

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

1891 ROGHU NATH PERSHAD AND ANOTHER (DEFENDANTS) *v.* HARLAL
 March 4. SADHU (PLAINTIFF) AND OTHERS (DEFENDANTS).*

*Transfer of Property Act (IV of 1882), s. 82—Mortgage—Contribution—
 Apportionment of the mortgage debt—Mortgage decree.*

A brought a suit upon a mortgage bond. Five of the defendants, who had subsequently purchased all the mortgaged properties, contended that under section 82 of the Transfer of Property Act the mortgage debt should be apportioned between the various mortgaged properties, and that each defendant should be allowed to pay off his rateable share of the mortgage debt.

Held, that the intention of section 82 was not that the lien of the mortgagee should be split, but simply to determine the liabilities of the purchasers *inter se*; and that therefore all the mortgaged properties were liable in satisfaction of the plaintiff's claim.

THIS was a suit upon a mortgage bond. The only defendants who contested the suit were persons who had subsequently purchased all the mortgaged properties. They contended that under section 82 of the Transfer of Property Act the amount of the plaintiff's claim should be apportioned between the various mortgaged properties according to their respective values, and that the plaintiff should be made to accept from each defendant his rateable share only of the mortgage debt. The Subordinate Judge was of opinion that all the mortgaged properties were liable in satisfaction of the mortgaged debt, and that the question of contribution must be left to a separate suit between the defendants *inter se*. Accordingly the Subordinate Judge gave the plaintiff a mortgage decree for the whole amount of his claim.

Sheo Golam Lall, defendant No. 12, one of those who defended the suit, appealed to the District Judge. The District Judge agreed with the Subordinate Judge in his view of the law and dismissed the appeal.

Sheo Golam Lall died on the 9th Kartick 1293 (25th October 1886), and his heirs Roghu Nath Pershad and Sheo Churn Lall appealed to the High Court.

* Appeal from Appellate Decree No. 2218 of 1889, against the decree of J. Crawford, Esq., Judge of Gya, dated the 7th of August 1889, affirming the decree of Baboo Abinash Chunder Mitter, Subordinate Judge of Gya, dated the 21st of December 1888.

Mr. *C. Gregory* and Baboo *Akshya Kumar Banerjee* for the appellants.

Moulvie *Mahomed Yusoof*, Baboo *Karuna Sunder Mookerjee*, and Baboo *Satish Chunder Ghose* for the respondents.

Mr. *Gregory* contended on behalf of the appellants that, as the mortgaged properties had passed into other hands and the original mortgagor was no longer the proprietor, under section 82 of the Transfer of Property Act the lower Courts should have apportioned the mortgage debt between the several persons who then owned the properties, and should have allowed the appellants to pay off their share of the mortgage debt.

The respondents were not called upon.

The judgment of the Court (TOTTENHAM and AMEER ALI, JJ.) was as follows :—

This was a suit to recover money due upon a mortgage by the sale of the mortgaged properties, which were the five properties originally mortgaged; and it appears that some have since passed out of the hands of the original mortgagor.

The present owners were made parties to the suit. The present appeal has been preferred by one of those parties, the original defendant No. 12; and the point which we have to decide is whether by virtue of section 82 of the Transfer of Property Act this defendant is entitled to require the plaintiff, mortgagee, to apportion his claim amongst the various properties mortgaged, and to accept from the appellant his rateable share only.

The learned pleader for the appellant has not been able to put before us any authority for his construction of section 82 of the Transfer of Property Act, nor are we aware of any such authority.

We think the position is not tenable, but that the lower Courts are quite right in the view they have taken of section 82, when the District Judge says, "that the intention of the law is not that the lien of the mortgagee should be split, but simply to determine the liabilities of the purchasers *inter se*." Section 82 upon the face of it refers to contribution as between the various persons who may be liable with respect to the same debt. It seems to us that the lower Courts were quite right in allowing the plaintiff a decree for the whole sum claimed, making all the mortgaged properties liable for the satisfaction of that decree, and

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leaving it to any one of the defendants who might have to pay up more than his rateable share to recover with reference to section 82 of the Transfer of Property Act from his co-debtors.

This appeal is dismissed with costs.

Appeal dismissed.

C. D. P.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

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JOGODINDRO NATH (DEFENDANT) v. SARUT SUNDURI DEBI,
ON HER DEATH HER HEIR HEMANTO KUMARI DEBI AND
ANOTHER (PLAINTIFFS).*

*Appeal—Withdrawal of suit—Appeal from order permitting withdrawal—
Decree—Civil Procedure Code (Act XIV of 1882), ss. 2, 373 and 588.*

An order made by an Appellate Court under section 373 of the Civil Procedure Code giving permission to withdraw a suit with liberty to bring a fresh one is not a decree within the meaning of section 2, and is not appealable.

Ganga Ram v. Data Ram (1) dissented from. *Kalian Singh v. Lekhraj Singh* (2) approved of.

THE plaintiffs brought a suit against the defendant for the recovery of possession of a certain piece of land. The Munsiff dismissed the suit on the ground that it was barred by limitation. The plaintiffs appealed and the Subordinate Judge passed an order under section 373 of the Civil Procedure Code, giving them permission to withdraw the appeal and the original suit with liberty to bring a fresh suit.

From this order the defendant appealed.

At the hearing of the appeal a preliminary objection was taken on behalf of the respondents that no appeal lay.

The *Advocate-General* (Sir Charles Paul), Baboo Hem Chunder Banerjee, and Baboo Srish Chunder Chowdhry for the appellant.

Baboo Srinath Das and Baboo Grija Sunker Mozumdar for the respondents.

* Appeal from Appellate Decree No. 1039 of 1890, against the decree of Baboo Kali Churn Ghosal, Subordinate Judge of Mymensingh, dated the 16th May 1890, reversing the decree of Baboo Mohendra Lal Ghosh, Munsiff of Pingna, dated the 4th of January 1889.

(1) I. L. R., 8 All., 82.

(2) I. L. R., 6 All., 211.