

should be held under that section, and not under any other section. Mr. *Dillon* contended that if the Magistrate were to proceed under section 145 a breach of the peace might take place before the proceedings under that section could be completed. A remedy, however, for such a case is provided in the section itself. The second proviso to sub-section (4) empowers the Magistrate in case of emergency to attach the subject of dispute pending his decision under the section. The order under section 107, therefore, was not a proper order, and should not have been made. This view is supported by the recent ruling of the Calcutta High Court in *Saroda Prosad Singh v. The Emperor* (1). If the Magistrate still thinks that there is likelihood of a breach of the peace occurring in consequence of a dispute concerning land, he may proceed under section 145; but he must also have regard to the fact that there has been litigation between the parties or their predecessors in title in the Civil Court by which their rights in regard to the property in question have been determined. For the above reasons, acceding to the recommendation of the learned Sessions Judge, I set aside the orders passed by the Joint Magistrate on the 25th of November, 1902.

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 MAHADRO
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 APPELLATE CIVIL.

 1903
April 14.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

JADU NATH PRASAD (JUDGMENT-DEBTOR) *v.* JAGMOHAN DAS
(DECREE-HOLDER).*

Civil Procedure Code, section 230—Execution of decree—Limitation—Act No. IV of 1882 (Transfer of Property Act), sections 88 and 90.

Held that a decree which is a combination of a decree for sale on a mortgage under section 88 of the Transfer of Property Act, 1882, with the decree provided for by section 90 of the same Act, cannot be treated as a decree for money to which the provisions of section 230 of the Code of Civil Procedure are applicable. *Jogul Kishore v. Cheda Lal* (2) followed. *Ram Charan Bhagat v. Sheobarat Rai* (3) and *Kartick Nath Pandey v. Juggernath Ram Marwari* (4) referred to in the judgment of Aikman, J.

* First Appeal No. 182 of 1902 from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 28th of July 1902.

- (1) (1900) 7 C. W. N., 142. (3) (1894) I. L. R., 16 All., 418.
(2) Weekly Notes, 1893, p. 184. (4) (1899) I. L. R., 27 Calc., 285.

1903

JADU NATH
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THIS appeal arises out of an application for the execution of a decree. The decree was passed on the 20th of December 1884, and was in effect a combination of a decree under section 88 and one under section 90 of the Transfer of Property Act, 1882. It directed that the amount found to be due to the plaintiffs should be realized first by sale of the mortgaged property, and if that should prove insufficient, then by sale of any other property belonging to the judgment-debtor. Execution of this decree was taken out from time to time, and apparently all the mortgaged property was sold, but the amount realized by its sale was not sufficient to satisfy the decree. The decree-holders on the 22nd of August 1901 presented an application praying that certain movable property belonging to the judgment-debtor might be sold. To this application it was objected that execution of the decree was barred under the provisions of section 230 of the Code of Civil Procedure. The lower Court (Subordinate Judge of Benares) overruled this objection and granted the decree-holder's application. The judgment-debtor accordingly appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Devendra Nath Ohdedar*, for the appellant.

Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and Munshi *Gokul Prasad*, for the respondent.

BURKITT, J.—This is an appeal from an order passed by the Subordinate Judge of Benares on an application for execution of decree. The decree was made on the 20th of December, 1884, and now more than 18 years afterwards we are called on to say whether certain movable property can or cannot be attached in execution of it. It was objected in the lower Court that execution was barred by the limitation rule contained in section 230 of the Code of Civil Procedure. The Subordinate Judge overruled that objection. Hence this appeal. In our opinion the decision of the Subordinate Judge is right. The decree in this case was passed very soon after the Transfer of Property Act came into force, at a time when Courts generally were not familiar with the manner in which decrees under sections 88, 89 and 90 should be drawn up. The decree here, we might say, is a combination of a decree under sections 88 and

90 of the Transfer of Property Act. It directs that the amount found to be due to the plaintiffs should be realized first by sale of the mortgaged property, and if that should prove insufficient, then by the sale of any other property belonging to the judgment-debtor. Execution was taken out from time to time, and apparently all the mortgaged property has been sold. It has proved insufficient to discharge the decree. The present application was put in on the 22nd of August, 1901, praying that certain movable property belonging to the judgment-debtor might be sold. Two objections were taken to the execution of this decree. The first has not been pressed. The second is that it is barred by section 230 of the Code of Civil Procedure. That objection is, in our opinion, without foundation. The decree is a decree of a nature that, under rulings both of this and of the Calcutta High Court, is exempted from the operation of section 230. The decree under execution is not one for payment of money or delivery of other property within the meaning of the third clause of section 230 of the Code. We know of no authority to the effect that this decree, which at one time was a mortgage decree, and as such, exempt from the operation of the rule contained in section 230, may subsequently become a decree to which that section would apply. The point now under our consideration has been decided by this Court in the case of *Jogul Kishore v. Cheda Lal* (1). That case apparently was a case on all fours with the case before us. In it the learned Judges are reported to have said as follows:—"It is true that it is not strictly a decree prepared under section 88 of the Transfer of Property Act; it is a combination of the decree proper under section 88 and of the supplementary decree which might be given after the exhaustion of the decree under section 88, under the provisions of section 90; but we think it is unquestionably a decree other than the decree referred to in section 230, and therefore not liable to the disabilities attached by that section to a decree for money more than twelve years old." We see no reason why we should dissent from the opinion therein expressed, and in our opinion that case governs the appeal now before us. We therefore dismiss the appeal with costs.

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(1) Weekly Notes, 1893, p. 184.

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AIKMAN, J.—I am of the same opinion. It is certainly an extraordinary thing that an application for the realization of money decreed to the respondent, or rather to his predecessor in title, so long ago as the 20th of December, 1884, should now be made, and that that application should be for the sale of articles of movable property set forth in the decree-holder's application. But the amount found due to the decree-holder has not been fully paid, and it is for the judgment-debtor who objects to the application to show that it is too late for the decree-holder to get his money. In support of his objection the judgment-debtor relies on the provisions of section 230 of the Code of Civil Procedure, which allow a period of twelve years, counting from the date of final decree, within which an application may be made to execute a decree for the payment of money. It was held by this Court in *Ram Charan Bhagat v. Sheobarat Rai* (1) that a decree directing the sale of hypothecated property is not a decree for the payment of money to which the limitation provided by section 230 applies, and that case has been followed by the Calcutta High Court in *Kartick Nath Pandey v. Juggernath Ram Marwari* (2). It is true that this decree is not purely a decree directing the sale of hypothecated property for the realization of money found due. It is of a composite nature, partaking both of the nature of the decree referred to in section 88 and of that referred to in section 90 of the Transfer of Property Act. But, as has been shown by my learned colleague, it has been held by this Court in the case cited by him that a composite decree of this nature is not a decree for the payment of money within the meaning of section 230, and the learned Judges who decided the case in the Calcutta High Court which has just been referred to take the same view. This being so, it seems clear that the judgment-debtor's objection fails and was properly repelled by the Court below.

Appeal dismissed.

(1) (1894) I. L. R., 16 All., 418.

(2) (1899) I. L. R., 27 Calc., 285.