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That suit was dismissed by the Court holding that the partition was not proved, and that, even if the Revenue Court had made such partition, it was infructuous and illegal and it was never acted upon. Being defeated in that suit the plaintiffs have brought the present suit for partition, asserting that the house, *gari*, etc., are joint, as the Court in the previous suit held that partition was not proved, and that they be allowed to recover possession over half of them to which they are entitled. It is thus clear that the cause of action for the present suit is not the same as it was in the previous suit. But it is urged that the present prayer for relief could have been included in the former suit in the alternative. I do not think that such a relief could have been prayed for in the other suit on the statement of facts made in it, and in the next place I do not think, assuming that the plaintiffs could have prayed for such a relief, that it was incumbent upon them to do so.* We concur in the view thus expressed by the learned Subordinate Judge. It appears to us that the two causes of action could not conveniently in any case have been put forward in the original suit, and we are of opinion that the plaintiffs, who, under a misapprehension of their rights in the former suit, failed in that suit, were not precluded from relying upon the title which they clearly had to a partition of the joint property. We therefore must allow this appeal, set aside the judgment of this Court with costs, and restore the decree of the lower appellate Court.

Appeal decreed.

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Before Mr. Justice Know and Mr. Justice Aikman.

JAMNA DAS AND OTHERS (OPPOSITE PARTIES) v. MISRI LAL,
(APPLICANT).*

Act No. IV of 1852 (Transfer of Property Act), section 89—Prior and subsequent incumbrancers—Rights of puisne mortgagee who has satisfied in part a prior mortgage.

A prior mortgagee obtained a decree for sale upon his mortgage in a suit to which the puisne mortgagee was a party, though the Court refused to let an account be taken in that suit of what was due on the second mortgage. The prior mortgagee's decree being partly satisfied, the puisne mortgagee paid the balance of what was due under that decree and then proceeded to

* First Appeal No. 72 of 1903 from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 10th of February 1903.

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apply for an order absolute for sale not only of the property comprised in the prior mortgage, in respect of which a decree had been obtained, but of the property comprised in his own mortgage.

Held that the applicant was not entitled to any order in respect of his own mortgage. *Bansidhar v. Gaya Prasad* (1) referred to.

THIS appeal arose out of an application under section 89 of Act No. IV of 1882 made by the respondent under the following circumstances. In 1891 Jamna Das, one of the appellants, mortgaged certain shares in villages Morthal and Jatpura to one Jogindro Nath Chatterji. In 1893 he mortgaged the same shares together with other property to Misri Lal, the respondent. In 1899 the prior mortgagee brought a suit for sale of the property mortgaged to him, impleading the puisne mortgagee Misri Lal. In that suit Misri Lal asked that an account might be taken on his mortgage, but the prayer was refused on the ground that his claim was not admitted by the mortgagor, and the Court declined to go into the matter then. The prior mortgagee realized the greater portion of his claim by sale of the shares in Morthal. There remained a balance of Rs. 1,762-9-0, and this balance was paid by Misri Lal, the puisne mortgagee. Misri Lal then proceeded to apply to the Court for an order absolute for the sale not only of the remaining property comprised in the prior mortgage, which he had satisfied in part, but of property covered by his own mortgage and for satisfaction of that mortgage. The Court (Subordinate Judge of Aligarh) considering himself bound by the High Court's ruling in *Bansidhar v. Gaya Prasad* (1), made an order as prayed. The judgment-debtors mortgagors thereupon appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the respondent.

