

ground of misjoinder of causes of action." In his judgment, Aikman, J., observes:—"I find myself unable to hold that the terms of section 44 apply to this case." He then refers to the case in the Madras High Court to which we have referred, and concurs in the interpretation there put upon the provisions of section 44. We also think that this case does not come within the provisions of section 44, and that the Subordinate Judge was in error. We must allow the appeal and remand the case under the provisions of section 562 of the Code of Civil Procedure for trial as regards the mortgage by conditional sale of the *sir* lands. We may observe that if the Subordinate Judge had considered it inadvisable to try the two causes of action arising under the two mortgages in the same suit, it was open to him under the provisions of section 45 to order separate trials. He did not, however, do so, labouring under the mistake that section 44, and not section 45, applied to the case.

The appellants will be entitled in any event to the costs of this appeal.

Appeal decreed and cause remanded.

Before Mr. Justice Blair.

SALIG RAM (DECREE-HOLDER) v. MURADAN AND OTHERS (JUDGMENT-DEBTORS).*

Act No. IV of 1882 (Transfer of Property Act), sections 86 and 87—Mortgage—Redemption—Redemption possible at any time until an order absolute under section 87 has been made.

A mortgagor who has obtained a decree for redemption may pay in the decretal amount, and obtain redemption at any time up to the making of an order absolute under section 87 of the Transfer of Property Act, 1882. Nor is the mortgagor deprived of his right to redeem by the fact that under an order of Court, not being an order under section 87, the mortgagee has been put into possession of the mortgaged property. *Nihalí v. Mittar Sen* (1) and *Somesh v. Ram Krishna Chowdhry* (2) followed.

THIS was an appeal arising out of proceedings in execution of a decree for foreclosure of a mortgage. The decree-holder

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* Second Appeal No. 841 of 1901, from an order of Maulvi Syed Tajamul Husain, Subordinate Judge of Farrukhabad, dated the 6th day of August, 1901, reversing the decree of Babu Hari Mohan Banerji, Munsif of Fatehgarh, dated the 3rd day of May 1901.

(1) (1898) I. L. R., 20 All., 448.

(2) (1900) I. L. R., 27 Calc., 705.

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held a usufructuary mortgage over certain zamindari property of the judgment-debtors, and had obtained a decree under section 86 of the Transfer of Property Act on the 7th of July, 1893. The mortgagee being in possession in lieu of interest, the decree provided that the mortgagors should pay the principal sum due under the mortgage by the 7th of January, 1894. The mortgage money was not paid within the period fixed by the decree, but the decree-holder never applied for an order under section 87 of the Transfer of Property Act. He, however, on the 6th of July, 1896, presented an application for execution of the decree, alleging that as the judgment-debtors had not paid the amount due under the decree within the period fixed by the Court, the decree-holder should be put into possession of the mortgaged property, and this notwithstanding the fact that he was already in possession. The Court executing the decree issued an order to the amin directing him to put the decree-holder into possession, and the decree-holder executed a dakhil-namah acknowledging that he had been put into possession of the property mentioned in the decree on the 1st of September, 1896. On the 8th of February, 1899, the decree-holder applied for mutation of names upon the allegation that he had been a long time in possession of the property under a purchase made at auction, and ignoring entirely his true title to the property. On this false application the decree-holder obtained mutation of names on the 17th of March, 1899, the names of the judgment-debtors being expunged. On the 6th of February, 1901, the judgment-debtors paid into Court the principal amount declared to be due under the mortgage and prayed to be allowed to redeem the property, basing their application on the ground that the decree-holder had never obtained from the Court an order absolute under section 87 of the Transfer of Property Act.

The Court of first instance (Munsif of Farrukhabad) dismissed the judgment-debtors' application. On appeal the lower appellate Court (Subordinate Judge of Farrukhabad) reversed the Munsif's decision and declared the judgment-debtors entitled to redeem. From this order the decree-holder appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and *Munshi Gulzari Lal*,
for the appellants.

Mr. *Ishaq Khan* and *Maulvi Muhammad Ishaq*, for the
respondents.

BLAIR, J.—This is a case in which a mortgagee having obtained a decree which is in effect a decree *nisi* under section 86 of the Transfer of Property Act, and the mortgagor having failed to pay the money within the time limited by that decree, he having deposited the money in Court at a later period than that fixed, the mortgagee in appeal now claims that the rights of the mortgagor to redeem have been absolutely determined. The facts upon which he relies for his contention are, that an application was made by the mortgagee that he should be put into possession of the mortgaged property, and that he had obtained an order to that effect. He argued that such application was, in substance and effect, an application under section 87 of the Transfer of Property Act, and I think it may be reasonably inferred that he intended to argue that from the fact that possession was given to the plaintiff it might be reasonably inferred that the right to redeem had been foreclosed by the Court granting such application. Unfortunately for him this contention has been already disposed of. The general proposition that the right of the mortgagor to redeem is not concluded otherwise than by an order made under section 87 of the Transfer of Property Act, has been laid down in several cases in this Court; and the fact that possession has been obtained by the plaintiff has been held in substance not to better the position of the mortgagee, if the mortgagor pays in the mortgage money before an order under section 87 is obtained. In a case to which I was a party, namely *Nihali v. Mittar Sen* (1) possession had already been obtained, and I find that in a recent case—*Somesh v. Ram Krishna Chowdhry* (2)—the Calcutta Court has ruled to the same effect. In the absence of authority to the contrary—and none has been cited—I abide by the ruling reported in *I. L. R.*, 20 *All.*, p. 446, and dismiss this appeal with costs.

Appeal dismissed.

(1) (1898) *I. L. R.*, 20 *All.*, 446.

(2) (1900) *I. L. R.*, 27 *Calc.*, 705.

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