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MUHAMMAD
BAKAR
v.
BAHAL
SINGH.

before Edge, C.J., and Brodhurst, J., who ordered that it should be laid before the Full Bench.

Maulvi *Ghulam Muftaba*, for the applicant.

Pandit *Sundar Lal*, for the opposite party.

EDGE, C.J., STRAIGHT, TYRRELL, MAHMOOD and KNOX, JJ.—We are of opinion that the powers conferred by s. 25 of Act IX of 1887 are purely discretionary. We agree with the opinion of Mahmood, J., in *re Muhammad Nizam-ud-din Khan v. Hira Lal* (1) and *Masum Ali v. Masum Ali* (2) that it was not intended by that section to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. We think we should not interfere under s. 25 of the Act unless it clearly appeared to us that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes and that this is not such a case. The application is dismissed with costs.

Application dismissed.

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December 22.

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

OUDDH BEHARI LAL (JUDGMENT-DEBTOR) v. NAGESHAR LAL (DECREE-HOLDER);

Execution of decree—Application for order absolute for sale—Mortgage—Act IV of 1882 (Transfer of Property Act) ss. 88 and 89.

The holder of a decree under s. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree.

Held that this was a good application under s. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters.

THIS was a second appeal in execution proceedings. The respondent was the holder of a decree for enforcement of a hypothecatory lien dated the 31st January 1885. The terms of the decree were as follows:—“It is ordered and decreed that a decree be passed against the absent defendant and against the property hypothecated,

(1) Weekly Notes, 1890, p. 121.

(2) Weekly Notes, 1890, p. 201.

for the amount claimed with costs and a future interest, by the enforcement of the hypothecation of the property mortgaged, and that the property mortgaged can be sold after six months." The decree-holder applied on more than one occasion and the judgment-debtor obtained postponements on various pleas. Ultimately, however, on the decree-holder making an application for execution, the judgment-debtor objected that execution could not be granted, the decree not being framed in accordance with the provisions of s. 88 of the Transfer of Property Act (IV of 1882). This objection was disallowed by the Subordinate Judge on the 25th November 1889. The judgment-debtor then appealed to the District Judge who upheld the Subordinate Judge's order, holding that the decree was practically in conformity with the provisions of s. 88 of the Transfer of Property Act, that the application before him was to all intents and purposes an application under s. 89 of the same Act, to have the order for sale made absolute and the property sold, and that since proceedings under s. 89 were proceedings in execution it was not necessary for the decree-holder to make two applications, one to have the order for sale made absolute and another to sell the property. The judgment-debtor then appealed to the High Court. The appeal came before Mahmood, J., who ordered it to be laid before a Bench of two Judges with the suggestion that the question involved was one which, with a view to uniformity of practice in the Court, it might be advisable to refer to the Full Bench. The case was accordingly under the order of the Chief Justice of the 7th November 1890 laid before the Full Bench.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *T. Conlan* and Munshi *Ram Prasad*, for the respondent.

STRAIGHT, J.—The point raised by this reference, which has been made to the Full Bench by the learned Chief Justice at the instance of my brother Mahmood, arises as to the construction to be placed upon s. 89 of the Transfer of Property Act. The appeal before my brother Mahmood was an execution appeal from an order of the District Judge of Gorakhpur, dated the 10th January 1890, by which he held that the decree before him, execution of which had

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been sought in the first Court, was a decree which practically complied with the requirements of s. 88 of the Transfer of Property Act, and that the application of the 23rd August 1888, for the execution of that decree was an application within the meaning of s. 89 of the Transfer of Property Act. That application was in the following terms:—"In my former application of the 6th July 1886, for sale of property, which was transferred to the Collector, the judgment-debtor applied for time and made an agreement to the effect that at the end of October 1887 he would pay, and he made an application for extension of time in Court and my application was dismissed. He has not paid, and therefore this application is made, and it is prayed that the property be attached and sold."

It has been contended this is not an application within the meaning of s. 89 of the Transfer of Property Act, for an order absolute for sale, and Mr. *Durga Charan*, who appears in support of the judgment-debtor, objector, appellant in the appeal, argues that that application is one which should be made to the Court which passed the decree as the Court which passed the decree, and it is not an application in execution. In other words, Mr. *Durga Charan* contends that before sale can be ordered, the Court which passed the original decree for sale, must make that decree absolute.

