

reason. It therefore follows, in our opinion, that this suit is one the cognizance of which by a Civil Court is absolutely forbidden by section 95, the matter of the suit being one in which an application might be made under clause (d) of section 95 of the North-Western Provinces Rent Act. We quite fail to understand why the respondent, having at his disposal the summary procedure provided by section 36 and the following sections of the Rent Act, should have preferred to take his case into a Civil Court. This is not a case in which we can proceed under the provisions of section 206 and the subsequent sections of the North-Western Provinces Rent Act. As has been frequently held, these sections contemplate those cases only in which a suit would lie in the Rent Court: but the procedure in the present case in the Rent Court would be by application and not by suit. It therefore follows that we cannot apply to the proceedings in this case the sections mentioned above. For the above reasons we allow this appeal. We set aside the judgment and decree of the lower appellate Court, and we direct that this suit do stand dismissed with costs in all Courts.

Appeal decreed.

Before Mr. Justice Banerji.

FIDA HUSAIN (DEFENDANT) v. MAULA BAKHSH (PLAINTIFF).*

Execution of decree—Civil Procedure Code, section 268—Attachment of debt—Payment of debt attached out of Court.

Where a debt, which had been attached under section 268 of the Code of Civil Procedure, was paid out of Court to the only person who, had the money due been paid into Court as required by the terms of the said section, would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, it was *held* that such payment amounted to a sufficient compliance with the requirements of section 268.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Amiruddin* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondent.

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* Second Appeal No. 876 of 1897 from an order of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Saharanpur, dated the 13th August 1897, modifying an order of Pandit Mohan Lal, Munsif of Deoband, dated the 11th January 1897.

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BANERJI, J.—This appeal arises out of proceedings relating to an application for an order absolute for sale under section 89 of Act No. IV of 1882. Certain property which belonged to the appellant Fida Husain and to other persons was mortgaged by them to one Ulfat Rai in 1886. The same property was subsequently mortgaged in 1887 to Ulfat Rai and Murlidhar, the father of one Atma Rai. The second mortgage fell by partition into the share of Atma Rai, and was assigned by him to the respondent, Maula Bakhsh, so that Maula Bakhsh became the holder of the second mortgage over the property. Before the assignment to Maula Bakhsh, Ulfat Rai brought a suit for sale upon his first mortgage and obtained a decree. It is alleged that he did not make Atma Rai, who, as I have said above, was at that time, jointly with Ulfat Rai, the holder of the second mortgage, a party to that suit. In execution of the decree which Ulfat Rai obtained on his first mortgage, he caused the mortgaged property to be sold by auction, and himself became the purchaser. He then sold the property so purchased to Fida Husain, and for a portion of the amount of the consideration for the sale he took a bond from Fida Husain. Maula Bakhsh brought a suit for sale upon the mortgage of 1887, of which he was the assignee, and in that suit he offered to redeem the first mortgage in favour of Ulfat Rai, the benefit of which had been acquired by Fida Husain by virtue of his purchase from Ulfat Rai. On the 13th of April 1896, a decree was passed in favour of Maula Bakhsh. The decree directed that Maula Bakhsh should pay to Fida Husain or into Court within three months of the date of the decree Rs. 250, the amount due on the first mortgage, and that upon his doing so he, Maula Bakhsh, would be entitled to bring to sale the whole of the mortgaged property for the realization of the said sum of Rs. 250, as also of the amount due upon the mortgage of 1887. After the decree was passed, Ulfat Rai brought a suit against Fida Husain upon the basis of the bond executed in his favour by Fida Husain for a part of the consideration for the sale effected by Ulfat Rai in favour of Fida Husain. In that suit he obtained an order on the 3rd

