

relinquish his holding. The same difficulty extends to the second contention. A tenant who wishes to relinquish a holding and to be no longer liable for the rent of the same can do so by a notice in writing only, and by relinquishing the whole of the land under his lease; but this section does not say that such a tenant cannot relinquish a portion of his land in any other way. He does so at his peril, and may continue liable for the rent, as the zamindar may refuse to take over a portion only of the holding; but where the zamindar takes over a portion of the holding and re-lets or occupies it, as in the present case, the tenant is no longer liable for the rent of the portion so let or occupied. This plea also fails. The appeal is dismissed with costs.

*Appeal dismissed.*

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WABIS  
KHAN  
v.  
DAULAT  
KHAN.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.*  
SHEO PRASAD (DECREE-HOLDER) v. BEHARI LAL (JUDGMENT-DEBTOR).  
*Act No. IV of 1882 (Transfer of Property Act), sections 89, 90—Execution of decree—Mortgage—Decree for sale of part only of the mortgaged property—Property sold insufficient to satisfy the mortgage debt—Application for decree over under section 90.*

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August 7.

A mortgagee holding a simple mortgage by which certain immovable property was hypothecated, sued for, and obtained, a decree for the sale of part only of the mortgaged property. Such portion having been sold, and the net proceeds of the sale having proved insufficient to satisfy the mortgage-debt, the decree-holder applied for a decree over under section 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor.

*Held* that the original decree having been in fact passed, whether rightly or wrongly, for sale of a part only of the mortgaged property, and the sale of that part having realized an amount not sufficient to satisfy the mortgage-debt, there was, under the circumstances, no objection to the mortgagee obtaining a decree over under section 90.

*Seemle* that there is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property, and, if the sale of the remaining portion proves insufficient to satisfy the mortgage-debt, obtaining a decree under section 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor.

IN this case the respondent Behari Lal mortgaged to the appellants Sheo Prasad his ancestral share in certain property

\* Second Appeal No. 1292 of 1900, from a decree of Pandit Ram Autar Pande, District Judge of Mainpuri, dated the 8th day of August 1900, reversing an order of Pandit Rajnath Saheb, Subordinate Judge of Mainpuri, dated the 26th day of November 1898.

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together with certain other property which had been purchased by him. The mortgage was in the usual form containing a personal covenant for payment of the mortgage debt, the property comprised in the mortgage being simply hypothecated as a security. Sheo Prasad instituted a suit for sale on this mortgage; but in his plaint he asked for sale of the purchased property only, for the reason that other portions of the property mortgaged were subject to prior incumbrances. A decree was passed in accordance with the prayer in the plaint, and the property sought to be sold was sold, but the proceeds of the sale proved insufficient to satisfy the decree. Under these circumstances the decree-holder applied for a decree under section 90 of the Transfer of Property Act for the balance due to him. The judgment-debtor raised an objection that as all the property comprised in the mortgage had not been sold, the decree-holder was not entitled to obtain a decree under section 90. The Court of first instance (Subordinate Judge of Mainpuri) disallowed the judgment-debtor's objection and gave the decree-holder a decree under section 90. On appeal the District Judge, relying on the ruling of the High Court in *Badri Das v. Inayat Khan* (1) and *Muhammad Akbar v. Munshi Ram* (2), and holding that a decree under section 90 could not be given unless and until the whole of the mortgaged property was sold, allowed the judgment-debtor's objection and dismissed the application of the decree-holder. The decree-holder accordingly appealed to the High Court.

*Munshi Gokul Prasad*, for the appellant.

*Pandit Mudan Mohan Malaviya*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This appeal raises a new point upon the meaning of several sections of the Transfer of Property Act. One Behari Lal mortgaged his share in certain ancestral property, and also his shares in property which he had purchased, to the appellant Sheo Prasad. The mortgage is in the usual form, and contains an agreement on the part of the mortgagor for payment of the mortgage debt, the property comprised in the mortgage being simply hypothecated as a security. The mortgagee instituted a suit for sale on foot of the mortgage, but

(1) (1900) I. L. R., 22 All., 404.

(2) Weekly Notes, 1899, p. 203.

in the prayer to his plaint he asked for an order for sale of the purchased shares of the property only, the reason being that the other portions of the property were subject to prior incumbrances. A decree was passed according to the prayer in the plaint for sale of the limited portion of the mortgaged property to which we have referred, and that property was sold under that decree, but the proceeds of the sale proved insufficient to satisfy the mortgage debt. Accordingly the appellant applied to the Court under section 90 of the Transfer of Property Act for a decree for the balance due to him. An objection was raised to this application on the ground that as all the property comprised in the mortgage had not been sold, the mortgagee had no right to obtain a decree under section 90. The Subordinate Judge disallowed this application, but upon appeal the District Judge reversed his decree, and dismissed the plaintiff's application, on the ground that no order can be passed under section 90 of the Transfer of Property Act until the entire property comprised in the mortgage has been sold. It has been urged before us that the policy of the framers of the Act was to preclude the mortgagee from taking any proceeding against his mortgagor in respect of his claim before he had exhausted his remedies against the mortgaged property; and that inasmuch as in this case a portion of the mortgaged property admittedly had not been sold, the benefits given by section 90 were not open to the mortgagee.

