bibee Moneerun and that she had executed the decree, and asked that her name might be substituted for his in the execution case.

The final order on this petition does not appear in the printed record; but we have been informed that it was made after the sale certificate to the respondent, via., on the 3rd of February 1869, and that the application by Meer Hossein was refused on the ground that the transfer to Moneerun was simply benami.

Another question to be determined in this appeal is, whether the proceedings by Moneerun kept the decree of the 14th of April 1864 alive? During the interval Mirza Mahomed appears to have died. As before mentioned he had been a trustee under the will or wasiatnama of 1st Baisakh 1265 (18th April 1859) executed by Kharoonnissa, by which Pergunna Bansdaub and other properties, moveable and immoveable, were so far as the same were made subject thereto, devoted to certain trusts which, if not precisely wuqf, were of that nature, and which will was acted upon as valid long before the decree against Mirza Mahomed of the 14th April 1864. It appears that by another wasiatnama, dated the 8th Bhadro 1221 (23rd August 1864) Mirza Mahomed, being about to proceed on a pilgrimage for three years, appointed the appellant Nadir Hossein, his sister''s son, trustee for three years of Kharoonnissa''s will. A recital appears in this document, which has been relied upon, to the effect that the trust income was insufficient to meet the expenses of the trust, and the income is stated as Rs. 3,296.

By his will, dated the 20th May 1868, Mirza Mahomed appointed Nadir Hossein trustee in his place of Kharoonnissa''s will; Mirza Mahomed''s will recites that 15■ annas share of Pergunna Pultapore had then recently been purchased and formed part of the trust property. Immediately after her purchase of the decree, viz., on the 4th of February 1869, the respondent applied for execution to the Principal Sudder Ameen of Moorshedabad

against property in that district and objections to such execution were made separately by Nadir Hossein the trustee, and by the heirs of Mirza Mahomed. The objection of the appellant Nadir Hossein was numbered 43 of 1859, and alleged that he was not the heir of Mirza Mahomed, and that he was not in possession of any property left by Mirza Mahomed, but that he was in possession of trust property under Kharoonnissa''s will as trustee in succession to Mirza Mahomed. The order upon this objection, dated. 29th May 1869, was that Nadir Hossein should be released from liability under the decree. Such order could only apply to or affect property in the district of Moorshedabad. The objection of Mirza Mahomed''s heirs (among whom Nadir Hossein was apparently not included) was numbered No. 23 of 1869, and among other grounds raised the question that execution was barred by limitation. This objection was rejected by the Principal Sudder Ameen of Moorshedabad on the 29th of May 1869, on the ground that the Mohunt''s execution case having been struck off on the 4th of May 1865, and Bibee Moneerun haying applied for execution on the 2nd of April 1868, she being in fact the nominee of Meer Hossein, such application by her must be considered as sufficient to keep the decree in force.

The respondent subsequently appears to have obtained an attachment of Pergunna Pultapore in the Zilla Court of Dinagepore, whereupon Nadir Hossein again under s. 246 made his objection that the property was trust property, and on the 7th of Jane 1870, the Judge of Dinagepore allowed the objection and released Pergunna Pultapore from attachment. In consequence of such release, the respondent instituted the suit in which this appeal arises in the Court of the Subordinate Judge of Dinagepore on the 6th of December 1870, insisting that the original mortgage lien on Pultapore, under the bond of the 28th Aghran 1268 (12th December 1681), was still subsisting, and was incident to the decree of the 14th of April 1864, and must override all alienations by Mirza Mahomed, or persons claiming through, him, and praying for a sale of the mortgaged premises in execution of the decree of the 14th of April 1864. As Nadir Hossein in his objections in the Moorshedabad and Dinagepore Courts had not raised the question that 15■ annas share of Pultapore had been purchased under Poran''s sale in execution out of the profits of the trust property, but had only alleged that such share was trust property, and that ho had succeeded to it as trustee under Kharoonnissa''s will, the respondent in the plaint could net raise the question of the validity of the purchase under Poran''s execution. And as in her plaint the respondent makes no mention of the proceedings in execution by Meer Hossein in 1865, and by Moneerun in 1868, and does not attempt to show that any proceedings in execution had been taken to keep the decree of the 14th of April 1864 alive, between the date thereof and her own purchase of it, she must have assumed that; if she was entitled to the mortgage lien, her right to sue in respect of the mortgaged property would not be barred for twelve years, notwithstanding that the mortgage-debt had been changed into a judgment-debt by the decree of the 14th of April 1864, and this assumption would seem to be correct and is in accordance with the judgments of Macpherson, J., in the cases of Surwan Hossein v., Shahazadah Golam Mahomed B.L.R., Sup, Vol., 879 and Biswanath Mukhopadhya v. Gosaindas Bara Madak 3 B.L.R.,

