

1906
April 27.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
SHIAM SUNDAR LAL (PLAINTIFF) v. GANESH PRASAD (DEFENDANT).^{*}
Act No. IV of 1882 (Transfer of Property Act), section 90—"Proceeds of any such sale."

In a suit for sale on a mortgage the property sold was described in the decree and order under sections 88 and 89 of the Transfer of Property Act as *haq zamindari*, whereas the property actually mortgaged comprised only *malikana* rights.

The plaintiff claimed a personal decree under the terms of the mortgage.

Held that the words "such sale" in section 90 of the Transfer of Property Act mean a sale of the property directed to be sold by the decree under section 88 and the order under section 89, and that the decree-holder was entitled to a decree under section 90. *Shao Prasad v. Behari Lal* (1) followed.

UNDER a mortgage-deed, dated the 8th November, 1899, the *malikana* rights of the defendant, Ganesh Prasad, in a five-biswa taluqdari share in mauza Pandri were mortgaged to the plaintiff, Shiam Sundar Lal. The deed contained a proviso that the mortgage-money should first be realized from the mortgaged property, and if that should prove insufficient, the sum could be realized from the other property of the mortgagor.

The mortgagee in his plaint, when suing for sale, wrongly described the mortgaged property as a five-biswa zamindari share in mauza Pandri. The suit was undefended and a decree for sale was passed under section 88 of the Transfer of Property Act. This decree followed the description given in the plaint, as did the order absolute under section 89. The zamindari rights were then sold. In the lower Courts it was successfully contended by the judgment-debtor that, inasmuch as none of the *malikana* property described in the mortgage deed had been sold, the plaintiff must first proceed against that property before he could claim to be entitled to a personal decree under section 90 of the Transfer of Property Act.

Mr. M. L. Agarwala, for the appellant.

Mr. W. K. Porter, Munshi Gobind Prasad and Dr. Satish Chandra Banerji, for the respondent.

^{*} Second Appeal No. 510 of 1905, from a decree of E. O. E. Leggatt, Esq., District Judge of Bureilly, dated the 29th of April, 1905, confirming the decree of Bibu Prag Das, Subordinate Judge, Bureilly, dated the 16th of July, 1904.

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STANLEY, C.J. and BANERJI, J.—The order of the court below of which the appellant complains, cannot be sustained. It appears that the respondent executed a mortgage in favour of the appellant of certain rights called *malikana* rights. A suit was brought upon the mortgage, but the property mortgaged was described in the plaint as *haq-i-zamindari*, that is, “proprietary rights.” The Court made a decree under section 88 of the Transfer of Property Act, for the sale of the zamindari rights, and this decree was made absolute under section 89. The property thus ordered to be sold has been sold; but, as the proceeds of the sale proved insufficient for the discharge of the debt, the appellant decree-holder made the application which has given rise to this appeal for a decree under section 90 of the Act. Both the Courts below have dismissed the application on the ground that the mortgaged property has not been sold. Section 90 of the Act provides that “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.” The words “such sale” referred to in the section manifestly mean a sale under the preceding sections, that is, a sale of the property directed to be sold by the decree under section 88 and the order under section 89. That property has in this case been sold and the proceeds of the sale were insufficient to pay the debt. The decree-holder is therefore entitled to an order under section 90. It is true that the interest in the property which was the subject-matter of the mortgage has not been sold, but the Court, wrongly in this instance, ordered some other interest in that property to be sold treating the same as the mortgaged property. The defendant ought to have opposed the claim, but he submitted to the decree passed against him. As the property ordered to be sold (rightly or wrongly) has been sold, the decree-holder is, we think, entitled to a decree under section 90. The principle of the ruling in *Sheo Prasad v. Behari Lal* (1) fully applies to this case. In that case a part only of the mortgaged property was sold; but it was held that, although all the mortgaged property had not been sold, a decree could be passed under

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section 90. We accordingly allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance through the lower appellate Court with directions to readmit it under its original number in the register and to prepare a decree under section 90 of the Transfer of Property Act. The appellant will have the costs of this appeal.

Appeal decreed.

1905
May 2.

Before Mr. Justice Banerji and Mr. Justice Aikman.
PARMANAND RAOT AND OTHERS (JUDGMENT-DEBTORS) v. GOBARDHAN
SAHAI AND OTHERS (DECREE-HOLDERS).*

*Pre-emption—Decree in pre-emption suit—Payment into Court—
Costs—Set off.*

A judgment, dated the 24th September, 1904, in favour of the pre-emptors under a foreclosure decree directed payment within two months of Rs. 2,100, together with the costs, if any, incurred by the purchaser in obtaining the order absolute. The corresponding decree contained the words "together with the costs of the purchaser in the foreclosure case, if any." The decree also awarded the plaintiffs a sum of Rs. 117-4-0 as costs. The Rs. 2,100 was paid within the time fixed.

On the 24th February, 1905, the judgment-debtors claimed that they were entitled to be restored to possession and that the suit must be deemed to have been dismissed, inasmuch as the costs, amounting to Rs. 25-12-0, of the proceedings relative to the order absolute had not been deposited.

Hold, following *Ishri v. Gopal Saran* (1), that the Rs. 117-4-0 could be set off against the Rs. 25-12-0: that the Rs. 2,100 deposited was therefore in excess of the actual sum payable under the decree and that the judgment-debtors' claim failed. *Jaggar Nath Pande v. Jekhu Tewari* (2) referred to.

THE material facts are given in the judgment of Banerji, J.

The Hon'ble Pandit *Sundar Lal* and *Munshi Gobind Prasad*, for the appellants.

Mr. B. E. O'Connor, *Babu Jogindro Nath Chaudhri* and *Babu Durga Charan Banerji*, for the respondents.

BANERJI, J.—The facts of this case are these:—

On the 24th of September, 1904, the respondents obtained a decree for pre-emption in respect of the foreclosure of a mortgage. The judgment directed that the plaintiffs pre-emptors should pay Rs. 2,100 within two months, together with the costs incurred by

* Second Appeal No. 389 of 1905, from a decree of W. Tudball, Esq., District Judge of Gorakhpur, dated the 19th of May, 1905, reversing the decree of *Munshi Achal Behari*, Subordinate Judge of Gorakhpur, dated the 1st April, 1905.

(1) (1884) I. L. R., 6 All., 351. (2) (1896) I. L. R., 18 All., 223.