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deposition, make it apparent that he has done so. The second document, to which I have already referred, affords a good example of the danger in the criminal case, involving the life of an accused, of making any such presumption as that which I was asked to make in the case of *Queen-Empress* v. *Riding* (1). The file in this case will be returned under seal to the Sessions Judge of Agra, and he will be requested to enquire into the origin of these two documents, and when and by whom they were signed, and when and by whom the alteration in that which is in English was made, and report to this Court accordingly.

TYRRELL, J.—I entirely concur in the dismissal of this appeal and in directing the sentence to be carried out, and I also concur with what has been said by the learned Chief Justice in respect of the deposition of Dr. Hilson, and I fully adopt the ruling of the learned Chief Justice in *Queen-Empress* v. *Riding* (1) and his remarks on the same subject which have been made in the present case.

APPELLATE CIVIL.

1888
January 4.

Before Mr. Justice Mahmood.

DAMODAR DAS AND ANOTHER (DECREE-HOLDERS) *v.* BUDH KUAR AND OTHERS (JUDGMENT-DEBTORS).*

Costs—Mortgage—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220—*Act IV of* 1882 (*Transfer of Property Act*), *ss.* 86, 87, 94.

A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs.

Held that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein* v. *Jusoda* (2) referred to.

THE appellants in this case obtained a decree for foreclosure against the respondents on the 9th September, 1886, and it was

* First Appeal No. 187 of 1887 from an order of Maulvi Mohamed Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 27th May, 1887.

(1) I. L. R., 9 All. 720. (2) I. L. R., 14 Calc. 185.

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provided in the decree that in default of payment of the decretal sum due on the mortgage by conditional sale on or before the 9th March, 1887, the defendants should be absolutely debarred of all right to redeem the property. The decree then went on to say:—"And this also is ordered, that the defendants do pay to the plaintiffs Rs. 401-6 in respect of the costs of this Court which have been incurred by them." This order was apparently passed under s. 220 of the Civil Procedure Code.

The defendants failed to pay the decretal money within the prescribed period, and accordingly, in execution of the decree, the decree-holders obtained possession of the mortgaged property. Subsequently, they made an application on the 10th May, 1887, in which they claimed to recover the sum awarded to them for costs under the decree of the 9th September, 1886.

The Court executing the decree (Subordinate Judge of Mainpuri) gave judgment as follows, rejecting the application.

"Certainly no costs will be allowed, because s. 87 of Act IV of 1882 says that if such payment is not so made, the plaintiff may apply to the Court for an order that the defendant be debarred absolutely of all rights to redeem the mortgaged property, and the Court shall then pass such order." The defendants failed to make payment, and the plaintiffs, having taken proceedings under the said clause, obtained possession of the foreclosed property. The plaintiffs have, therefore, no right to recover costs, because two cases are contemplated in the section: one is that the defendants pay the judgment-debt together with costs, and the other is that the plaintiffs obtain possession. In the second case, it does not at all appear from the section that the decree-holder shall, notwithstanding delivery of possession, be entitled to costs. My order in the regular suit was also to the following effect:—"The judgment-debtors either pay the whole amount with costs or be debarred of all rights to redeem. The forfeiture of the rights of redemption is the result of not fully carrying out the condition of the first case, including costs. That case is different in which the Court awards costs personally against the judgment-debtor who continues personally responsible. But when such is not the case, and a general order is made under s. 87, the third case does not hold

good, that either the right of redemption is barred or payment should be made. There is no case in which the right of redemption is barred for default in paying the principal and interest, and yet costs remain due separately."

The decree-holders appealed to the High Court.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the appellants.

The respondents were not represented.

MAHMOOD, J. (after stating the facts and the conclusions of the lower Court, continued):—I am unable to accept this view of the law. The decree in the case appears to have been framed in the terms of ss. 86 and 87 of the Transfer of Property Act (IV of 1882) and of s. 94 of the same enactment. It is unnecessary for me to go into the exact effect of these various sections in this case, because the decree of the 9th September, 1886, which I am called upon to interpret, appears to me explicit in terms as to costs.

It is one thing to say that by reason of the money due upon the *bai-bil-wafa* mortgage the mortgage has ceased to be redeemable, and it is another thing to say that the order as to costs contained in the decree forms a part and parcel of the money due upon such a mortgage. In a suit for foreclosure, the plaintiff may be claiming neither more nor less than what is really and rightly due upon the mortgage, and the defendant in resisting the suit would, in order to escape costs, be entitled to show that there was no real dispute or that he had been improperly impleaded. But in a case like the present, in which the suit ended in the decree of the 9th September, 1886, the defendants appear to have disputed the rights of foreclosure and to have failed in such defence. The order as to costs in this case has been dealt with as a separate part of the decree unaffected by the question whether or not the defendants-mortgagors paid the amount due on the *bai-bil-wafa* mortgage. Such, I think, is the general effect of the view adopted by the learned Judges of the Calcutta High Court in *Rutnessur Sein* v. *Jusoda* (1), and in the present case it seems to me that the decree itself is explicit and the order relating to costs should have been allowed to be executed by the lower Courts."

(1) I. L. R. 14 Calc. 185.

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For these reasons I decree the appeal, and as the amount due for costs is a matter relating to accounts, the proper course is to set aside the order of the lower appellate Court and remand the case under s. 562 of the Civil Procedure Code to be dealt with according to law as stated in this judgment. I order accordingly. Costs will abide the result.

Cause remanded.

1888
January 9.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

ARJUN SINGH (OPPOSITE PARTY) *v.* SARFARAZ SINGH (PETITIONER).*

Pre-emption—Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre-emptive right.

Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul-arz*, bring suits to enforce their rights, in the absence of anything in the *wajib-ul-arz* to the contrary, the rule of Muhammadan law must be observed, and however the property may be divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought.

In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three annas share, and the other a decree in respect of a two annas six pies share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held (affirming the judgment of MAHMOOD, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt.

THIS was an appeal under s. 10 of the Letters Patent from a decision of Mahmood, J., sitting as a single Judge. The facts of the case are fully stated in the judgments of the Court.

Mr. *J. Simeon*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case are these:—One Ram Kant Misr was the owner of a 5 annas 6 pies share, which he sold under a sale-deed dated Pus badi 12, 1290 fasli (1883) to Ganga

*Appeal No. 13 of 1887 under s. 10, Letters Patent.