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similar to that contained in section 40. It is clear that the deed of compromise having been incorporated into the decree, registration was not necessary.

In my judgment the property in the present case having been made security for the payment of the Rs. 100 to Musammam Maina by the decree of the Court, Musammam Bachchi, when she attempted to transfer the property, was attempting to give away something more than was her's to give. She could only give the property subject to the burden of making good the annuity to Musammam Maina. In my opinion the security can be enforced against the property in the hands of the defendants unless some reason not at present appearing exists why Musammam Maina cannot enforce her right. Having regard to what I have said, I consider that the case should be remanded to the lower appellate Court under the provisions of section 562. All parties present during the argument agree that this is the proper course. I allow the appeal, set aside the decree of the lower appellate Court, and remand the case to the lower appellate Court to dispose of the same in due course having regard to what I have stated above. The appellant will have her costs of this appeal against such of the respondents as appealed against the decision of the Court of first instance. Other costs will abide the result.

Appeal decreed and cause remanded.

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May 14.

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

GAJADHAR LAL AND ANOTHER (DEFENDANTS) v. THE ALLIANCE
BANK OF SIMLA, LIMITED (PLAINTIFF) *

*Mortgage—Act No. IV of 1882 (Transfer of Property Act), sections 88, 89,
90—Decree for sale—Sale partly in India, partly in England—Act No.
XV of 1877 (Indian Limitation Act), schedule II, article 178.*

A mortgagee obtained a decree under section 88 of the Transfer of Property Act for sale of all the property included in the mortgage, and in pursuance of the decree some of the mortgaged property was sold in India, and, at the request of the mortgagor, to enable a better price to be obtained, some of it was subsequently sold in England.

The mortgagee then applied for a decree under section 90. *Held* that the sale which took place in England must be treated as a sale had in connection with the decree passed in this country, and that the defendants appellants

* First Appeal No. 304 of 1904, from a decree of Babu Ishri Prasad, Subordinate Judge of Cawnpore, dated the 18th of September 1905.

could not be heard to say that the property ordered to be sold was not exhausted by proceedings under section 89, and that a decree could be passed under section 90. *Muhammad Akbar v. Munshi Ram* (1) and *Badri Das v. Inayat Khan* (2) referred to. Held further, that limitation must be held to run from the date of the sale in England.

THE following are the facts:—

The defendant executed a mortgage of a factory, a house, and some shares (later converted into stock) in favour of the Alliance Bank of Simla, Limited, Cawnpore, to secure a loan of Rs. 80,000.

The Bank later received a power-of-attorney from the defendant authorizing them to sell shares and stock.

The Bank obtained a decree for sale under section 88 of the Transfer of Property Act. The Court gave permission, at the request of the defendant and without opposition from the plaintiff, for the shares to be sold in England to obtain a better price.

The factory and house were sold on June 10th, 1901.

The shares were not sold in England till January 4th, 1905, the delay being due to the action of the defendant in obstructing the sale of the shares in England and the consequent litigation there.

The decree being still not fully satisfied, the Bank applied in India for a decree under section 90 of the Transfer of Property Act. The defendant filed objections that the application was time-barred and that the whole of the mortgaged property not having been sold under section 89, but part of it under a decree obtained in England, the plaintiff was not entitled to a decree under section 90.

The lower Court (Subordinate Judge of Cawnpore) disallowed the objection.

Pandit *Moti Lal Nehru* and Dr. *Tej Bahadur Sapru*, for the appellants.

Mr. *A. E. Ryves*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This is an appeal by the defendants against an order passed against them under section 90 of the Transfer of Property Act. On the 4th of February, 1895,

(1) Weekly Notes, 1899, p. 208. (2) (1900) I. L. R., 22 All., 404.

