

(1880) 06 CAL CK 0028

Calcutta High Court

Case No: None

Ramkant Roy
Chowdhry

APPELLANT

Vs

Kristodass Kundoo
and Another

RESPONDENT

Date of Decision: June 10, 1880

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 7

Citation: (1881) ILR (Cal) 142

Hon'ble Judges: Prinsep, J; Morris, J

Bench: Division Bench

Judgement

Prinsep, J.

(who, after stating the facts as above, continued):-The first objection is, that the suit is barred by limitation under Article 15 or Article 16, sch. 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.

2. The main objection pressed on us by Mr. H. Bell, who appears as counsel for the appellants, is, that this suit is barred by Section 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* (11 Moore's I. A. 551), and on *Ramhurry Mondul v. Mothurmohun Mondul* (20 W. R. 450), but the fallacy of his 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 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" (11 Moore's I. A. 605). Applying this test we have no doubt that the cause of action in the two cases are distinct.

3. But besides these grounds we are of opinion that the objection must fail for another reason. In the case of *Heera Lall Chowdhry v. Janokeenath Mookerjee* (16 W. R. 222), 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."

4. 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.

5. 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 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 Hitter's case (13 W. R. 301), could not be determined except in a separate suit such as has now been brought.

6. 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.