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on at one and the same time," and he added that it was open to the Magistrate to put the accused on terms as to appearance or otherwise. In that case the learned Judges refused to make any order interfering with the Magistrate's discretion. In the [862] case of *Goberdhone Pramanick v. Iswar Chunder Pramanick* (1) the petitioner denied the execution of a mortgage bond, but the Special Sub-Registrar held that he had executed it and directed a prosecution under section 82 of the Indian Registration Act, upon which the petitioner sued for a declaration that the bond was a forgery. This Court observed that the proceedings in the civil suit are much more likely to result in a proper conclusion than the summary proceeding taken before the registration officers, and accordingly the criminal prosecution was stayed. Acting upon the authority of those cases, we think that we ought not to interfere with the Magistrate's discretion except upon good cause shown. Now in the present case the petitioner has not been able to show any special reason for our interference. On the contrary it would appear expedient that the Magistrate should proceed forthwith to make the preliminary inquiry prior to commitment. It is not a private prosecution, but one directed by the District Judge, in what he believes to be the interests of justice, and as the Magistrate states in explanation the witnesses are related to the accused persons and therefore it is desirable that their evidence should be recorded without undue delay. We may add that, if the Magistrate should find that a *prima facie* case under section 467 of the Indian Penal Code has been made out and should accordingly commit the accused for trial, it would be hardly possible that the case could come on before the July Sessions. In the meantime the appellant in the probate case ought to be able, if he exercises due diligence, to have the paper book prepared. If he satisfies the Sessions Judge that this has been done and that he has moved the Court to expedite the hearing of the appeal, there is little doubt that the Sessions Judge would accede to any prayer he may make for a reasonable postponement of the trial. We think, however, that the proceedings in the Magistrate's Court ought not to be stayed or postponed, and we accordingly discharge the Rule.

Rule discharged.

31 C. 863 (=8 C. W. N. 684)

[863] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Brett, Mr. Justice Mitra, Mr. Justice Geidt and Mr. Justice Woodroffe.

BIBIJAN BIBI v. SACHI BEWAH.*

[30th May, and 17th June, 1904.]

Mortgage—Sale of mortgaged property—Execution of decree—Transfer of Property Act (IV of 1882) ss. 86, 88, 89—Right to redeem—Order absolute for sale—Stoppage of sale by payment of mortgage debt—Civil Procedure Code (Act XIV of 1882) s. 291—High Court Circular Order No. 13 of 27th April 1892.

* Appeal from Order No. 278 of 1903, against the order of G. K. Deb, District Judge of Hooghly, dated the 11th July 1903, reversing the order of Purna Chunder De, Munsif at Howrah, dated the 16th May 1903.

(1) (1900) 5 C. W. N. 44.

The concluding words of s. 89 of the Transfer of Property Act viz., "thereupon the defendant's right to redeem and the security shall both be extinguished," relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale.

A mortgagor judgment-debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage decree, by payment of the debt before the sale actually takes place, although an order absolute for sale may have already been passed.

Malikarjunadu Setti v. Lingamurti Pantulu (1), *Krishnaji v. Mahadev Vinayak* (2), *Raja Ram Singhji v. Chunni Lal* (3) and *Shyam Kishen v. Sundar Koer* (4) followed.

Jogendra Nath Mukerjee v. Methana Abraham (5) and *Popple v. Sylvester* (6) referred to.

[**Foll.** 28 All. 778=3 A. L. J. 630=A. W. N. 1906, 230; 31 Mad. 354=18 M. L. J. 259=3 M. L. T. 281; 13 I. C. 144. **Rel. on** 28 All. 28=1905 A. W. N. 168=16 C. L. J. 156; 18 I. C. 357; 46 I. C. 479. **Appl.** 2 C. L. J. 202; 7 C. L. J. 581=12 C. W. N. 282=3 M. L. T. 202. **Expl.** 7 C. L. J. 1. **Ref.** 9 C. L. J. 96=18 C. W. N. 226; 37 Cal. 897; 10 C. L. J. 590=4 I. C. 731; 13 C. L. J. 487=15 C. W. N. 672=9 I. C. 1027; 21 C. L. J. 104=27 I. C. 780=37 I. C. 433=1 Pat. L. J. 261=9 C. L. J. 96; 47 C. 446=55 I. C. 189; 59 I. C. 868.]