App.; 140.

The appellant by his written statement in this suit for the first time set up the case that the property had been purchased under Poran''s execution out of the profits of Kharoonnissa''s trust property. He further insisted that the decree of the 14th of April 1864 was a mere money-decree, which did not carry with it the mortgage lien, and that proceedings in execution under such decree were barred by limitation, inasmuch as Moneerun''s application for execution on the 2nd of April 1868 must be treated as fraudulent and inoperative. He also insisted that, as Meer Hossein failed to establish by suit his right to the purchase money, when the property was sold in 1866 under Poran''s execution, and allowed her to obtain such money by submitting to the rejection of his claim under s. 270, his mortgage rights (if any) over the property thereupon ceased.

The Subordinate Judge settled five issues in the suit, which are in effect as follows:--

1. Whether the decree sued upon was barred by limitation?

2. Whether the respondent; had a mortgage lien upon the property;

3. Did the property belong to Mahomed Mirza?

4. Whether the respondent was bound by the act (default) of Meer Hossein?

5. Whether the respondent was entitled to set aside the alleged trust under which the appellant claimed to hold the property?

On the fifth issue, which in a particular view of the case is a material issue, evidence appears to have been taken, but the Subordinate Judge having decided the case on other grounds did not give any judgment on such issue, though he incidentally expressed an opinion upon, it.

The subordinate Judge found on the first issue that the decree was not barred by limitation inasmuch as the proceedings'' by Meer Hossein in 1865 and by Moneerun 1868 were sufficient to keep it alive. But he seems to have partly founded his decision with respect to Moneerun''s proceedings on a decision of the 9th of January 1869, to which he says Nadir Hossein was a party, but which does not appear in the record.

On the second issue, he found that the mortgage lien still subsisted, and had passed to the respondent, and must override any sale under Poran''s decree; at the same time incidentally expressing his opinion that the alleged purchase with trust-money was so palpably suspicious that proof of it bond fides must be adduced before its could be allowed to stand against Mirza Mahomed''s judgment-creditors-One ground for such suspicion being the fact that it was purchased in the name of Korshed Begum, a relation of Mirza Mahomed, instead of in the name of Nadir Hossein, who was then acting as trustee under his temporary appointment by the deed of the 23rd of August 1864.

On the third issue the Judge found, what is not denied, that the property at the date of the mortgage belonged to Mirza Mahomed. And on the fourth issue he held that Meer Hossein''s default in letting Poran got the purchase-money in 1865 did not discharge the mortgage lien.

Against this decision the defendant has appeared, insisting on the same objections substantially as those token in his written statement.

The issues settled in the Court below are sufficient for the determination of this case.