I am of opinion that an application for an order absolute for sale under s. 89 of the Transfer of Property Act is a proceeding in execution, and subject to the rules of procedure governing such matters.

In reference to the analogous s. 87 of the same Act, a like view was expressed by my brother Mahmood and myself in the case of *Kedur Nath v. Lalji Sahai* (1), with regard to orders absolute for foreclosure, and I see no grounds for doubting the propriety of that decision. Where a decree has been passed under ss. 86, 87, 88, 89 or 92 directing payment into Court by a specified date of a sum of money and, in the event of its not being paid, declaring that foreclosure or sale shall follow, or a right to redeem shall be barred, it would, in my opinion, be a misnomer, if payment is made, to des-

(1) I. L. R., 12 All., 61.

cribe such payment as other than one made in execution of decree. On the other hand, it appears equally clear to me that if such payment is not made, the consequences which follow are also matters concerned with the execution of the decree, flowing as a matter of course out of the decree itself, *viz.*, to give it effect against the judgment-debtor for having failed to satisfy the conditions of the decree. If decrees are properly prepared under ss. 86, 88 and 92, they should fully set out all these conditions and declare the consequences that will follow if they are or are not fulfilled.

Such being the view I take of this matter, the decision of the learned Judge below was a right decision and this appeal must be and it is dismissed with costs.

EDGE, C.J.—I concur.

TYRELL, J.—I entirely concur.

MAHMOOD, J.—I also agree in my brother Straight's judgment, and also in everything that he has said, but I am anxious to say, as one of the Judges who referred this case to the Full Bench, and with reference to my order of reference of the 1st August 1890, that there are three rulings of this Court, to be considered, and one ruling of the Calcutta Court. Dealing first with the printed case of *Rām Lal v. Narain*, (1) to which reference is made in my order of reference, I cannot help feeling that the judgment delivered by my brother Straight to-day conflicts with that decision, and since his judgment in this case has the concurrence of the whole Court, I hold that the earlier decision cannot be any longer treated as authority upon this point. The next is an unreported case which also is before me, *viz.*, *Babu Dina Prasad Singh v. Shah Sifat Alam* (F. A. No. 16 of 1889) which was disposed of by the learned Chief Justice on the 2nd July 1889. That judgment also was cited, and I must express the opinion that the view expressed by my brother Straight to-day renders that judgment also unauthorized for any further discussion of the same question in this Court. The third case is that of *Musammat Parbati v. Behari Raj* (S. A. No. 512 of 1890) on the execution side, which was disposed

(1) I, L, B., 12 All., 539,

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of by the judgment of the learned Chief Justice and our late colleague Mr. Justice Young dated the 8th May 1890, and that judgment is confirmed by what my brother Straight has said. Then comes the fourth case, namely, the case in which the Calcutta Court in the case of *Poresk Nath Mujumdar v. Ramjodu Mojumdar* (1) decided the same point, and it was cited by Mr. *Durga Charan* as an authority in his favour.

There is much in that judgment which undoubtedly supports the argument which Mr. *Durga Charan* addressed to us. But it is unnecessary, after the expression of opinion which has been given to the view of this Bench by my brother Straight, that I should say anything more than this that I am not prepared to accept that or all that was said in that case either as to the theory of the *decrees nisi* in such cases or as to the decrees absolute or their effect upon the procedure of the Court, which is governed by the Civil Procedure Code. I therefore give my full concurrence to all that has fallen from my brother Straight.

KNOX, J.—I concur with what has been said by the learned Chief Justice and my brother Straight.

Appeal dismissed

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December 22.

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

AMME RAHAM AND OTHERS (PLAINTIFFS) v. ZIA AHMAD AND OTHERS
(DEFENDANTS).

Act XV of 1877 (Limitation Act) sch. ii, No. 127—Limitation—Said by Muhammadans for possession by right of inheritance of shares in the property of their deceased ancestor.

The words "joint family property" in No. 127 of sch. ii of the Limitation Act (XV of 1877) mean "the property of a joint family."

Hence the period of limitation prescribed by No. 127 of sch. ii of the Limitation Act will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immovable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they allege they had been dispossessed by the defendants.

Bavasha v. Masumsha (2) dissented from.

(1) I. L. R., 16 Calc., 246.

(2) I. L. R., 14 Bom., 70.