

in suits for recovery of possession of immovable property, as follows—"Mesne profits mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom together with interest on such profits." We have not materials before us to enable us to say what amount should be allowed for mesne profits in this case; and moreover we do not know when the plaintiffs got possession of the disputed property. We shall, therefore, leave the actual amount of profits to which the plaintiffs are entitled for the determination of the execution department, directing attention, however, to the true criterion for estimating the mesne profits as laid down in section 211. In calculating such mesne profits the execution department should not award the gross rental of the property unless it is satisfied that the entire rental was received by the lessees defendants, or with ordinary diligence might have been received by them. We may also point out that the ordinary collection expenses ought to be allowed to the defendants in this case, if any have been incurred. We accordingly so far modify the decree of the Court below with costs.

Decree modified.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DEBI PRASAD (DECREE-HOLDER) v. JAI KARAN SINGH AND OTHERS
(JUDGMENT-DEBTORS).*

1902
May 28.

Act No. IV of 1882 (Transfer of Property Act), sections 88, 89—Mortgage—Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment.

In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court. *Held*, that the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. *Nihali v. Mittar Sen* (1), *Raham Ilahi Khan v. Ghasita* (2), and *Sita Ram v. Madho Lal* (3), referred to. *Ram Lal v. Tulsa Kuar* (4) distinguished.

*Second Appeal No. 378 of 1900 from a decree of H. E. Holme, Esq., District Judge of Azamgarh, dated the 26th January 1900, confirming a decree of Munshi Rai Izzat Rai, Munsif of Azamgarh, dated the 18th November 1899.

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

1902

DEBI
PRASAD
v.
JAI KARAN
SINGH.

THE facts of this case sufficiently appear from the first order of remand made by the High Court.

Munshi *Kalindi Prasad*, for the appellant.

Munshi *Gokul Prasad* (for whom Babu *Sital Prasad Ghosh*), for the respondents.

AIKMAN, J.—The appellant got a decree for sale under the provisions of section 88 of the Transfer of Property Act. The decree was for sale on redemption by the appellant of two prior mortgages, one simple and one usufructuary. He paid into Court certain sums for satisfaction of the prior mortgages, and applied for the sale of the property. The Court of first instance disallowed his application on the ground that the payments by him had not been made within the time prescribed by the decree. The decree-holder appealed. The learned District Judge dismissed his appeal, although not on the ground upon which the Court of first instance had proceeded. The learned District Judge states that the decree-holder had paid the principal only of the two prior mortgages. It is admitted by the *vakil* for the respondent that the learned Judge has fallen into error as regards one of the mortgages, *viz.* the simple mortgage, inasmuch as the record shows that the appellant paid not only the principal, but also the interest due upon that mortgage. With regard to the usufructuary mortgage, the learned Judge says that the mortgagee had possession in lieu of interest, and he appears to be under the impression that so far as the usufructuary mortgage is concerned the appellant decree-holder had paid all that was due under it. This is not admitted by the respondent. It is stated that there is still a considerable sum due to the usufructuary mortgagee on account of interest. In order to enable me to dispose of this appeal, I find it necessary to refer to the lower appellate Court the following issue for trial under the provisions of section 566 of the Code of Civil Procedure, *viz.*, whether the amount paid by the decree-holder, Lala Debi Prasad, was sufficient to discharge the amount due under the prior usufructuary mortgage. On the return of the finding, ten days will be allowed for objection.

[A return was made to this reference that the decree-holder had paid all that was due under the two prior mortgages. But it was argued that the

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.