KNOX and AIKMAN, JJ.—This appeal arises out of an application made by one Misri Lal, respondent, to the effect that a decree absolute under section 89 of Act No. IV of 1882 be passed in his favour. The property over which he asks for this decree absolute is property which originally belonged to the appellants. The appellants are members of a joint Hindu family,

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and in 1891 Jamna Das, one of them, had mortgaged certain shares in villages Morthal and Jatpura to Babu Jogindro Nath Chatterji. In 1893 he mortgaged the same shares together with other property in favour of the respondent, Misri Lal. In 1899 the prior mortgagee brought a suit for sale of the property mortgaged to him, impleading the puisne mortgagee Misri Lal. In that suit Misri Lal asked that an account might be taken on his mortgage, but his prayer was refused on the ground that his claim was not admitted by the mortgagor, and the Court declined to go into the matter then. The prior mortgagee realized the greater portion of his claim by the sale of the shares in mauza Morthal. There was, however, a balance of Rs. 1,762-9-0 left unsatisfied. For this he could have proceeded against the share in mauza Jatpura. This balance was discharged by Misri Lal. The ruling referred to by the Subordinate Judge, *i.e.*, *Bansidhar v. Gaya Prasad* (1), is sufficient warrant for Misri Lal stepping into the shoes of the prior mortgagees and decreeholders and getting an order which would authorize him to sell up the share in Jatpura and to recover thereby the balance which he had paid in full satisfaction of the decree held by the prior mortgagees, but it was no warrant for the order given by the Subordinate Judge in favour of Misri Lal to recover not only the Rs. 1,762 odd which had been paid by him, but also the amount due on his own bond, and over the property in that bond other than the shares in Morthal and Jatpura. In these respects the decree passed by the Court below must be varied.

We allow the appeal so far as to direct that the words "and Rs. 9,380-8-3, on account of the subsequent demand due to the petitioner" be struck out. Further that instead of the words and figures "Rs. 11,479-2-9, with further interest thereon at the rate of 8 annas per cent. per mensem from the 5th April 1902 up to date of realization," the words and figures "Rs. 1,898-10-6, with future interest thereon at the rate of 8 annas per cent. per mensem from the 5th April 1902 up to the date of sale" be substituted. Further, that wherever the figures Rs. 11,479-2-9 appear in the decree the figures

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Rs. 1,898-10-6 be substituted therefor. Lastly, hat all items entered in the specification of property with the exception of the first item be struck out. To this extent we allow the appeal; *quoad ultra* it is dismissed. The parties will pay and receive costs in this Court proportionate to failure and success.

Decree modified.

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Before Mr. Justice Knox and Mr. Justice Aikman.

MATA AMBER AND ANOTHER (DECREE-HOLDERS) v. SRI DHAR
(JUDGMENT-DEBTOR).*

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*Act No. IV of 1882 (Transfer of Property Act), sections 90, 92 and 93—
Prior and subsequent incumbrancers—Redemption of mortgage—Execution of decrees.*

A puisne mortgagee of certain property sued the prior mortgagees for redemption. A decree was passed for redemption or sale. The plaintiff did not pay the amount decreed, and the property was sold, but it failed to realize the amount of the debt and costs due to the prior mortgagees.

Held that the decree, so far as it affected the puisne mortgagee, not being a personal decree, the prior mortgagees could not recover the balance of the amount decreed by arrest of the puisne mortgagee. Section 90 of the Transfer of Property Act, 1882, could not be so construed as to make it applicable to the present case. *Ram Lal v. Sil Chand* (1) referred to.

THIS was an appeal arising out of proceedings in execution of a decree. The facts are as follows:—Mata Amber and Sukhdeo were prior mortgagees and Sri Dhar a puisne mortgagee of the same property. Sri Dhar brought a suit to redeem the prior mortgage. In this suit he obtained a decree for redemption upon payment of Rs. 4,577 plus Rs. 699 on account of costs. The money, however, was not paid by the decree-holder within the time limited by the decree, and consequently the mortgaged property was sold. The sale realized some Rs. 700 less than the amount which had been found due to the prior mortgagees. This amount the prior mortgagees sought to recover by means of an application for execution by arrest of the puisne mortgagee. The executing Court (Subordinate Judge of Allahabad) rejected the application, and on appeal by the prior mortgagees the District Judge agreed with the first

* Second Appeal No. 1124 of 1902 from a decree of C. Rustomjee, Esq., District Judge of Allahabad, dated the 17th September 1902, confirming a decree of Mr. H. David, Subordinate Judge of Allahabad, dated the 15th February 1902.