Taking the second and fourth issues together, I am of opinion that, as the form of mortgage or charge created by the bond of 28th Aghran 1268 (12th December 1861) did not vest any estate in the Mohunt, but only established a lien as incident to the money-debt, such lien continued an incident of the debt when it passed from a contract-debt into a judgment-debt, and so continued when such judgment-debt was subsequently assigned to Meer Hossein. Otherwise the right to the lien must have remained in the Mohunt. But as his judgment-debt represented the full amount for which Mirza Mahomed and the land were liable to him, and as he had transferred such judgment-debt to Meer Hossein for what must be taken to have been its full value, he could not retain the lien either against Mirza Mahomed or Meer Hossein. He could not retain it against Mirza Mahomed, for he had no longer any debt of demand against him or the lands; and as Mirza Mahomed had neither done nor paid any thing to discharge the lien, it must still have continued to exist. But the only possible existence it could have would be as incidental to the judgment-debt; and therefore I am of opinion that the sale of the money decree of the 14th of April 1864 passed with it the lien under the bond of the 28th Aghran 1268 (12th December 1861). The cases of Sarwan Hossein v. Shahazadah Golam Mahomed B.L.R., Sup. Vol., 879 and Biswanath Mukhopadhya v. Gosaindas Madak Bara 3 B.L.R. App., 140 are in fact authorities for this position. Such lien could only be enforced against the property subject thereto, so lung as it remained the property of Mirza Mahomed, and so long as the decree remained in force by attachment under that decree, though, according to the decisions,--and it would seem as a necessary consequence of s. 246, Act VIII of 1859,--if the property before attachment had passed into the hands of third persona, a separate suit would have been requisite to enforce the lien against the land in the hands of such third persons. It has been urged that, because the property was situate in the district of Maldah, the Moorshedabad Court could have no power to affect it by its decree; but the effect of the decree in the Moorshedabad Court was not to create any right against the land, but to turn a contract-debt to which a lien was incident into a judgment-debt to which without any operation of the Moorshedabad Court, any already existing lien would attach by reason of it representing the original contract debt.

Moreover is the case before us at the date of the tale to Meer Hossein, the property over which the lien extended had already in fact been attached by the Mohunt under the decree of the 14th April 1864. It seems to me dear that an attachment under a

money-decree on a mortgage-bond and the mortgage Ken cannot co-exist separately in the property hypothecated; and that such an Attachment must be treated when existing as an attachment enforcing the lien. This attachment existing at the date of Meer Hossein''s purchase passed as an incident of the decree purchased by him; and as the property was sold on the 29th April 1866 pending such attachment, the lien was transferred from the property to the purchase-moneys; and thereupon the property became thenceforth discharged from the lien. Meer Hossein might, after the rejection by the Sadder Ameen of his application, with respect to these purchase-moneys, have instituted a regular suit to establish his title to them under s. 270; but failing to do so, he forfeited his lien both on the land and the purchase-moneys.

But having forfeited such lien, it does net follow that he forfeited the right to execute otherwise the decree of the 14th of April 1864. The only result was that such decree became thenceforth a mere money-decree discharged from any incidental lieu.

It becomes necessary therefore to decide the first issue tried by the Subordinate Judge, vie., Is execution of that decree barred under s. 20 of Act XIV of 1859?

That section enacts that process of execution shall not issue, unless some proceedings shall have been taken to enforce or keep in force a decree within three years next preceding the application for execution.

It has been strenuously argued before us that the proceeding intended by that section must be a proceeding by some person legally and rightfully entitled to the decree; and consequently that neither the attempts by Meer Hossein in 1865, to obtain the sale-moneys (the decree at that time not having been legally transferred to him), nor the attempt by Moneerun in 1868 to execute the decree (she being a nominee of Meer Hossein for the purpose of defrauding his creditors and her name not having been substituted for that of Meer Hossein as decree-holder), could operate to keep the decree alive. I cannot find any warrant in s. 20 for such argument. That section appears to me not to require more than that some actual proceeding should be taken which, if successful would result in the discharge or partial discharge of the judgment-debt. With respect to the proceeding of 1865 by Meer Hossein, if he had succeeded in retaining under attachment, as he was bona, fide attempting to do, the purchase moneys arising under Poran''s execution, the decree, which he had then contracted to purchase and the transfer of which he was then enforcing by suit in which ho afterwards succeeded, might have been satisfied therewith. I see no ground whatever for holding that the application mode by Meer Hossein in 1865 were not proceedings to enforce the decree. And with respect to Moneerun''s proceedings in 1868, the appellant admits in his written statement that, on the 2nd of April 1868, she applied for execution, and that notices were issued under s. 216. Had suck proceeding resulted in a realization of money, it cannot be said as between the judgment debtor and Meer Hossein, or those claiming under Meer Hossein, that the receipt by Moneerun of such money would not have gone in discharge of the decree. Moneerun might only have been entitled to hold the money in trust for Meer

