

mortgagee was entitled to make the application under rule 89.

As we take this view, the other question, whether an application for revision lies, does not arise because if the Court below was correct in holding that the mortgagee could make the application, then there is no question of any illegal or irregular exercise of jurisdiction.

We dismiss the application with costs.

Application dismissed.

APPELLATE CIVIL.

*Before Mr. Justice Bisheshwar Nath Srivastava,
and Mr. Justice G. H. Thomas*

NAND BAHADUR SINGH AND ANOTHER (DEFENDANTS-
APPELLANTS) *v.* BINDESHWARI PRASAD AND
OTHERS (PLAINTIFFS-RESPONDENTS)*

1935
December, 2

Transfer of Property Act (IV of 1882), section 68(c)—Usufructuary mortgage—Mortgaged property allotted to another co-sharer at partition and mortgagee dispossessed—Mortgagor unable to show what property was allotted to him in lieu of mortgaged property, effect of—Mortgagee, whether entitled to money decree.

Where a usufructuary mortgage is dispossessed of a part of the mortgaged property as a result of its being allotted to another co-sharer at partition and the mortgagor fails to show what property was allotted to him in lieu of the mortgaged property, the mortgagee is entitled to a money decree under section 68(c), Transfer of Property Act, as it stood before the amendment made in 1929. *Byjnath Lall v. Ramoodeen Chowdhry* (1), and *Mohammad Afzal Khan v. Abdul Rahman* (2), distinguished. *Talek Singh v. Jalal Singh* (3), and *Janki Saran Singh v. Syed Mohammad Ismail* (4), followed.

*Second Civil Appeal No. 203 of 1934, against the decree of Pandit Kishen Lal Kaul, Subordinate Judge of Sultanpur, dated the 21st of February, 1934, modifying the decree of Babu Shubhrendra Bhushan Banerji, Munsif, Musafirkhana, Sultanpur, dated the 30th of September, 1933.

(1) (1874) L.R., 1 I.A., 106.
(3) (1909) 5 I.C., 130.

(2) (1932) L.R., 59 I.A., 405.
(4) (1932) 139 I.C., 525.

1935

NAND BAHADUR SINGH

v.

BINDESHWARI PRASAD

Mr. *Hyder Husain*, for the appellants.Messrs. *R. D. Sinha* and *H. H. Zaidi*, for the respondents.

SRIVASTAVA and THOMAS, JJ.:—This is a second appeal arising out of a suit brought by the mortgagee under section 68 of the Transfer of Property Act.

The facts of the case are that on the 10th of June, 1885, one Ramadhin Singh executed a usufructuary mortgage in favour of one Raghunath Tiwari, father of the plaintiff Sita Ram Tewari. Ramadhin Singh died, and is now represented by defendants 1 and 2. On the 1st of July, 1915, another deed which is now admitted before us to be a deed of further charge was executed by defendants 1 and 2 in favour of Sita Ram Tewari plaintiff. The mortgaged property consisted of eight plots of land situate in three villages. Subsequent to the execution of the aforesaid deeds two of the villages in which the mortgaged plots were situate were the subject of partition, one in the year 1918 and the other in the year 1927. The result of these partitions was that five of the mortgaged plots were allotted to the shares of other co-sharers and the mortgagee was dispossessed of them. The plaintiff therefore sued claiming the principal money due on both the aforesaid deeds together with interest on the deed dated the 1st of July, 1915 and a sum of Rs. 43-12 on account of damages consequent on his dispossession. He claimed a simple money decree for these amounts on the basis of the provisions of section 68 of the Transfer of Property Act. The trial Court gave a decree for the whole of the principal amount as well as the interest claimed but awarded only Rs.26-4 on account of damages. The decree of the trial Court was affirmed on appeal by the learned Subordinate Judge of Sultanpur with the modification that the amount of damages was reduced from Rs.26-4 to Rs.21. Defendants 1 and 2 have come to this Court in second appeal.

The plaintiff-respondent Sita Ram Tewari died during the pendency of the appeal in this Court leaving three grandsons Bindeshwari Prasad, Bhola Nath and Haunsala Prasad. The appellants made an application for the names of all the three grandsons being substituted in place of their deceased grandfather. In answer to this application Bhola Nath and Haunsala Prasad contended that they were the sole heirs of Sita Ram and questioned the right of Bindeshwari to any share in the estate of Sita Ram. In the circumstances it was ordered that the names of all the three grandsons of the deceased be substituted in his place without prejudice to the rights of Bhola Nath and Haunsala Prasad. After the passing of this order a compromise was arrived at between the appellants and Bindeshwari Prasad. In this compromise the appellants recognized Bindeshwari Prasad as entitled to one-half of the property left by Sita Ram and on this basis the appellants and Bindeshwari Prasad agreed that one-half of the property in dispute be redeemed in favour of the appellants on payment of Rs.275 by them to Bindeshwari Prasad. The counsel for the appellants and Bindeshwari Prasad have informed us that subsequent to this compromise the sum of Rs.275 has been paid by the appellants to Bindeshwari Prasad and that Bindeshwari Prasad has no longer any claim against the defendants. The result therefore is that the claim of Bindeshwari Prasad should be dismissed against the defendants. We accordingly allow the appeal in part and in terms of the compromise dismiss the claim of Bindeshwari Prasad against the defendants-appellants.