SECOND APPEAL by the decree-holders mortgagees, Bibijan Bibi and others.

In this case the decree-holders had obtained a mortgage decree on the 2nd April 1902 and an order absolute for sale under s. 89 of the Transfer of Property Act had been passed by the Court some time in 1902. On the 9th May 1903, the [864] decree-holders applied for execution of the decree and thereupon a sale proclamation was issued, fixing the 13th July 1903 as the date of sale of the mortgaged property. On the 16th May 1903, the judgment-debtors mortgagors, Sachi Bewah and another, applied for permission to deposit the decretal mortgage-debt to save the mortgaged property from being sold. The Munsif held that Rule No. 3, contained in the High Court Circular Order No. 13 of 27th April 1902, making s. 291 of the Code of Civil Procedure applicable to sales of mortgaged properties, in execution of mortgage decrees, was *ultra vires*, as under s. 89 of the Transfer of Property Act, the judgment-debtors had no longer any right to redeem the mortgaged property. He also relied upon the principle laid down in the Full Bench case of *Kedar Nath Raut v. Kali Churn Ram* (7) and disallowed the application.

On appeal by the judgment-debtors, the District Judge allowed the application of the judgment-debtors, holding that the right to redeem the mortgage by payment of the debt remained in spite of an order absolute for sale being passed under s. 89 of the Transfer of Property Act. He held that the ruling relied upon by the Munsif did not apply to the case and that under the Circular Order of the High Court above referred to, the judgment-debtors were competent to deposit the debt under s. 291 of the Civil Procedure Code.

The appeal originally came on for hearing on the 7th April 1904 before a Division Bench consisting of Maclean, C.J., and Stanley, J., who directed that, as the question raised was an important one, it should be heard by a Special Bench of five Judges.

Babu Mahendra Nath Ray (Babu Krishna Prasad Sarbadhikari with him), for the appellants, submitted that the Circular Order of the

(1) (1900) I. L. R. 25 Mad. 244.

(2) (1900) I. L. R. 25 Bom. 104.

(3) (1897) I. L. R. 19 All. 205.

(4) (1904) I. L. R. 31 Cal. 373.

(5) (1902) 6 C. W. N. 769.

(6) (1882) L. R. 22 Ch. D. 98.

(7) (1898) I. L. R. 25 Cal. 703.

