

decree-holder, not having paid the amount which he had to pay within the time limited by the decree, had lost the right to redeem the prior incumbrances. A further reference was therefore made to the lower appellate Court as to whether the appellant, on or before the 30th July, 1899, had tendered to the prior mortgagees, defendants 2 and 3, the amount due under their mortgages. It was found that the decree-holder had not tendered the amount due on the prior mortgages on or before the 30th of July 1899, but had deposited it in Court after the period limited by the decree had expired. On the question whether the decree-holder could avail himself of the deposit so made, the appeal was referred to a Division Bench, by which, on the 28th May, 1902, judgment was delivered as below.]

BANERJI and AIKMAN, JJ.—The ruling in *Ram Lal v. Tulsa Kuar* (1) is distinguishable from the present case. Besides, the view taken in that case was departed from by one of the learned Judges who was a party to that decision in the later case of *Nihali v. Mittar Sen* (2). There is also in favour of the appellant the ruling in *Raham Ilahi Khan v. Ghasita* (3), and the principle of the Full Bench ruling in *Sita Ram v. Madho Lal* (4) also supports the case for the appellant. That being so, the payment of the amount of the prior mortgages by the appellant was sufficient to discharge those mortgages. We allow the appeal, and, setting aside the order of the Court below, we remand the case to the Court of first instance, with directions to re-admit it under its original number in the register and proceed to try it on the merits. The appellant will have his costs of this appeal. Other costs will follow the result.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
 CHAJMAL DAS (OBJECTOR) v. LAL DHARAM SINGH (OPPOSITE PARTY).*

1902
 May 31.

Civil Procedure Code, section 246—Execution of decree—Cross decrees—Set-off—Decree against which set-off is claimed not before the Court for execution.

Section 246 of the Code of Civil Procedure clearly contemplates that where one decree is sought to be set off against another, the decree against

* First Appeal No. 224 of 1901 from an order of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 28th June 1901.

(1) (1896) I. L. R., 19 All., 180. (3) (1898) I. L. R., 20 All., 375.
 (2) (1898) I. L. R., 20 All., 446. (4) (1901) I. L. R., 24 All., 44.

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which the set-off is asked for must be before the Court for execution. *Rewa Mahlon v. Ram Kishen Singh* (1) referred to.

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

Munshi *Gokul Prasad* and Munshi *Haribans Sahai*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BANERJI, J.—The facts out of which this appeal has arisen are these. One Dharam Singh obtained a decree against Brij Bhukan Lal and others on the 21st September 1895. That was a decree for sale upon a mortgage. After the sale of the mortgaged property the decree-holder obtained, on the 10th February, 1900, a decree under section 90 of the Transfer of Property Act. In execution of this decree he caused a decree held by Brij Bhukan Lal and others against one Chajmal Das, dated the 9th September, 1892, to be attached. It is common ground that the decree last mentioned was passed by the Court of the Subordinate Judge of Mainpuri, and was not in course of execution at the time when it was attached. It is also admitted that Dharam Singh by virtue of the attachment did not apply for the execution of the decree. It appears that Chajmal Das holds a decree, dated the 5th October, 1882, against Brij Bhukan Lal and others. He came forward with an application to the Court which had attached Brij Bhukan's decree against Chajmal Das, and prayed that the amount of his decree, dated the 5th October, 1882, should be set off under section 246 of the Code of Civil Procedure against the amount of the decree held against him by Brij Bhukan Lal and others. The lower Court has refused this application, and from the order of the lower Court this appeal has been preferred.

In our opinion the application of Chajmal Das was premature. Section 246 of the Code of Civil Procedure clearly contemplates that when a decree is sought to be set-off against another, the decree against which the set-off is asked for must be before the Court for execution. This is evident from the position of section 246 in the Code. Chap. XIX, in which the

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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Appeal dismissed.

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

1902
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.