Hossein, or for his creditor; but that circumstance would not have affected the discharge of the decree in execution of which such moneys were realized. The fraud of Meer Hossein, in attempting to withdraw the decree from the claims of his creditors, did not concern the judgment-debtor. As against him the execution proceedings were very real proceedings, to realize the judgment-debt, and of which, had they been successful, the creditors of Meer Hossein might have availed themselves; and such proceedings were not act aside until after the purchase by the respondent, and only as fraudulent against her. With respect to Moneerun''s name not having been substituted for that of Meer Hossein as decree-bolder, it does not appear that the assignee need do more than apply for execution under s. 208, Act VIII of 1859, and it does appear from the appellant''s written statement, and from his petition dated the 21st July 1868, that in fact Bibee Moneerun had executed the decree, from which execution the appellant by his petition prayed to be released.

I am, therefore, of opinion that the Subordinate Judge was right in holding that execution under the decree of the 14th of April 1864 was not barred. And as a matter of fact that decree has been executed by the respondent in the Moorshedabad Court against the heirs of Mirza Mahomed as an existing decree. But inasmuch as I dissent from the conclusion of the Subordinate Judge, with respect to the continuing existence of the mortgage lien, being of opinion that such lien was upon the sale in execution under Poran''s decree transferred from the land to the purchase-moneys, it becomes necessary to enquire whether the property, which the respondent now seeks to sell, is trust property; or whether the purchase in the name of Korshed Begum, under Poran''s execution, was in facts purchase with the money of Mirza Mahomed, and the property purchased consequently liable for Mirza Mahomed''s debts.

Having regard to the appellant''s defense set up in the second and tenth paragraphs of his written statement. I think that the fifth of the issues settled by the Subordinate Judge was sufficient to raise the question as to whether or not the property was trust property.

This question the Subordinate Judge has only incidentally treated in his judgment, as it was not necessary for him to decide it, if, as he held, the mortgage lien still existed. Some evidence on the issue was adduced by the appellant and appears in the record; and the Judge has clearly shown the inclination of his opinion that the purchase was fictitious, adducing as a reason for such opinion the fact that the property had been purchased in the name of a near relation of Mirza Mahomed, and not in the name of Nadir Hossein, the then acting trustee.

In addition to this reason, counsel for the respondent has relied on three circumstances to invalidate the purchase: first because the trusts of the deed of the 1st of Baisakh 1266 (13th April 1859) are not wuqf, and therefore that the deed is invalid as against the heirs of Kharoonnissa; secondly, that the allegation that the property was purchased out of the profits of Kharoonnissa''s trust property is obviously untrue, because in the deed of the 33rd of August 1864, under which Mirza Mahomed appointed the appellant as a trustee

for three years, it is recited that the profits were inadequate to defray the expenses, and the schedule to such deed shows that the income of Rs. 3,296 was fully absorbed in payment of the claims and expenses specified in such schedule; and thirdly, because the property continued after the sale under Poran''s decree to be registered in (the name of Mirza Mahomed. I think the first of the above grounds untenable, because whether the trusts were or were not strictly wuqf, they were trusts that had been established, acted upon, and acquiesced in, for some years anterior to the decree of the 14th of April 1864, at which date all heritable rights (if any) of Mirza Mahomed in the property subject to the deed antagonistic to the trusts thereof, so far as such trusts affected the property, must be considered to have ceased.

With regard to the third objection, there is nothing in the record to show that, after the sale under Poran''s execution, the property continued to be registered in the name of Mirza Mahomed, but even if the allegation were correct, it would not under any circumstances be conclusive; and in this particular case, if the property was bought with funds of which Mirza Mahomed was trustee, the fact that the property continued registered in his name would be immaterial.

