

section appears, relates to "the execution of decrees," and the sub-head E, under which section 246 occurs, provides "the mode of execution of decrees." It was observed by their Lordships of the Privy Council in *Rewa Mahton v. Ram Kishen Singh* (1) that the Court before which cross-decrees may be produced "is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not." These observations of their Lordships leave no room for doubt that the decree against which a set-off is claimed must be before the Court for execution. As the decree of Brij Bhukan Lal against Chajmal Das was not before the Court for execution, Chajmal Das was not entitled to claim a set-off under section 246, and his application was premature. On this ground alone his application ought to have been dismissed. The result is that we affirm the order of the Court below and dismiss this appeal with costs.

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CHAJMAL  
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v.  
LAL DHARAM  
SINGH

*Appeal dismissed.*

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.  
AMOLAK RAM AND ANOTHER (PLAINTIFFS) v. CHANDAN SINGH  
AND OTHERS (DEFENDANTS).\*

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June 10.

*Hindu law—Joint Hindu family—Mortgage of an undivided share  
—Effect on such mortgage of a subsequent partition.*

A mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, but the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. *Byjnath Lal v. Ramoodeen Chowdry* (2) and *Hem Chunder Ghose v. Thako Moni Debi* (3) referred to.

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

Mr. C. C. Dillon, Dr. Satish Chandra Banerji and Munshi Jang Bahadur Lal, for the appellants.

Messrs. D. N. Banerji and G. W. Dillon, and Munshi Govind Prasad, for the respondents.

\* Second Appeal No 426 of 1900 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 3rd of February, 1900, confirming a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 20th of April, 1899.

(1) (1886) L. R., 13 I. A., 106, p. 110. (2) (1874) L. R., 1 I. A., 106.  
(3) (1893) I. L. R., 20 Cal., 533.

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STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs appellants under the following circumstances:—On the 1st of June, 1878, one Naubat Singh executed a mortgage in favour of Mukand Singh and Munna Singh, the predecessors in title of the defendants first party. The mortgage comprised a 5 biswa share in the village Muzaffra, and shares in three other villages. Naubat Singh, Sher Singh and the mortgagees Mukand Singh and Munna Singh were joint owners of certain property. On the 6th of June, 1878, that is, five days after the mortgage, a partition took place between these persons, under which the whole of the village Muzaffra, including, of course, the five biswas mortgaged under the mortgage of the 1st of June, 1878, was allotted to the share of Mukand Singh and Munna Singh. On the 28th of June, 1880, Mukand Singh and the heirs of Munna Singh, who had in the meantime died, obtained a decree upon their mortgage against Naubat Singh. That was a decree for the sale of all the property comprised in the mortgage, including the 5 biswa share in Muzaffra. Before that decree was obtained, Naubat Singh and Sher Singh had executed a mortgage in favour of the present plaintiffs on the 21st of May, 1880, mortgaging to them all the property which had fallen into their share under the partition referred to above, and another village Atrauli. That mortgage included shares in two of the villages which had been mortgaged to Mukand Singh and Munna Singh in 1878. The plaintiffs were not made parties to the suit brought by Mukand Singh and the heirs of Munna Singh upon their mortgage. The plaintiffs brought a suit upon their own mortgage of 1880 without joining in that suit the prior mortgagees, and obtained a decree on the 20th of September, 1881. In execution of that decree they purchased, on the 20th November, 1885, a 5 biswa share in Chalessar and a 10 biswa share in Khera Buzurg, which included the shares in those villages comprised in the mortgage of 1878. On the 30th of November, 1884, the decree obtained by Mukand Singh and the heirs of Munna Singh was assigned by them to Lachmi Narain, defendant No. 6. The deed of assignment contained a stipulation to the effect that Lachmi Narain was not to proceed against the 5 biswa share of Muzaffra.

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Execution of the decree was taken out by Lachmi Narain, and he applied for the sale of the shares in the villages Khera Buzurg and Chalossar, which the plaintiffs had purchased in execution of their own decree. The plaintiffs preferred an objection, which prevailed in the Court executing the decree. Thereupon Lachmi Narain brought a suit, and obtained a decree on the 5th of November, 1886, declaring that the villages purchased by the plaintiffs were liable to sale in execution of the decree of 1880. In order to save the property from sale in pursuance of this decree, the plaintiffs discharged the decree of 1880, and brought the present suit for contribution against the principal defendants, the legal representatives of Mukand Singh and Munna Singh, upon the ground that the 5 biswa share of Muzaffra mortgaged to Mukand Singh and Munna Singh in 1878, and allotted to their share by partition, was liable to contribute rateably towards the mortgage-debt. The suit was resisted on the ground that at the time of the partition it was agreed between the mortgagor and the mortgagees that the 5 biswa share in the village Muzaffra should be released from liability, and should not be deemed to be a part of the mortgaged property. This contention found favour with both the Courts below, and those Courts, holding that it was intended that the mortgage should not be enforced against the village Muzaffra, and that the village in question was consequently not liable under the mortgage of 1878, have dismissed the suit.

