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EMPEROR
v.
ALI.

before the Court. Accordingly I direct that the record be returned to the learned Sessions Judge with directions that he proceed with the trial of the charge made against Banno.

APPELLATE CIVIL.

1902

December 12.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

BALKISHANJI MAHARAJ (OBJECTOR) v. MITHU LAL
(DECREE-HOLDER).*

Act No. IV of 1882 (Transfer of Property Act), section 89—Mortgage—Order absolute for sale of a portion of the mortgaged property only—Proceeds of sale of such portion insufficient to satisfy decree—Application for further order absolute for sale of other property.

If an order absolute for the sale of a portion only of the mortgaged property has been obtained by the mortgagee decree-holder and the proceeds of the sale of that portion prove insufficient to satisfy the decretal debt, there is nothing in law to prevent the decree-holder from obtaining a further order to sell another portion of the mortgaged property, provided that his application is within limitation.

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

Mr. G. W. Dillon (for whom Dr. Satish Chandra Banerji), for the appellant.

Babu Jogindro Nath Chaudhri (for whom Mr. M. L. Agarwala,) for the respondent.

BURKITT and AIKMAN, JJ.—This is an appeal by a judgment-debtor in an execution case. On the 23rd of June, 1900, Musammat Rukia got a decree under section 88 of the Transfer of Property Act for sale of certain property mortgaged to her in default of payment of the mortgage money. On the 26th of February, 1901, she got an order absolute under section 89 of that Act for sale of a portion of the mortgaged property, viz. a 5-biswa share in mauza Pipalgaon. Thereafter she transferred her decree to the respondent Bohra Mithu Lal, who has been allowed under section 232 of the Code of Civil Procedure to proceed with the execution of the decree. The assignee has now applied for an order absolute under section 89 for sale of

* First Appeal No. 187 of 1902, from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 22nd July, 1902.

another portion of the mortgaged property. The Court below has given the assignee the order he asked for. The present appeal is brought against that order of the lower Court. The grounds of appeal are not very artistically worded; but the learned vakil explains that he means by them to contend that the decree-holder having obtained an order under section 89 for sale of a portion of the mortgaged property, any further application for an order under that section is barred; in other words, he contends that the making of the first order extinguished the power of the Court under section 89, and precludes it from passing any further order under that section. So far as we know, or can ascertain, this question is entirely a novel one. After giving the point our careful consideration, we have arrived at the conclusion that the decision of the Court below is right. It is quite clear from the terms of section 89 that when an application is made for an order absolute under that section, the Court may pass an order that the mortgaged property, or a sufficient part thereof, be sold. Assuming that an order has been obtained for sale of a part of the mortgaged property and that the proceeds of that sale prove insufficient to discharge the decretal amount, we cannot see anything in law to prevent the mortgagee decree-holder from asking for a further order to sell another part of the mortgaged property, provided his application is within time. It has been held by this Court that an application under section 89 is an application in execution. There can be no doubt that successive applications for execution (say of a money decree) are admissible so long as the decree has not been fully satisfied, and execution of the decree has not become time-barred. We see no reason why a different principle should be applied to the case of a decree for money to be realized by sale of mortgaged property. For these reasons we see no reason why a mortgagee who has obtained a decree under section 88 of the Transfer of Property Act for sale of several parcels of the property mortgaged to him, and who considers that the sale of one or more portions of those items will suffice to discharge the decretal amount should not be allowed to apply under section 89 for an order absolute for the sale of those parcels only. If his expectation is not fulfilled, we cannot

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see anything to preclude him from proceeding against other portions of the property, so long as he does so within the time allowed by law. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1902
December 13.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

DEBI SINGH AND OTHERS (PLAINTIFFS) v. JIA RAM AND OTHERS (DEPENDANTS).*

Hindu Law—Mitakshara—Joint Hindu family—Mortgage of joint family property executed by the father—Decree and sale of mortgaged property—Suit by sons to recover their shares—Act No. IV of 1882 (Transfer of Property Act), section 85—Effect of sale.

Where property belonging to a joint Hindu family has been sold by auction in execution of a decree obtained upon a mortgage of such property executed by the father of the joint family, it is open to the sons to sue for the recovery of their shares in the property so sold, if they were not made parties to the suit in which the decree against their father was obtained, provided that the mortgagee had at the time of suit notice of their interests in the property. But their suit must be based upon some ground which under the Hindu law would free them from liability as sons in a Hindu joint family to pay their father's debts. A sale once having taken place, the sons cannot succeed in a suit to recover the property sold upon the sole ground that they were not made parties to the original suit. *Kaunsilla v. Chandar Sen* (1) overruled. *Hargu Lal Singh v. Gobind Rai* (2) and *Bhawani Prasad v. Kalla* (3) distinguished. *Rewa Mahton v. Ram Kishen Singh* (4), *Nanomi Babuasia v. Modhun Mohun* (5), *Suraj Bansi Koer v. Sheo Proshad Singh* (6), *Malkarjun v. Narhari* (7) and *Bhagbut Pershad Singh v. Girja Koer* (8) referred to.

Jia Ram and his three sons, Debi Singh, Balwant Singh and Dharam Singh, constituted a joint Hindu family governed by rules of the Mitakshara law. As such joint Hindu family Jia Ram and his sons owned a 10 biswansi share in a holding in

* Appeal No. 55 of 1901, under section 10 of the Letters Patent.

(1) (1900) I. L. R., 22 All., 377.

(2) (1897) I. L. R., 19 All., 541.

(3) (1895) I. L. R., 17 All., 537.

(4) (1886) I. L. R., 14 Calc., 18.

(5) (1885) I. L. R., 13 Calc., 21.

(6) (1879) I. L. R., 6 I. A., 88.

(7) (1900) I. L. R., 25 Bom., 337.

(8) (1888) I. L. R., 16 Calc., 717.