

*Ravji Chiplunkar v. Shapurji Shet* (5), but there is nothing in the judgment of their Lordships in that case to encourage the opinion that, where a decree for redemption has been obtained, the mortgagor can bring a second suit for redemption. In our opinion it was the intention of the Legislature, as expressed in sections 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. We further think that the allowance of a second suit for redemption would be to go contrary to the principle of section 244 of the Code of Civil Procedure, and that the fact that a mortgagor has failed to comply with his decree for redemption within time cannot give him a fresh cause of action. His original cause of action for redemption, it appears to us, was extinguished. It also appears to us that section 13 of the Code of Civil Procedure would preclude a second suit upon the same cause of action. We dismiss this appeal with costs.

*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.*

RAJA RAM SINGHJI (DECREE-HOLDER) v. CHUNNI LAL (OBJECTOR)\*

*Execution of decree—Decree for sale on a mortgage—Order absolute for sale—Act No. IV of 1882 (Transfer of Property Act) section 89—Civil Procedure Code, sections 291, 310A.*

Sections 291 and 310A. of the Code of Civil Procedure, 1882, will apply to a sale held in virtue of an order absolute for sale passed under section 89 of the Transfer of Property Act, 1882, although no power is given under that Act to postpone the operation of an order under section 89.

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. T. Conlan and D. N. Banerji, for the appellant.

Babu Jogindro Nath Chaudhri, Pandit Sundar Lal, and Pandit Baldeo Ram Dave, for the respondent.

EDGE, C.J., and BLAIR, J.—The Maharaja of Bhurtpur brought a suit for sale under section 88 of the Transfer of Property Act, 1882. The mortgage included several villages, and we infer

\* First Appeal, No. 214 of 1896, from an order of Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 20th April 1896.

(5) I. L. R., 10 Bom., 461.

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from the judgment and decree in the case that various amounts were charged upon the various villages as the liabilities of the particular villages. The Maharaja obtained a decree for sale under section 88. The decree specified the amount for which each village was liable. After that decree had been obtained, one Chunni Lal obtained from the representative of the mortgagor a mortgage with possession of three of the villages. The Maharaja of Bhurtpur put his decree in execution, and obtained an order for the sale of the three villages in question. That order was made under section 89 of the Transfer of Property Act. It is true that the order did not say that it was an order absolute, but the order under section 89 of the Transfer of Property Act is an order for sale in execution, as was held by the Full Bench of this Court. Afterwards Chunni Lal put in a petition asking that the mortgagee should be directed to receive from him the amount decreed against these particular villages and be ordered to abstain from bringing the villages to sale, but did not tender to the mortgagee or bring into Court the amount decreed against these particular villages. We have asked under what section that application was made. It could not have been made under section 89 of the Transfer of Property Act. The day fixed for payment had passed, and section 89, unlike sections 87 and 93 of the same Act, gives the Court no power to extend the time for payment on good cause shown. The Subordinate Judge, however, made an order in the terms of the prayer which had the effect of postponing the sale, and from that order this appeal has been brought.

We are told by the vakil for Chunni Lal, but it is not admitted on behalf of the mortgagee, and we do not know if it is the case or not, that after the order was made the amount decreed against these villages was paid into Court. We need not consider that question. Section 89 provides what is to happen in case the amount is paid on or before the day for payment, and as to what is to happen "if such payment is not so made." If such payment is not so made, the plaintiff can apply for an order for sale, and the Court shall then pass an order that such property, or a

sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88, and "thereupon the defendant's right to redeem and the security shall both be extinguished." It is quite clear that the Court had no power under section 89 of the Transfer of Property Act, 1882, to extend the time within which payment of the debt and costs might be made. The Legislature must intentionally have omitted to give that power in section 89 which it had expressly given in sections 87 and 93. We have had to consider this group of sections in the following cases:—*Amolak Ram v. Lachmi Narain*; *Ram Lal v. Tulsa Kuar*, and *Kashi Prasad v. Sheo Sahai* (1).

