

from the decision of that court could have been preferred was the court of the District Judge, inasmuch as a question of jurisdiction was raised and decided. (See section 177 (b) of the Tenancy Act.) As the suit was filed in the court of the Munsif, an appeal from his order lay to the District Judge. Therefore, even if the view adopted in *Ram Charan Ram v. Sheoraj* (1) is correct, as to which we express no opinion, section 197 would apply to the present case, and no objection can be taken to the order of remand. It was, however, held in the case of *Badam Singh v. Musammatt Sabta Kuar* (2) that the court of the District Judge* being the court to which an appeal lay from the decision of the Munsif, the section applied. In either view, therefore, the appeal is not sustainable. We accordingly dismiss it with costs.

Appeal dismissed.

1911

NAUBAT
SINGH
v.
BALDEO
SINGH,

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
MUHAMMAD AHMAD-ULLAH KHAN, (AUCTION-PURCHASER) v. AHMAD SAID KHAN (DECREE-HOLDER) AND RAFAT KHAN (JUDGEMENT-DEBTOR). *
Civil Procedure Code (1908,) schedule 1; order XXI, rule 89—*Execution of decree—Sale in execution of simple money decree, the decree-holder holding also a decree upon a mortgage of the property sold—Application by decree-holder to have sale set aside.*

1911
February 16.

A decree-holder held two decrees against the same judgement-debtor, the one being a decree for sale on two mortgages, and the other a simple money decree. In execution of the latter decree the decree-holder caused part of the mortgaged property to be sold by auction, and it was purchased by a stranger.

Hold that the decree-holder was not competent to apply under order XXI, rule 89, of the Code of Civil Procedure, 1908, to get this sale set aside.

THIS was an appeal from an order setting aside an auction sale upon an application made under order XXI, rule 89, of the Code of Civil Procedure. The facts out of which the appeal arose were, briefly, as follows. The respondent, Ahmad Said Khan, obtained a decree against the judgement-debtor, Rafat Khan, on the 8th of October, 1909, for sale upon two mortgages. Subsequently, in November, 1909, he obtained another decree against the same judgement-debtor, but this was a simple decree for money. In execution of this latter decree he caused mauza Neali, one of the villages comprised in the mortgages upon which he had obtained the earlier decree, to be sold by

* First Appeal No. 276 of 1910 from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 7th of May, 1910.

(1) (1906) 3 A. L. J., 226. (2) (1905) 2 A. L. J., 119.

1911

MUHAMMAD
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v.
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auction. It was purchased by the appellant, Muhammad Ahmad-ullah Khan. Thereupon the decree-holder applied under order XXI, rule 89, to have the sale set aside and made the deposit required by the section. This application was granted and the auction-purchaser thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent, decree-holder.

STANLEY, C. J., and BANERJI, J.—This is an appeal from an order setting aside an auction sale upon an application made under order XXI, rule 89, of the Code of Civil Procedure. The facts are these:—The respondent, Ahmad Said Khan, obtained a decree against the judgement-debtor, Rafat Khan, on the 8th of October, 1909, for sale upon two mortgages. Subsequently, in November, 1909, he obtained another decree against the same judgement-debtor, but this was a simple decree for money. In execution of this latter decree he caused mauza Neali, one of the villages comprised in the mortgages upon which he had obtained the earlier decree, to be sold by auction. It was purchased by the appellant, Muhammad Ahmad-ullah Khan. Thereupon the decree-holder, Ahmad Said Khan, applied under order XXI, rule 89, to have the sale aside and made the deposit required by the section. This application has been granted by the court below, which was of opinion that the decree-holder in his capacity as mortgagee was a person who held an interest in the property sold within the meaning of rule 89. That rule empowers a person who is the owner of immovable property which has been sold in execution of a decree, or holds an interest in such property by virtue of a title acquired before the sale to make an application to have the sale set aside. It is not alleged on behalf of Ahmad Said Khan that he is the owner of the property sold, but he contends that as mortgagee of the said property he holds an interest therein by virtue of which he is competent to make the application. No doubt, ordinarily a mortgagee of the property sold is a person who has an interest in it, and in view of the provisions of rule 89 he would be competent to make an application, but we have to consider the facts of this particular case. Here the holder of the decree for money was also the holder of two mortgages in respect of the property of

which he sought to have a sale. He caused the property to be sold either free from the mortgages, or subject to the mortgages. If it was sold free from the mortgages he must be deemed to have abandoned his mortgages, and in that case he has no interest, in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor, that is, his right of redemption. In this right of redemption the mortgagee has no interest. Therefore, from either point of view, the decree-holder in this case has no interest in the property sold such as would entitle him to make an application under rule 89. We think the judgement of the court below to the contrary is erroneous. We accordingly allow the appeal, set aside the order of the court below and dismiss the application of the respondent, Ahmad Said Khan, to have the sale set aside, with costs in both courts.

Appeal allowed.

1911

MUHAMMAD
AHMAD-UL-
LAH KHAN
v.
AHMAD
SAID KHAN.

1911

February 17.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
BIHARI AND ANOTHER (DEFENDANTS), v. RAM CHANDRA AND OTHERS
(PLAINTIFFS).*

Evidence—Burden of proof—Usufructuary mortgage—Suit for possession of mortgaged property not brought for nearly twelve years—Presumption that no consideration passed.

Where the plaintiffs, who were usufructuary mortgagees, were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired, it was held, on plea raised by the defendants that no consideration had passed, that the burden of proving that consideration had passed was rightly shifted to the plaintiffs. *Achobandil v. Mahabir* (1) followed. *Mahabir Prasad v. Bishan Dayal* (2) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J.—The facts of the case are set forth in the judgement under appeal, which was as follows:—

“The facts are as follows:—Bihari, defendant No. 1, on the 15th of December, 1896, executed a mortgage with possession in favour of the plaintiffs. In that deed the recitals are that they received the entire mortgage money as detailed below, that they put the mortgagees in possession and that they from that date should continue in possession thereof and should sublet the said property. The plaintiffs on the basis of that mortgage instituted

* Appeal No. 96 of 1910 under section 10 of the Letters Patent.

(1) (1886) I. L. R., 8 All., 641. (2) Weekly Notes, 1904, p. 163.