Section 89, which is relied upon on behalf of the respondents, provides that if the defendant does not pay the amount ascertained to be due by him to the mortgagee, the latter "may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold." The subsequent section provides as follows:—"When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum." It is contended that under section 89 the Court is bound to pass an order for the sale of the mortgaged property (*i. e.*, the whole of the mortgaged property), or a sufficient part thereof to satisfy the debt, and that it is only

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when the Court has passed such an order, and the mortgaged property has been sold, and the proceeds of sale have proved insufficient to satisfy the debt, that the mortgagee can apply under the provisions of section 90 for a decree for payment of the balance due to him. It seems to us that great hardship might be entailed on a mortgagee if he could not relinquish his claim to part of the property purporting to be comprised in his mortgage, except on the penalty of losing his right under section 90, if he found that it was his advantage to do so. For example, it might be that a portion of the property was heavily incumbered; it might also be that the mortgagor's title to a portion of the property was in dispute: in either of these cases the result of endeavouring to sell the portion so incumbered, or the portion the title to which was in dispute, might entail heavy expenses and protracted litigation. Therefore there seems no reasonable objection under such circumstances to the abandonment by a mortgagee of his claim in respect of a part of his security, and to his seeking relief by sale of the remaining portion. We fail to see that there is anything contrary to the policy of the Act in allowing this to be done. This, however, it is unnecessary for us to determine in the present appeal. A decree has been passed under section 88 for the sale of a portion of the mortgaged property; it is not for us to say whether that decree was passed rightly or wrongly; it is a subsisting and binding decree which has not been impeached, and we must treat it as valid. Under the decree so passed the mortgagee, who has sold all the property included in the decree and ordered to be sold, has failed to realize the entire amount of his debt. We have only, therefore, to consider whether the provisions of section 90 apply. That section directs that when the nett proceeds of "any such sale" are insufficient to pay the amount due, the Court may pass a decree for such sum. According to the ordinary meaning of the language used in this section, "any such sale" means a sale which had been directed under the previous sections of the Act. It is not disputed but that a sale has taken place under the provisions of section 89. Consequently as it appears to us, whether or not the Court was wrong in passing a decree under section 89 for sale of a portion only of the mortgaged property, it is clear that

without impeaching and setting aside that decree, the Court would not be justified in holding that no order could be passed under section 90. For these reasons we allow the appeal, set aside the order of the lower appellate Court, and restore the order of the Subordinate Judge. The objector respondent must pay the costs of the objection in all Courts.

*Appeal decreed.*

## FULL BENCH.

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August 11.

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

RAM LAL (DEFENDANT) v. MUNAWAR SHAH (PLAINTIFF).\*

*Act No. XII of 1881 (N.-W. P. Rent Act), section 148—Land-holder and tenant—Suit for rent—Plea of payment to third person—Suit by such third person for declaration of title and for possession—Limitation.*

*Held* that the proviso to section 148 of the North-Western Provinces Rent Act, 1881, refers only to a suit to recover the rent in respect of which the suit mentioned in the first paragraph of the section has been brought, which rent has actually been paid to a third person. The proviso was not intended to abridge the period of limitation for a suit on title to obtain possession or a declaration of possession of the land out of which the rent in dispute issues. *Dasrath Rai v. Bhirgu Rai* (1) overruled. *Muhammad Salim v. Abdul Rahim* (2), *Ganga Prasad v. Baldeo Ram* (3), *Kishen Coomar Shaha v. Jaaban Singh* (4), *Hurronath Roy v. Srishteadhur Doss* (5) and *Ishur Chunder Sen v. Beepin Behary Roy* (6) followed. *Bhagmanee Koonwer v. Fuzund Ali* (7) referred to by KNOX, J.

THE facts of this case are as follows:—

One Ram Lal brought a suit for the rent of a holding for the years 1302 and 1303 Fasli against the tenants of the holding. The tenants pleaded that they had paid the rent for the years in question *bond fide* to one Munawar Shah. An inquiry was held by a Revenue Court under the provisions of section 148 of the North-Western Provinces Rent Act, 1881, and that Court found that Ram Lal was entitled to the rent in question.

\* Second Appeal No. 1105 of 1900, from a decree of Babu Nihal Chandar, Subordinate Judge of Shahjahanpur, dated the 9th of June, 1900, reversing the decree of Rai Bageshri Dial, Munsif of East Budaun, District Shahjahanpur, dated the 31st of August, 1899.

(1) (1901) I. L. R., 23 All., 434. (4) (1866) 5 W. R., Act X Rulings, 85.  
 (2) Weekly Notes, 1885, p. 261. (5) (1867) 7 W. R., 152.  
 (3) (1888) I. L. R., 10 All., 347. (6) (1876) 25 W. R., C. R., 481.  
 (7) (1866) N.-W. P. H. C. Rep., 1866, E. C. A., 20.