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High Court, dated the 27th April 1902, making s. 291 of the Civil Procedure Code applicable to sales in execution of mortgage decrees under the Transfer of Property Act, was *ultra vires*, as being inconsistent with the last clause of s. 89 of that Act: see s. 104 of the Transfer of Property Act. The legislature [865] declares in s. 89 that upon an order absolute for sale being passed, the defendant's right to redeem shall be extinguished. This provision must have a meaning, and will be made nugatory, if the mortgagor defendant is permitted to save the mortgaged property from sale by payment of the debt, *i.e.*, to *redeem it*, after his right of redemption has been extinguished. Ordinarily the High Court has the power of making rules consistent with the Civil Procedure Code under s. 652 of that Code, and s. 104 of the Transfer of Property Act would be altogether unnecessary, if it was not intended to place any restriction on that power in regard to matters in which there is a conflict between the Code and the Act. I rely upon the view indicated by Maclean, C.J., in the Full Bench case of *Kedar Nath Raut v. Kali Churn Ram* (1), *viz.*, that it is exceedingly doubtful whether a rule of the High Court by which the mortgagor's right to redeem is extended after an order absolute for sale has been passed, would be consistent with the Transfer of Property Act. This was the view of all the other Judges, except Banerjee, J. Certain observations in the case of *Prem Chand Pal v. Purnima Dasi* (2) are no doubt against this contention, but they have been virtually dissented from in the case of *Khetter Nath Biswas v. Faizuddin Ali* (3). The case of *Shyam Kishen v. Sundar Koer* (4) was, I submit, wrongly decided. The Allahabad High Court has held that s. 291 of the Code of Civil Procedure must be taken to have modified the rigour of the law contained in s. 89 of the Transfer of Property Act. It is admitted that there is a conflict. It is admitted also that the right like the one claimed in the present case is a *right to redeem*: *Behari Lal v. Ganpat Rai* (5), *Raja Ram Singhji v. Chunni Lal* (6) and *Harjas Rai v. Rameshar* (7). The case of *Raja Ram Singhji v. Chunni Lal* (6) was dissented from by the Calcutta High Court in the case of *Kedar Nath Raut v. Kali Churn Ram* (1). The case of *Krishnaji v. Mahadev Vinayak* (8), which is against me, follows the reasoning of the Allahabad [866] High Court, and is moreover inconsistent with the earlier decision of *Taniram v. Gajanan* (9) of the same High Court, which is in my favour. The first attempt to reconcile s. 89 of the Transfer of Property Act with s. 291 of the Code of Civil Procedure was made in 1885 by Mr. Macpherson in his commentaries on the Transfer of Property Act [see page 697], who suggested that, after an order absolute for sale has been passed, the parties are no longer in the relation of mortgagor and mortgagee, their position is that of judgment debtor and judgment creditor and their rights are governed by the Code of Civil Procedure. This view was adopted by Sir Muttasami Ayyar, J., in *Ramunni v. Brahma Dattan* (10) and later on by the Full Bench decision of the Madras High Court in *Mallikarjunadu Setti v. Lingamurti Pantulu* (11), which is against me. This argument, it is submitted, is erroneous, as

(1) (1898) I. L. R. 25 Cal. 703, 708.
(2) (1888) I. L. R. 15 Cal. 546.
(3) (1897) I. L. R. 24 Cal. 682, 685.
(4) (1904) I. L. R. 31 Cal. 373.
(5) (1887) I. L. R. 10 All. 1.
(6) (1897) I. L. R. 19 All. 205, 208.

(7) (1898) I. L. R. 20 All. 354.
(8) (1900) I. L. R. 25 Bom. 104.
(9) (1899) I. L. R. 24 Bom. 300.
(10) (1892) I. L. R. 15 Mad. 366, 370.
(11) (1900) I. L. R. 25 Mad. 244.

by the express language of s. 89 of the Transfer of Property Act, the rights of the parties after an order absolute for sale has been made, are governed by the last clause of that section. There is nothing in the case of *Dakshina Mohan Roy v. Basumati Debi* (1) against my contention.

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Babu *Digambar Chatterjee*, for the respondents, submitted that the right claimed by the mortgagor in the present case was not a *right to redeem*, which is defined in s. 60 of the Transfer of Property Act. The right to pay up the decretal amount under s. 291 of the Code of Civil Procedure did not involve a delivery of the mortgage deed, etc. Hence s. 89 of the Transfer of Property Act is no bar to the exercise of such right. Besides, as held by the Madras High Court in the case of *Mallikarjunadu Setti v. Lingamurti Pantulu* (2), the Code of Civil Procedure is applicable of its own force to the execution of decrees on mortgages. Sir Bhashyam Ayyangar, J., held that, if the High Court made rules under s. 104 of the Transfer of Property Act, inconsistent with the provisions of the Code of Civil Procedure, such rules would be *ultra vires* of the Indian Legislature under s. 22 of the Indian Councils Act and s. 15 of the Charter Act. [867] Lastly, it is submitted that the decree-holders are estopped from taking the plea by their own act, by causing a sale proclamation to be published, which distinctly declared that the judgment-debtors were competent to pay up the debt under s. 291 of the Code of Civil Procedure.

