

1906

PREONATH  
MUKERJI  
v.  
BISHUNATH  
PRASAD.

appellate Court and remand the appeal to that Court with directions that it be re-admitted on the file of pending appeals in its original number and be disposed of on the merits. In all other respects the appeal is dismissed. We think that under the circumstances the respondent is entitled to half the costs of this appeal, and we so direct. We say nothing as to the costs of the plaintiff appellant.

*Decree modified.*

1906

December 18.

*Before Mr. Justice Sir George Knox.*

PIRBHU NARAIN SINGH (DECREE-HOLDER) v. BALDEO MISRA  
(JUDGMENT-DEBTOR).\*

*Act No. IV of 1882 (Transfer of Property Act), section 90—Mortgage—Mortgaged property totally incapable of being sold—Decree under section 90 not obtainable.*

Where property mortgaged was property which the mortgagee could by no possibility bring to sale in execution of a decree under his mortgage, it was held that no decree over under section 90 of the Transfer of Property Act, 1882, could be granted. *Kedar Nath v. Chandu Mal* (1) distinguished.

THIS was an application by a mortgagee for a decree over under section 90 of the Transfer of Property Act, 1882, based upon the ground that inasmuch as the property mortgaged had been found not to belong to the mortgagor at all, the mortgagee was entitled to the remedy sought. The Court of first instance (Munsif of Benares) dismissed the application, and this order was affirmed by the District Judge on appeal. The decree-holder appealed to the High Court, which remitted an issue as to the interest possessed at the time of the mortgage and at the time of the application under section 90 by the mortgagor in the mortgaged property. The finding returned was that the mortgagor had no rights in the holding mortgaged at either time.

The Hon'ble Pandit *Sundar Lal* and *Munshi Gokul Prasad*, for the appellant.

The respondent was not represented.

KNOX, J.—The finding to the issue sent down is to the effect that the property mortgaged is an occupancy holding of which the

\* Second Appeal No. 290 of 1905, from a decree of G. A. Paterson, Esq., District Judge of Benares, dated the 13th of January 1905, confirming a decree of Babu Hira Lal Sinha, Munsif of Benares, dated the 1st of October 1904.

mortgagor was not the tenant at the date of the last settlement, nor is at the present day. The result is that the appellant finds himself with the property mortgaged to him, which, so far as he is concerned, is non-existent and which he certainly cannot bring to sale. The learned vakil who appears for the appellant cannot refer me to any ruling which goes so far as to say that an order may be granted under section 90 of the Transfer of Property Act, where no property has been put to sale because from no fault of the mortgagee the property mortgaged to him cannot be brought to sale. The remedy given by section 90 is an extraordinary remedy and must, therefore, be applied with great care and jealousy. In the present case it does seem a hardship that the mortgagee is deprived of his security from no fault of his own, and is now barred from enforcing a personal remedy in the ordinary way. The learned vakil asks me to apply the principle laid down by Aikman, J., in *Kedar Nath v. Chandu Mal* (1) where, at page 27, the learned Judge remarks as follows:—"In the present case the respondent brought to sale the whole of the mortgaged property which he could sell, and has thus exhausted his rights under the order absolute," and further on adds:—"It appears to me that on this state of facts it would be in the highest degree inequitable to refuse him a decree by which alone he can recover from his judgment-debtors the unpaid balance of money which they owe him." But the procedure adopted by the decree-holder in that case was one which could be brought into harmony with sections 88, 89 and 90 of the Transfer of Property Act. In the present case it is not so. It seems to me I have no alternative but to dismiss the appeal, but without costs, as no one appears for the respondent.

*Appeal dismissed.*

(1) (1903) I. L. R., 26 All., 25.

1906

PIRBHU  
NARAIN  
SINGH  
v.  
BALDEO  
MISRA.