

1900
June 29.

Before Mr. Justice Banerji and Mr. Justice Aikman.
BADRI DAS (DECREE-HOLDER) v. INAYAT KHAN AND ANOTHER.
(OPPOSITE PARTIES).*

Act No. IV of 1882 (Transfer of Property Act), Section 90—Execution of decree—Decree for sale on a mortgage—Mortgaged property sold in execution of a decree held by a different mortgagee—Section 90 not applicable.

In order to make the remedy provided by section 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under section 90. Section 90 does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar v. Munshi Ram* (1) followed.

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

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) for the appellant.

Pandit *Sundar Lal* for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for a decree under section 90 of the Transfer of Property Act, which has been refused by the Court below. The appellant obtained a decree under section 88 of the Transfer of Property Act for the sale of certain houses and zamindari property. He has caused the houses to be sold by auction, but not the zamindari property. He alleges that the zamindari property has been sold in execution of a decree obtained by another mortgagee upon a prior mortgage, and on this ground he asks for a decree under section 90. This case, in our opinion, is fully governed by the ruling of this Court in *Muhammad Akbar v. Munshi Ram* (1). As was pointed out in that case, a condition precedent to an application under section 90 is that the mortgaged property has been sold, that the proceeds of the sale are insufficient to discharge the mortgage and that there is a balance due to the mortgagee. Here the mortgaged property, by which we must understand the whole of the mortgaged property, has not been sold at the instance of the decree-holder, and therefore he is not entitled to obtain a decree under section 90. It is not enough

* Second Appeal No. 353 of 1898 from a decree of Kunwar Jwala Prasad, Additional Judge of Aligarh, dated the 4th February 1898, confirming a decree of Munshi Ganga Prasad, Munsif of Bulandshahr, dated the 26th June 1897.

(1) Weekly Notes, 1899, p. 208.

that a prior mortgagee has caused the zamindari property to be sold by auction. That such a sale has taken place is apparently due to the fault of the appellant himself. If he was a party to the suit in which the prior mortgagee obtained his decree, he ought to have redeemed the prior mortgage so as to make the mortgaged property available for the realization of the amount of his own mortgage. If, on the other hand, he was not made a party to the prior mortgagee's suit, it is still open to him to redeem that mortgage, and having done so, he would be entitled to bring the zamindari property to sale for the realization of his own money. In any case, as the appellant has not caused the whole of the property mortgaged to him to be sold, he cannot apply for a decree under section 90 of the Transfer of Property Act. This appeal must fail and is dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Blair.

HAFIZ ABDUL RAHIM KHAN (APPLICANT) v. RAJA HARI RAJ SINGH
 (OPPOSITE PARTY).*

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 June 14.

Scheduled Districts Act (No. XIV of 1874), section 6—Rule 17 of the Kumaon Rules, 1894—Code of Civil Procedure, sections 562, 564—Right of Appeal against order under section 562—Order of remand where decision of first Court was not confined to preliminary point.

Where the Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under section 562 of the Code of Civil Procedure.

Held that under Government Notification No. $\frac{925}{VII-569B}$, dated 27th June, 1894, Rule 17, an appeal lies from such an order of remand. *Sayid Muzhar Hossein v. Mussamat Bodha Bibi* (1) referred to.

Held further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under sections 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under section 562.

THE facts appear sufficiently from the judgment of the Court.

* Miscellaneous Reference No. 302 of 1899.