of June 1896 for attachment of the money payable by Maula Bakhsh to Fida Husain under the decree of the 13th of April 1896. This was an order passed, before judgment, under section 484 of the Code of Civil Procedure. Under section 486 a prohibitory order in the terms of section 268 of the Code was issued to and served upon Maula Bakhsh. On the 11th of July 1896, that is, before the expiry of the three months fixed in the decree of the 13th of April 1896, Maula Bakhsh paid into Court Rs. 85-8-0, and informed the Court that he had paid the balance of Rs. 164-8-0 to Ulfat Rai in pursuance of the attachment. I may here observe that before the date last mentioned Ulfat Rai had obtained a decree in the suit brought by him against Fida Husain. On the 12th of November 1896, Maula Bakhsh presented the application which has given rise to this appeal, on the allegation that he had complied with the requirements of the decree passed in his favour, and that, as the amount of that decree had not been paid, he was entitled to an order absolute for sale under section 89 of the Transfer of Property Act. The application was opposed by Fida Husain, who contended that the payment of Rs. 164-8-0 to Ulfat Rai was not equivalent to a payment to him, and was in violation of the terms of the decree of the 13th of April 1896. The Court of first instance overruled this contention, but the lower appellate Court allowed it and held that Maula Bakhsh had not performed the obligation which lay on him under the terms of the decree referred to above. That Court, however, for the reasons stated in its judgment, granted Maula Bakhsh an extension of time for payment of Rs. 164-8-0. From the order granting extension Fida Husain has preferred this appeal. Maula Bakhsh has taken objection under section 561 of the Code of Civil Procedure, contending that there was a sufficient compliance on his part with the decree passed in his favour. After the case for the appellant had been stated, the objection under section 561 was allowed to be first argued, because if it prevailed it would not be necessary to consider the appeal. In my judgment the objection under section 561 must be allowed. Under the decree made in

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favour of Maula Bakhsh he was no doubt liable to pay to Fida Husain or into Court Rs. 250 within three months from the date of the decree. There is no question that he has paid Rs. 85-8-0 out of that amount within the time fixed in the decree. It is also not disputed, and indeed the Courts below have found, that he paid Rs. 164-8-0 to Ulfat Rai within the three months. Now the question is, whether such payment was a payment in compliance with the decree. After the prohibitory order under section 486 (read with section 268) of the Code of Civil Procedure had been issued to Maula Bakhsh, he was not competent to pay the amount for which the prohibitory order had been issued to Fida Husain. If he had made such payment to Fida Husain he would have been guilty of non-compliance with the order of the Court which issued that prohibitory order. Under section 268 a debtor, prohibited to pay the debt due by him, might pay the amount of the debt into Court, and such payment would discharge him as effectually as payment to the party entitled to receive the debt. If the sum of Rs. 164-8-0, to which the prohibitory order related, had been paid into the Court which issued the prohibitory order, such payment would undoubtedly have absolved Maula Bakhsh from liability to Fida Husain for payment of the amount. In this case, instead of paying the amount into Court, he paid it to the person who would have been entitled to withdraw it from the Court if it had been paid into Court. The fact of the payment to Ulfat Rai appears to have been certified to the Court, so that although in fact the payment was made to Ulfat Rai, it was in reality a payment which, by reason of the certification of it into Court, was equivalent to a payment into Court within the meaning of section 268. The Lower Appellate Court seems to think that payment to a creditor who has obtained an attachment from the Court is the same thing as payment to any ordinary creditor. This view of the Court below is, in my opinion, erroneous. No creditor other than a creditor who had obtained an attachment of a debt due to his debtor could enforce payment of such debt. After the issue of the order of

attachment Maula Bakhsh could not have paid the sum of Rs. 164-8-0 to Fida Husain without being called upon by the Court, which had forbidden him to make the payment, to answer for his conduct. The only way in which he could have obtained immunity from liability was by paying the amount mentioned in the attachment order into Court. In order to reap the fruits of the decree obtained by him, he was also bound to make the payment within the three months allowed in the decree, and as he made the payment to the person who, as I have said above, was the only person who could withdraw it from Court, the payment to such person was equivalent to payment into Court, and consequently to a payment made to Fida Husain. That being so, Maula Bakhsh complied with the decree, and was entitled to an order absolute for sale under section 89. The fact that after the order of the Lower Appellate Court allowing the objections of Fida Husain, Maula Bakhsh deposited the Rs. 164-8-0 over again, does not preclude him from maintaining his present objection. I allow the objection, and, setting aside the order of the Lower Appellate Court with costs, restore the order of the Court of first instance.

The appeal must necessarily fail, and I dismiss it with costs.

Appeal dismissed.

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Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Know.
ISHAQ ALI KHAN (PLAINTIFF) v. CHUNNI AND OTHERS (DEFENDANTS)*.
Act No. IV of 1882 (Transfer of Property Act) section 85—Mortgage—Non-joinder of parties—Subsequent mortgagee after suit on prior mortgage filed.

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Held, that section 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit.

In this case one Moti Singh, who was the owner of a certain share in mauza Muhammadpur Ghiror, mortgaged, on the 12th

*Second Appeal No. 825 of 1896, from a decree of H. W. Lyle, Esq., District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 23rd December 1895.