The plaintiffs have preferred this appeal, and two contentions have been raised on their behalf. The first is that, notwithstanding the partition, the share in Muzaffra was still liable under the mortgage; the second contention is, that the defendants are estopped from asserting that the village in question is no longer liable under the mortgage of 1878 and the decree obtained on foot of it.

As regards the first contention, it may be observed that the lower appellate Court has found that at the time of partition both the parties to the mortgage intended that the mortgage should not be enforced against Muzaffra. That must be taken to be a finding of fact, and cannot be challenged in second appeal. In the next place, it has been held by their Lordships of the

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Privy Council in *Byjnath Lall v. Ramoodeen Chowdry* (1) that the mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, and that the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. The principle of this ruling was followed by the Calcutta High Court in *Hem Chunder Ghose v. Thako Moni Debi* (2). The learned Judges observed in that case:—"The mortgage was subject to the right of those sharers to enforce a partition, and, as their Lordships held in the cases referred to, thereby to convert what was an undivided share of the whole into a defined portion held in severalty. In the absence, therefore, of any fraud in effecting the partition, plaintiff has no right to proceed against that portion of the undivided mortgaged property which, on partition, was allotted to the defendants, but he can proceed against that portion of the undivided property which was allotted to the mortgagors defendants in substitution of their undivided share in the portion mortgaged." Consequently after the partition which took place in 1878, as to which there is no suggestion at all of fraud or collusion, the mortgage of 1878 could not be enforced against the 5 biswa share in the village Muzaffra which passed out of the share of the mortgagor under the partition. The plaintiffs, therefore, cannot claim that the said share was still liable to contribute towards the payment of the mortgage debt.

As to the plea of estoppel, it is based upon the fact that Mukand Singh and the heirs of Munna Singh, in suing upon their mortgage, asked for a decree for the sale, among other property, of the share in Muzaffra, and obtained a decree for the sale of that share; and it is urged that after having obtained such a decree, it is no longer open to their representatives to contend that the share in their possession is not liable under the decree. This might probably have been a valid contention had it been alleged that the plaintiffs had been induced by the fact of the existence of the said decree to purchase the shares comprised in that decree which they did purchase and to discharge

(1) (1874) L. R., 1 I. A., 106.

(2) (1893) I. L. R., 20 Cal., 533.

the decree. Before their purchase the decree had been assigned to Lachmi Narain, who applied for its execution, and in the deed of assignment it was distinctly provided that the share in Muzaffra should not be proceeded against, but should be deemed to be released from liability. It is not asserted on behalf of the plaintiffs that they were ignorant of the provisions of this sale-deed. On the contrary, the allegations contained in the plaint show that they were fully cognizant of what that sale-deed provided. They have set out among the terms of the sale-deed the clause which was to the effect that the decretal amount would not be recoverable from the 5 biswa share of Muzaffra. So far, therefore, from the plaintiffs having been misled by the decree of 1880, they were fully aware when they satisfied that decree that the share of Muzaffra was no longer liable under it. That being so, they cannot plead estoppel against the defendants, and claim contribution from them upon the ground of the liability of that share to contribute rateably towards the mortgage debt.

In our opinion this appeal must fail. We dismiss it with costs.

*Appeal dismissed.*

*Before Mr. Justice Blair and Mr. Justice Aikman.*

KALLU AND ANOTHER (DEFENDANTS) v. DIWAN (PLAINTIFF).\*

*Land-holder and tenant—Mortgage of holding by land-holder to tenant—Mortgagee's rights as tenant not merged in his rights as mortgagee.*

The fact of a tenant's taking a mortgage of land comprised in his holding from his landlord does not of itself extinguish the tenancy by merging the rights of the tenant in those of the mortgagee. The effect of such a mortgage on the tenant rights would be merely that they would be in abeyance. When the landlord redeemed the mortgage, the parties would revert to their former position, and the landlord would not be entitled to get possession of the land except by ejecting the tenant in due course of law.

IN the suit out of which this appeal arose the plaintiff claimed a decree for redemption of a usufructuary mortgage of 17 bighas 17 biswas situated in mauza Kaserwa Kalan, pargana Shamli, executed on the 1st of May 1890 in favour of the defendants and their deceased brother •Tarif. The plaintiff alleged that on the date mentioned he (the plaintiff) put the mortgagees in possession, and "accordingly they have been in

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\* Appeal No. 59 of 1901 under section 10 of the Letters Patent.