31 G. 868=8
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Babu *Mahendra Nath Ray*, in reply.

Cur. adv. vult.

MACLEAN, C. J. The appellants obtained against the respondents an order absolute for sale under section 89 of the Transfer of Property Act, of property mortgaged to them by the latter. The property was advertised for sale in pursuance of the order, but before the sale took place the mortgagors applied for permission to pay into Court the mortgage money and costs in satisfaction of the decree. The Court executing the decree declined to receive the money tendered by the respondents. The District Judge on appeal held that the money should have been received under the power conferred on the Court by section 291 of the Code of Civil Procedure and ordered accordingly. The mortgagees have appealed.

The contention on behalf of the appellants is that an order absolute for sale having been passed and having regard to section 89 of the Transfer of Property Act, the mortgagor's right to redeem was extinguished, and as the practical effect of an order under section 291 permitting the deposit of the mortgage debt and costs is to extend the period for redemption, the section can have no application in a proceeding for sale in pursuance of an order under section 89. This contention is based on the words at the end of the section, "and thereupon the defendant's right to redeem and the security shall both be extinguished." In the view we take of the construction of that section, it becomes immaterial to consider whether section 291 of the Civil Procedure Code should properly be regarded as inconsistent with, or as ancillary to section 89 of the Transfer of Property Act, nor is it necessary to consider whether the rules of this Court making section 291 applicable to sales of mortgaged properties are or are [868] not *ultra vires*, or whether in fact, any such rules were really necessary. If the words

(1) (1900) 4 C. W. N. 474.

(2) (1900) I. L. R. 25 Mad. 244.

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"and thereupon" relate to the passing of the order absolute for sale only, a difficulty might arise as to the application of section 291 of the Code of Civil Procedure, but in our opinion these words relate to the actual sale and the distribution of the proceeds, and not merely to the order passed for the purpose. It is not until a sale takes place and the sale-proceeds are distributed and the mortgage-debt is thereby satisfied that the mortgagee's security ought to be extinguished.

The Legislature can scarcely have intended that the security was to be extinguished on the mere making of the order for sale, and before the mortgagee had been paid out of the proceeds of sale. The mortgagee continues to be the owner of the property subject to the payment of the debt, until the sale is completed, and then the ownership passes to the auction-purchaser. This seems to us to be a reasonable construction of the concluding words of section 89 of the Transfer of Property Act, and prevents numerous anomalies, which would otherwise arise. In this view, the rule of procedure laid down in section 291 of the Code of Civil Procedure is not inconsistent with section 89 of the Transfer of Property Act, as the right to redeem is not extinguished, until the sale has been actually completed and the proceeds of sale dealt with.

Though the result has been arrived at by a different train of reasoning, the view we take is in accord with that taken by the High Court at Madras in *Mallikarjunadu Setti v. Lingamurti Pantulu* (1), by the High Court at Bombay in *Krishnaji v. Mahadev Vinayak* (2), by the High Court at Allahabad in *Raja Ram Singhji v. Chunni Lal* (3) and by this Court in *Shyam Kishen v. Sundar Keer* (4). The appeal, therefore, is dismissed with costs.

BRETT, J. I agree.

MITRA, J. I agree with the learned Chief Justice.

GEIDT, J. I agree and I think that the interpretation proposed derives support from the difference in the penalty foreshadowed in the preliminary decree as attaching to default in [869] payment, according as the preliminary decree is for foreclosure or for sale.

When the preliminary decree is for foreclosure, the mortgagor is told that, if payment of the amount found due is not made on the day fixed, he will be absolutely debarred of all right to redeem the property (section 86). But when the preliminary decree is for sale, no such consequence is foreshadowed as the penalty for default of payment on the day fixed. In the latter case the mortgagor is told (section 88) that in default of payment, the mortgaged property will be sold, and the proceeds of the sale applied in payment of what is due to the plaintiff. If the Legislature had intended that the extinguishment of the defendant's right to redeem should be one of immediate consequence of the defendant's default to pay on the day fixed, we should have expected it to be mentioned in the preliminary decree.