With respect to the second objection, it is no doubt very suspicious that the property was purchased under Poran''s execution for Rs. 14,009 on the 29th of April 1865, within less than a year after the recital stating that the trust income was insufficient to defray current expenses; on the ether hand, it should be noticed that in Kharoonnissa''s will, the profits had been estimated at Rs. 8,636, and that by the death of Mirza Enayet Ali Beg, one of the objects of the trust, Rs. 1,200 per annum, a personal allowance to him, had been set free; and three witnesses were examined on behalf of the appellant, one of whom deposed'' that Mirza Mahomed purchased the 15■ annas share of Pultapore in the name of Korshed Begum from the funds of Kharoonnissa, but stated that his knowledge was founded only on communication by Mirza Mahomed himself and another witness stated that the purchase was made by means partly of the trust funds, and partly of a subscription made for the purpose of the purchase. Counsel for the ''appellant has urged that the respondent has not adduced a scintilla of evidence to show that the purchase-money moved from Mirza Mahomed himself; and he very strongly pressed upon our attention the case of Sreemanchunder Dey vs. Gopaul Chunder Chuckerbutty . That cue it no doubt in many respects a stronger case than the present, and it is there broadly laid down that in cases of this nature, although there may be circumstances of very strong suspicion, though the person insisting on the validity of the purchase may even have given a false account of the sources from which the purchase-moneys were derived, still the affirmation lies upon the party impeaching the sale, and the Court must not act upon suspicion, but must require actual proof that the purchase-moneys are the moneys of the judgment-debtor. Of course, we must follow the rulings in that case, unless the circumstances of the present case materially differ therefrom.

There were two circumstances in that case which were relied on by the Privy Council (p. 48) as very material, which do not exist in the present case. This suit is not ''the fruit of

angry feeling," and although the plaintiff in this as in that case is only a transferee of the judgment-debt, yet in the present case the property was attempted to be attached by the plaintiff"s predecessor, through Moneerun, prior to the transfer to the plaintiff. Under these circumstances, it seems to me very material in the present case to consider what explanation the respondent gives of the manner in which the purchase-moneys were supplied on the purchase in 1865, under Poran"s execution, and such explanation deliberately made and supported by evidence, must, I think, be taken as an admission binding upon him. His statement is that the property was purchased in 1866 out of the surplus profits of Kharoonnissa"s trust settlement, and he seems to have assumed that the conclusion of law must be that the property so purchased is trust property. This assumption mom-over altogether ignores the fact that the property affected by Kharoonnissa"s will was thereby dedicated to trust purposes only so far as the trusts thereby declared might require; and that under inch will Mirza Mahomed would, at the date of the purchase, have been entitled to retain for his own benefit all surplus profits not required for the execution of the trusts, inasmuch as, subject to such execution, he was expressly made by that will irresponsible and unaccountable. If then this property was purchased out of surplus income not required for the purposes of the trust, it was purchase with funds which, at the time, Mirza Mahomed might have applied to this own purposes without being liable to account for the same to any one, so that such purchase) would in fact have endured for his own benefit; for if the purchase was made out of profits, it follows that before the purchase the trust property was already more than sufficient for the purposes of the trust. No evidence, beyond a mere recital in Mirza Mahomed"s will, has been adduced to show that during Mirza Mahomed"s lifetime, the property purchased in the name of Korshed Begum by funds applicable to his own purposes was dedicated by him to trust purposes, which would prevent a judgment creditor executing his decree against the property so purchased. In the absence of such evidence, and on the admission of the appellant that the property was purchased out of surplus profits not applicable to trust purposes, and as the execution of the respondent"s decree is not barred by limitation, I think that the respondent is entitled to execute her decree against the 15■ annas share of Pergunna Pultapore, and I am therefore of opinion that this appeal should be dismissed with costs.

* Regular Appeal, No. 240 of 1871, against a decree of a Subordinate Judge of Zill a Dinagepore, dated the 30th June 1871.