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that under no circumstances was the one party to call for and the other to give delivery of the silver to which the contracts related. The defendants have, in our opinion, failed to discharge the *onus* which lay on them, and on this point we fully agree with the finding of the Court below.

As to the third plea—that *badni* transactions were not within the scope of the business of the partnership between the parties—the learned Subordinate Judge finds against the defendants. He says that the evidence proves that the partnership related both to cash and *badni*. We have not been referred to any evidence from which we may conclude that this finding of the Court below is not justified. The result is that this appeal must fail, and we dismiss it with costs.

*Appeal dismissed.*

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July 23.

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

SHAIIDA HUSAIN (PLAINTIFF) v. HUB HUSAIN AND OTHERS  
(DEFENDANTS).\*

*Civil Procedure Code, section 108—Decree ex parte—Decree set aside as against one only of the joint judgment-debtors—Fresh decree ultimately passed at variance with the decree standing against the other judgment-debtor—Application for order absolute for sale under section 89 of Act No. IV of 1882—Practice.*

A mortgagee sued his mortgagors (three in number) for sale of the mortgaged property, and obtained a decree for payment of Rs. 2,270, or in default, for sale. One of the judgment-debtors, as against whom the decree was *ex parte*, applied under section 108 of the Code of Civil Procedure, and got the decree set aside as against himself. Subsequently, whilst the decree against the other two mortgagors became final, the third mortgagor succeeded in proving that the amount of the mortgage-debt was only Rs. 1,556-15-0, and a decree was passed against him accordingly. On application by the decree-holder for an order absolute for sale, the Court, under these circumstances, directed that an order absolute under section 89 of the Transfer of Property Act should issue for the sale of all the mortgaged property, but that the property belonging exclusively to that judgment-debtor who had successfully objected, should not be sold, unless and until the mortgaged property belonging to the others had been sold, and had failed to realize a sum sufficient to satisfy the smaller decree.

\* Second Appeal No. 1196 of 1900, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 7th of June, 1900, reversing a decree of Babu Nihal Chander, Subordinate Judge of Shahjahanpur, dated the 22nd of July, 1899.

IN this case the plaintiff, Shaida Husain held a mortgage over certain property belonging to Hub Husain. Subsequent to the date of this mortgage Mahbub Husain, the son and Matlub-un-nissa, the wife of Hub Husain purchased part of the mortgaged property from Hub Husain. The plaintiff brought a suit upon his mortgage against all three persons, and obtained a decree for sale against them under section 88 of the Transfer of Property Act; the amount ascertained to be due on the mortgage being Rs. 2,270. As against Mahbub Husain this decree was *ex parte*. He accordingly made an application under section 108 of the Code of Civil Procedure to get the decree set aside as against him, and in this application he was successful and the decree was set aside as against him. When the suit was subsequently reheard as between the plaintiff and Mahbub Husain the latter succeeded in proving that the sum actually due on the mortgage was only Rs. 1,556-15-0 and not Rs. 2,270. After both these decrees had become final two applications by the decree-holder asking for a decree absolute under section 89 of the Transfer of Property Act were heard by the Subordinate Judge and were dismissed. The plaintiff decree-holder appealed, and the lower appellate Court (District Judge of Shahjahanpur) holding that the result of Mahbub Husain's application under section 108 of the Code of Civil Procedure had been the setting aside of the decree as against all the defendants, made an order for sale for realization of the smaller amount only, namely, Rs. 1,556-15-0 with costs.

From this order the plaintiff appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Munshi *Gobind Prasad* and Babu *J. N. Mukerji*, for the respondents.

STANLEY, C.J. and BLAIR, J.—This is an appeal by the plaintiff against the order of the District Judge, made on an application for an order absolute for sale under section 89 of the Transfer of Property Act, in pursuance of two decrees passed in favour of the appellant on foot of a mortgage. It appears that the mortgage in question was executed by the defendant, Hub Husain, in favour of the plaintiff. Subsequent to the date of the mortgage the defendants, Mahbub Husain,

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the son of Hub Husain, and Matlub-un-nissa, the wife of Hub Husain, purchased a portion of the mortgaged property from Hub Husain. The plaintiff instituted a suit on foot of his mortgage against these three defendants, and obtained a decree for sale under section 88 of the Transfer of Property Act on the 31st May, 1897, the amount ascertained to be due being Rs. 2,270. This decree was obtained *ex parte* as against Mahbub Husain. In consequence he presented an application to the Court under section 108 of the Code of Civil Procedure to have the decree set aside as against him, and upon this application the Court set aside this decree as against him, but not as against the other defendants, and directed the case to be heard as against him alone. Subsequently the case was re-heard as between Mahbub Husain and the plaintiff, when it was found that the sum actually due on foot of the mortgage was a sum of Rs. 1,556-15-0, and not the sum of Rs. 2,270, for which the prior decree had been passed. This case exemplifies the inconvenience and mischief which was pointed out by the Court in the case of *Bhura Mal v. Har Kishan Das* (1) as certain to arise if it were the case that, under the provisions of section 108 of the Code, a decree can, in a case like the present one, be set aside as against one or more defendants and not as against all the defendants. The time for appealing has elapsed, and we find in this case two binding decrees of the Court in respect of the same mortgage-debt, under one of which two defendants are found liable to pay to the plaintiff a sum of Rs. 2,270, whilst the third defendant has established that the sum properly payable on foot of the mortgage is only Rs. 1,556-15-0. This is an anomalous state of things, and could not, as it seems to us, have been contemplated by the framers of the Code. Be this as it may, we must endeavour to work out the decrees which have been obtained as best we can, having regard to the rights and interests of all the parties. In the Court of first instance it was held that an order absolute could not be passed under the circumstances under section 89 of the Transfer of Property Act. The Subordinate Judge was, in our opinion, clearly wrong in this. In the lower appellate Court the order of the Subordinate

(1) (1902) I. L. R., 24 All., 383.

Judge was reversed, and an order was passed against all the defendants for sale of the mortgaged property in default of payment of the lesser sum of Rs. 1,556-15-0.

The plaintiff now appeals against this order, in so far as it ignores the fact that the plaintiff holds a decree, against which there has been no appeal, and the time for appealing has elapsed, against two of the defendants for the larger sum of Rs. 2,270. As against these two defendants the plaintiff is clearly entitled to have an absolute order for sale of the property which belongs to these two defendants to satisfy this larger sum ; but as regards the third defendant he is only entitled to an absolute order for sale in default of payment of the lesser sum of Rs. 1,556-15-0. We think, under the circumstances, that the reasonable and proper order for us to make is to pass an absolute order for sale of all the mortgaged property under the provisions of section 89 of the Transfer of Property Act, but to direct a stay to be put on the sale of the property which exclusively belongs to Mahbub Husain until a sale has been had of all the mortgaged property which belongs to Hub Husain and Musamma Matlub-un-nissa. If the proceeds of the last-mentioned sale are not sufficient to satisfy the amount found to be due by Mahbub Husain, that is, the lesser sum of Rs. 1,556-15-0, then, and in this event only, we direct that the property of Mahbub Husain, or a sufficient part of it, be sold to make good such deficiency. The learned advocate and pleader for the parties have expressed themselves satisfied with this form of order. We therefore allow this appeal, and modify the order of the lower appellate Court in the manner above pointed out by us. The appellant is entitled to his costs of this appeal.

*Decree modified.*

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