WOODROFFE, J. I agree with the learned Chief Justice in thinking that, having regard to the grounds of decision, the questions whether clause 3 of the Circular order of this Court of the 27th April 1892, declaring section 291 of the Civil Procedure Code to be applicable to mortgage decrees, is or is not *ultra vires*, as also whether (as has been argued before us) the execution sections of the Civil Procedure Code apply to mortgage decrees, do not arise in this appeal, which I agree should be dismissed, not upon any ground based upon or connected with

(1) (1900) I. L. R. 25 Mad. 244.

(3) (1897) I. L. R. 19 All. 205.

(2) (1900) I. L. R. 25 Bom. 104.

(4) (1904) I. L. R. 31 Cal. 373.

clause 3 of the Circular order or the provisions of section 291 of the Civil Procedure Code, but for the reason that, in my opinion, a mortgagor has the right to redeem at any time until the sale of the mortgaged property has been completed, and that, upon a reasonable construction of section 89 of the Transfer of Property Act, it does not prohibit the exercise of such right after the passing of an order absolute for sale and before the sale under such order has actually taken place. This view as to the right of redemption is in conformity with the practice, which, so far as I am aware, has prevailed on the original side of this Court and with the observations made in the judgment in the case of *Jogendra Nath Mukerjee v. Methana Abraham* (1), though there it was considered that the equitable [870] right of the mortgagor to redeem at any time before the property is sold, is not based on, but is outside the provisions of, the Transfer of Property Act.

This construction of section 89 is, it seems to me, also supported by the fact that the extinction of the right to redeem and of the security are treated as being on the same footing by that section. As the extinction of the security merely refers to the sale of the property free of the lien, it cannot of course occur, until the sale has taken place, the security not being extinguished by the order absolute [see *Popple v. Sylvester* (2).] I agree therefore in thinking that the right to redeem also is not lost, until the sale has taken place and in holding that it was open to the respondents to pay the mortgage-debt notwithstanding that an order absolute for sale had been passed, no sale under such order having in fact taken place.

Appeal dismissed.

31 C. 871 (=31 I. A. 127=9 C. W. N. 74=8 Sar. 635).

[871] PRIVY COUNCIL.

RANI SRIMATI v. KHAGENDRA NARAYAN SINGH.*

[21st, 22nd April, and 14th May, 1904.]

[On appeal from the High Court at Fort William in Bengal.]

Evidence—Admissibility of evidence—Evidence Act (I of 1872) s. 32—Document—Contemporaneous proof—New trial—Concurrent decisions on fact—Mithila law—Sister's son—Agnate—Preferable heir.

Documents which, it was contended, were inadmissible against the appellant on the ground that they were *res inter alias acta* and did not come within any of the classes of evidence enumerated in s. 32 of the Evidence Act (I of 1872) were held to be admissible against him as being clearly evidence against persons through whom he claimed.

On an issue as to whether a posthumous son had been born, to whom the respondent would, if the affirmative were proved, succeed in preference to the appellant, a document in Persian characters was produced written on two pieces of paper of very different textures fastened together, of which the lower portion (which the appellant contended was a forgery) was in a different handwriting from that of the upper portion and was written with a different pen.

It was also objected that the word in the upper portion translated "son" really meant only "child" or "offspring" without distinction of sex.

Held, that even if the appellant's contentions were correct, other expressions in the upper portion of the document pointed to the existence of a son, and the fact of its being expressly referred to in another document of slightly

* Present:—LORD MACNAGHTEN, LORD LINDLEY, AND SIR ARTHUR WILSON.

(1) (1902) 6 C. W. N. 769.

(2) (1882) L. R. 22 Ch. D. 98.

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