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It is contended by Mr. Baldeo Ram for Chunni Lal that section 291 of the Code of Civil Procedure, 1882, applied in this case and enabled Chunni Lal to have the sale stopped upon payment into Court of the debt and costs. It is hardly necessary for us to decide whether that section would apply or not, as at the time when the order under appeal was made the debt and costs had not been paid into Court or to the mortgagee. But, although what we are about to say is under the circumstances *obiter*, it is better that we should, for the guidance of Subordinate Courts in these Provinces, express our opinion as to the application of section 291 of the Code of Civil Procedure, 1882, to a case in which under section 89 of the Transfer of Property Act, 1882, an order absolute for sale has been made.

It is clear that, when such an order for sale has been made under section 89, the defendant's right to redeem is by that section extinguished. The Transfer of Property Act, 1882, (Act No. IV of 1882) received the assent of the Governor-General on the 17th of February 1882, and came into force on the 1st of July in the same year. Act No. XIV of 1882 (the Code of Civil Procedure, 1882) received the assent of the Governor-General on the 17th of March 1882, and came into force on the 1st of June in the same year. The only procedure provided by the Legislature for the conducting of sales under decrees of Civil Courts is that which

*Supra*, pp. 174, 180 and 186.

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is contained in the Code of Civil Procedure, and, although it may appear an anomaly that a Code which deals merely with procedure should in effect in a certain event give not only a right to redeem, but actual redemption, to a mortgagor whose right to redeem had been extinguished by the express enactment of the Legislature dealing with decrees for sale, and although in such cases section 89 of Act No. IV of 1882 and section 291 of Act No. XIV of 1882 are in conflict, it appears to us that we would be bound to hold that section 291 of Act No. XIV of 1882 must be taken to have modified in that respect section 89 of Act No. IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs had been paid into the Court that ordered the sale. It may be that section 310A of Act No. XIV of 1882 and the sections of that Act under which the execution of a decree is transferred from the Civil Court to the Collector further modify the concluding provisions of section 89 of Act No. IV of 1882. In our view of the law Chunni Lal, being a mortgagee, although his title arose subsequently to the decree for sale, could have availed himself of any right which his mortgagor had after the making of the decree and of the order for sale, and could have paid into Court the amount payable under the decree for sale and any costs which the Court might by an order under section 94 of Act No. IV of 1882 add to the mortgage money, and thus stop the sale; but he did not adopt that course. The course which he adopted was one which might result in the indefinite postponement of the satisfaction of the decretal debt, and it is to be remembered that the Court not having the power to impose terms as a condition of postponing the day appointed for payment, as it might if the case were one to which section 87 or section 93 of Act No. IV of 1882 applied, could not protect the mortgagee decree-holder from loss by making it a condition of a postponement that Chunni Lal should pay interest on the decretal amount.

We allow this appeal with costs, and, setting aside the order under appeal, we dismiss the application of Chunni Lal with costs. This decision will not preclude Chunni Lal from availing himself of such rights as he may have under the Code of Civil Procedure.

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*Appeal decreed.*

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## PRIVY COUNCIL.

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LALTA PRASAD AND OTHERS (PETITIONERS) v. SHEIKH AZIZ-UD-DIN AND OTHERS (OBJECTORS).

On petition from the High Court at Allahabad.

*Alleged want of notice to respondent—Appeal heard ex parte—Practice.*

THERE is no rule, among those made by the High Court under the authority of law, that the respondent in an appeal to the Queen in Council shall receive formal notice of the transmission of the record of the appeal, of the pendency whereof he has had notice.

The mere allegation that the respondents in this appeal had, in consequence of their having had no express notice that the appeal had been set down for hearing, allowed the hearing of the appeal to take place *ex parte* was not considered sufficient to entitle them to a re-hearing thereof.

THIS was a petition filed on the 28th May 1896 for the re-hearing of an appeal heard by the Judicial Committee in 1895, according to whose opinion by order in Council, (5th August 1895) the appeal was allowed, the decree of the High Court (1st March 1891) was reversed, and it was directed that judgment for the appellants should be entered.

The petition alleged that the hearing had been *ex parte*; that no notice had been received by the respondents, or their agents, of the transmission of the record to the office of the Privy Council; and that no notice had been given to them that the appeal had been set down for hearing, of which they first heard on the 29th August 1895. Had they known beforehand, they would have appeared in support of the High Court's judgment.

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*Present*:—LORDS WATSON, HOBHOUSE, and MORRIS and SIR R. COUCH.