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the defendant, appellant, executed a mortgage in favour of the Alliance Bank of Simla, Limited, to secure advances to the extent of Rs. 80,000. The properties comprised in the mortgage were a factory and a house situate in Cawnpore and also 172 shares of £10 sterling each in the Delhi-Umballa-Kalka Railway Company, Limited. On foot of this mortgage the Bank instituted a suit for sale of the mortgaged property and obtained a decree for sale under section 88 of the Transfer of Property Act of the property comprised in the mortgage including the Railway shares. This decree was made absolute on the 22nd of March, 1901. The defendants being apprehensive that an advantageous sale of the shares could not be had in India applied to the Court to permit these shares to be sold in England through a broker. To this the Bank offered no opposition, and an order permitting the sale of the shares in England was accordingly passed on the 16th of April, 1901. The shares had at this time being converted into stock. It appears that shortly after the execution of the mortgage, namely, on the 17th of April, 1905, the defendant, Gajadhar Lal, gave a power-of-attorney in favour of the Bank empowering it to sell or transfer any shares or stock in any public Company standing in his name and also to receive all dividends on such shares or stock. On the 10th of June, 1901, the factory and house property comprised in the mortgage were sold and were purchased by the Bank; but the proceeds of the sale proved altogether insufficient to satisfy the amount due. In May, 1901, with a view to the sale of the stock in London, the Bank remitted to their London Agents the stock certificate as also the power-of-attorney to which we have referred and a transfer in blank of the stock certificate; but the Railway Company declined to act upon the power-of-attorney or the blank transfer. Consequently, on the 20th of May, 1902, the Bank instituted a suit in the Chancery Division of the High Court of Justice in England against the defendants, appellants, and the Railway Company for the sale of the Railway stock and for other relief which it is unnecessary here to specify. Gajadhar Lal filed a defence and set up, amongst others, the plea that the Railway stock in question was not comprised in the Bank's mortgage. A decree was passed in favour of the Bank, whereby it was ordered that an account should be taken of what was due

to the Bank on foot of its mortgage and that on failure by the defendants, appellants, to pay that amount, the Railway stock should be sold, and out of the proceeds the Bank should be at liberty to retain whatever sum should be certified to be due to them. It was found that on the 4th January, 1905, a sum of £4,531 4s. 0d. would be due to the Bank on foot of their mortgage. The proceeds of the sale fell short of satisfying this sum by a sum of about Rs. 35,000. Accordingly the Bank applied for a decree under section 90 of the Transfer of Property Act with a view to the payment of this balance. The appellants objected to the order on two grounds—first, that the execution of the decree was barred; and secondly, that the whole of the mortgaged property not having been sold by auction in this country under section 89 of the Act, the plaintiff Bank was not entitled to obtain a decree under section 90. The Court overruled the objections, and hence this appeal.

The contention on behalf of the appellants before us was that the property ordered to be sold was not exhausted by proceedings taken in this country under section 89, and that consequently a decree could not be passed under section 90; also that the sale which was carried out in this country under section 89 took place on the 10th of June 1901, and that the application under section 90 not having been made until the 5th of May, 1905, that is, more than three years from the date of the sale, was barred under Article 178 of the Limitation Act. It was also contended that the Bank was debarred by its conduct in instituting a suit in England from obtaining a decree under section 90. We are of opinion that there is no force in any of these contentions, and that the Court below acted rightly in passing the decree complained of.

As regards the first objection to the order which was pressed by Mr. *Moti Lal*, the answer to it is that, rightly or wrongly, a decree was passed against the defendants appellants, for sale not merely of the factory and house property, the subject-matter of the mortgage, but also of the Railway stock, and that according to the rulings of this High Court a decree could not be obtained under section 90 until the whole of the mortgaged property directed to be sold had been sold: see *Muhammad Akbar v. Munshi*

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Ram (1), and *Badrī Das v. Inayat Khan* (2). In the interests and at the instance of the defendants, appellants, themselves, the Railway stock was not sold under the decree. Permission was given to the parties to effect a sale of it in England; but instead of co-operating with the Bank in such sale the defendants, appellants, opposed the sale and went so far as to deny that the stock was mortgaged at all. We must, we think, treat the sale which took place in England as a sale had in connection with the decree passed in this country, but carried out by the parties independently of the Court in this country at the express instance of the defendants appellants, and that they cannot be heard to say that the sale was not in pursuance of the order for sale passed under section 89.

As regards the question of limitation which has been raised, it appears to us that if the Bank had applied for a decree under section 90 before the Railway stock was sold, the defendants appellants might have successfully objected to the application on the ground that all the property ordered to be sold had not been sold. Only when the Railway stock was sold could it be ascertained that the nett proceeds of the sale directed by the Court were insufficient to pay the amount due on the mortgage. We therefore are of opinion that the application for a decree under section 90 was not barred by limitation.

As regards the remaining objection, we can discover nothing in the conduct of the Bank which disentitles it to the relief asked for. It acceded to the wish of the defendants appellants to have the Railway stock sold in England. It was owing to the misconduct of the defendants appellants that the Bank found it necessary to take proceedings in the High Court of Justice in England and to have the sale carried out by that Court. Under the circumstances the defendants appellants have no ground for complaint.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1899, p. 208. (2) (1900) I. L. R., 22 All., 404.