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same month with this application treating the matter as if nothing had been paid in the interim, and going back to the month of December, 1883, as the date of the default which had been the ground of the original application for the execution of the whole decree. If the argument of the learned pleader for the decree-holder were carried to its logical conclusion, he might, by merely filing an application every three years, have gone on receiving instalments till the eleventh year, and then have come in and asked for the execution of the whole decree, which seems to me absurd. There is enough stated in the judgments of the two first Courts to satisfy me, as it satisfied my brother Tyrrell, and satisfies the learned Chief Justice, that there was a waiver by the decree-holder of his right to execute his whole decree in respect of the alleged default in December, 1883. I may, however, add that the two first Courts on the evidence came to the conclusion that there never was any real default at all. On that finding alone my brother Tyrrell was right. The appeal is dismissed with costs.

Appeal dismissed.

1889
 August 5.

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

RAJ SINGH AND ANOTHER (JUDGMENT-DEBTORS) v. PARMANAND (DECREE-HOLDER).*

Mortgage—Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage—Act IV of 1882 (Transfer of Property Act), ss. 88, 89, 90.

The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.

THIS was an appeal from a decree of the District Judge of Aligarh reversing a decree of the Munsif of Haveli. The judgment of the District Judge was as follows:—

“In this case the appellant had obtained a decree against the respondents as legal representatives and heirs of a mortgagor under the terms of s. 88 of the Transfer of Property Act. The mortgaged

* Second Appeal No. 1099 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated the 4th July, 1888, reversing a decree of Maulvi Saiyid Akbar Husain, Munsif of Haveli, dated the 21st March, 1880.

property was eventually brought to sale, but the proceeds were insufficient to satisfy the decree debt. The decree-holder then applied praying that the Court would pass a further decree under s. 90 of that Act for the balance due on the mortgage. The Munsif, relying on the case of *Pran Kuar v. Durga Prasad* (1), refused the application. But that case is not to the point, the original decree having been issued in 1881 before the passing of the Transfer of Property Act. The respondents contend that as in the decree against them no order was passed that any other property than that charged with the debt should be sold, the provisions of ss. 13 and 43 do not allow the claim now made by the appellant. If the proceedings under s. 90 of the Transfer of Property Act could be described as a fresh suit, s. 43 would apply. But reading ss. 88, 89 and 90 of that Act together, it is clear that they contemplate a further decree in the same suit, when the proceeds of the sale are insufficient to satisfy the debt. The language of s. 88 of the Transfer of Property Act, and the form of a decree for the sale in a suit by a mortgagee, No. 128 in sch. IV of the Code of Civil Procedure, and the form for a decree under s. 88 of the Transfer of Property Act as issued by the High Court, agree in omitting any reference to the relief to be granted to the plaintiff in the event contemplated by s. 90 of the Transfer of Property Act. The decree-holder is entitled to have a further decree, under s. 90 of the Transfer of Property Act if the balance is legally recoverable from the defendants. The case must therefore be remanded to the lower Court for the determination of this issue, and if it be determined in favour of the appellant, for the passing of a decree under s. 90 of the Transfer of Property Act. The appeal is admitted. The case is remanded under s. 562 of the Civil Procedure Code to be disposed of with reference to the remarks made above. The costs of this appeal will follow the costs of the application to the lower Court."

The judgment-debtors appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

(1) I. L. R., 10 All. 127.

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EDGE, C. J., and TYRRELL, J.—The only point in this case is whether the decree contemplated by s. 90 of the Transfer of Property Act can be made in the suit in which the decree for sale was passed, or whether a fresh suit must be instituted to obtain such decree. There is nothing in the Act to suggest that a fresh suit is necessary; and there is everything to suggest that it is not. If it were intended that a fresh suit should be brought, that intention would have been given effect to by the introduction of appropriate words into s. 90.

We dismiss the appeal with costs (1).

Appeal dismissed.

1889
 August 14.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BANWARI LAL (*Plaintiff*) v. SAMMAN LAL (*Defendant*).*

Civil Procedure Code, ss. 562, 564—"Suit."

S. 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Amiruddin*, for the appellant.

Mr. *Simeon*, for the respondent.

STRAIGHT, J.—This is an appeal from an order of remand. The suit brought by the plaintiff-respondent was one in which he claimed two reliefs: first, he asked for an injunction to defendant, restraining him from interfering with his, the plaintiff's, erection upon the roof of his own house of certain buildings; secondly, he claimed a right of easement over the roof of the defendant's house in order to give him access to the roof of his own house. The first Court decreed the plaintiff's claim for an injunction, but as to his second head of claim, it said, that upon the face of the plaint, the statement of the easement claimed was so inadequate and unsatisfactory that it was impos-

* First Appeal No. 66 of 1889 from an order of Maulvi Saiyid Muhammad, Subordinate Judge of Saharanpur, dated the 20th April, 1889.

(1) See also *Sonatum Shah v. Ali Newaz Khan*, I. L. R., 16 Calc. 423.