Next there remains the contest between the appellants on the one hand and Bhola Nath and Haunsala Prasad on the other. The only contention urged by the learned counsel for the appellants is that section 68(c) of the Transfer of Property Act does not apply to the case. It has been argued that if the mortgagee has been dispossessed of part of the mortgaged property as a

1935

NAND BAHADUR SINGH
v.
BINDESHWARI PRASAD

*Srivastava
and Thomas,
JJs.*

1935

NAND BAHADUR SINGH
v.BINDESH-
WARI
PRASAD*Srivastava
and Thomas,*
J.J.

result of the partition he is not entitled to any decree for money but is entitled to claim possession of the plots allotted to the share of the mortgagor in lieu of the mortgaged plots which have been allotted to other co-sharers, by way of substituted security. It is no doubt true that section 68 of the Transfer of Property Act does not specifically provide for a case in which the mortgagee of an undivided share of a co-sharer is deprived of it as a result of subsequent partition, but we are of opinion that the provisions of section 68(c) are sufficiently general to cover a case like the present. It may be noted that the parties are agreed that the decision of the present case is to be based on the provisions of the old section as it stood before the amendment made in 1929. Reliance has been placed on behalf of the appellants on the decision of their Lordships of the Judicial Committee in *Byjnath Lall v. Ramooddeen Chowdhry* (1) and *Mohammad Afzal Khan v. Abdul Rahman* (2). In both these cases the mortgage related to undivided shares in properties held jointly and it was held that it may be enforced against properties which under a revenue partition had been allotted to the mortgagor in lieu of his undivided share. In our opinion these cases cannot help the appellants because they have failed to show what lands, if any, were allotted to the mortgagor in lieu of the five plots covered by the mortgage which have been allotted to the shares of other co-sharers. We are told that the villages in which these plots are situate are *bhaiyachara* villages and that the mortgagor owned considerable area of land in each of the said villages and in the circumstances it is impossible to say which lands, if any, were allotted in substitution for the five plots in question. As stated before we are inclined to agree with the Courts below that in the circumstances, the case is met by clause (c) of section 8 of the Transfer of Property Act. It authorises the mortgagee to sue

(1) (1874) L.R., 1 I.A., 106.

(2) (1932) L.R., 59 I.A., 405.

the mortgagor for the mortgage money if the latter fails to secure the mortgagee in undisturbed possession of the mortgaged property. In the present case the mortgagee has admittedly been dispossessed by the co-sharers of the mortgagor who have been allotted the lands in question at the partition. The case therefore comes within the terms of this clause. We are supported in this view by the decision of the Calcutta High Court in *Talek Singh v. Jalal Singh* (1). The case is very similar to the present one. The defendant in that case made a usufructuary mortgage but subsequently the estate was partitioned under the Estates Partition Act (Bengal Act V of 1887) and the lands of which the plaintiff was in possession by virtue of the mortgage fell into the share of defendant's co-sharer, who took possession and dispossessed the plaintiff. It was held that the plaintiff was entitled under section 68(c) of the Transfer of Property Act to sue for the money. Referring to the decision of the Privy Council in *Byjnath Lall v. Ramoodeen Chowdhry* (2), CHATTERJEE, J. remarked as follows:

"If the whole share or any portion of the share owned by the appellants had been mortgaged and if the whole share or portions thereof had been represented after the partition by another whole share or another property, then the case might come within the principle of the decision of the Privy Council in *Byjnath Lall v. Ramoodeem Chowdhry* (2). But that is not the case here. The lands are entirely different, there is nothing to fix the identity of the security and the creditors are not bound to receive the lands now offered."

This case was approved by the Patna High Court in *Janki Saran Singh v. K. B. Syed Mohammad Ismail* (3). We are therefore in agreement with the lower Court that the mortgagee in the circumstances of this case is

1935

NAND BABA-
DUR SINGH.

v.

BINDESH-
WARI
PRASAD*Srivastava
and Thomas,
Jj.*

(1) (1909) 5 I.C., 130.

(2) (1874) L.R., 1 I.A., 106.

(3) (1932) 139 I.C., 525.

1935

NAND BAHADUR SINGH
v.
BINDESHWARI PRASAD

entitled to a money decree under section 68(c) of the Transfer of Property Act.

Srivastava and Thomas, J.J.

For the above reasons we would uphold the decree of the lower appellate Court with this modification that Bhola Nath and Haunsala Prasad will be entitled to such share only out of the amount decreed by the lower Court as is proportionate to the share to which they are found entitled in the estate of Sita Ram. The question as regards the share of Bhola Nath and Haunsala Prasad in the estate of Sita Ram will be determined in accordance with the result of the civil suit which we are informed by the counsel for the respondents is contemplated between Bindeshwari Prasad on the one hand and Bhola Nath and Haunsala Prasad on the other. In the circumstances we make no order as to the costs of this appeal.

Appeal partly allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,
and Mr. Justice G. H. Thomas*

1935
December, 3

RUDRA NARAIN AND OTHERS (OBJECTORS-APPELLANTS)
v. MAHARAJA OF KAPURTHALA THROUGH
HIS AGENT AT BAHRAICH (DECREE-HOLDER-RESPONDENT)*
Limitation Act (IX of 1908), Article 182(5)—Oudh Rent Act (XXII of 1886), section 61—Ejectment suit, whether a step in aid of execution—Ejectment for arrears, if a coercive process.

A suit brought by the holder of a decree for arrears of rent to eject the tenant under section 61, Oudh Rent Act, constitutes a step in aid of execution under Article 182(5), Limitation Act. Steps in aid of execution of a decree may be broadly divided into two classes—(1) Steps taken with the object of removing certain obstacles in the way of execution; (2) Steps directed to the furtherance of or advancement of execution. To deter-

*Execution of Decree Appeal No. 80 of 1934, against the order of Pandit Damodar Rao Kelkar, District Judge of Gonda, dated the 11th of September, 1934, upholding the order of Mr. B. N. Nigam, I.C.S., Assistant Collector, 1st Class of Bahraich, dated the 29th of January, 1934.