

hable, and that, although the suit has been dismissed as against the defendant No. 3, yet a decree for the whole amount has been very properly given against the two defendants, who are appellants before us.

The appeal is dismissed with costs.

*Appeal dismissed.*

S. C. G.

*Before Mr. Justice Banerjee and Mr. Justice Pratt.*

PRAMATHA CHANDRA ROY

*v.*

KHETRA MOHAN GHOSE.\*

1902  
July 1.

*Transfer of Property Act (IV of 1882) s. 89—Mortgage—Order absolute for sale of mortgaged property, application for—Decree—Execution—Uncertified payment to decree-holder—Appeal—Civil Procedure Code (Act XIV of 1882) ss. 244, 258, 540, 578—Court-fee, insufficiency of—Error affecting merits or jurisdiction.*

Proceedings under s. 89 of the Transfer of Property Act are not proceedings in execution of a decree, but in continuation of the original suit; and an appeal from an order absolute made under that section lies under the provisions of s. 540 of the Code of Civil Procedure as an appeal from an original decree.

*Tiluck Singh v. Parsotein Proshad* (1), and *Tara Proshad Roy v. Bhubodeb Roy* (2) relied upon.

The decision of the majority of the Full Bench in *Mallikarjunadu Setti v. Lingamurti Pantulu* (3) dissented from, and that of the minority (Sir Arnold White C.J. and Moore J) followed.

In an application under s. 89 of the Transfer of Property Act for an order absolute for sale of the mortgaged property, s. 258 of the Civil Procedure Code is no bar to an inquiry into the plea of payment of the mortgage debt.

THE plaintiffs, Pramatha Chandra Roy and another, appealed to the High Court.

The plaintiffs having brought a suit against Khetra Mohan Ghose, the defendant, on a simple mortgage bond, Khetra Mohan,

\* Appeal from Appellate Decree No. 135 of 1899, against the decree of H. R. H. Coxe, Esq., District Judge of Midnapore, dated the 15th of October 1898, reversing the decree of Babu Amrita Lal Palit, Munsiff of Midnapore, dated the 3rd of September 1898.

(1) (1895) I. L. R. 22 Calc. 925. (2) (1895) I. L. R. 22 Calc. 931.

(3) (1900) I. L. R. 25 Mad. 244.

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on September 25, 1894, executed a *solehnama* in respect of Rs. 384-8, and the suit was decreed by the Munsiff of Midnapore against the defendant according to the terms of the *solehnama*.

On September 22, 1897, the plaintiffs presented an application to the Munsiff, under s. 89 of the Transfer of Property Act for an order absolute for sale of the mortgaged property, alleging that the defendant had paid them only Rs. 79, but failed to pay the balance of the decretal amount.

The defendant objected to this application on the ground that the mortgage debt had been fully paid off, and the decree-holders had absolved him from the liability under the decree, and in proof thereof he filed the *hatchitta* given him by the decree-holders.

The Munsiff held that, there being no certificate as to the alleged payment by the judgment-debtor, it could not be recognised under the provisions of s. 253 of the Code of Civil Procedure; and the payment not being legally proved, he disallowed the defendant's objection and ordered the mortgaged property to be put up to sale, as prayed for by the decree-holders.

On appeal the District Judge reversed the finding of the Court of first instance, holding that the payment of the mortgage debt had been proved to his satisfaction, although, as the learned District Judge observed, the defendant "very foolishly neglected to get formal receipts;" and he accordingly refused the plaintiffs' application under s. 89 of the Transfer of Property Act.

Against this decision the plaintiffs now appealed.

*Babu Joy Gopal Ghosh* for the appellants.

No one appeared for the respondent.

**BANERJEE AND PRATT JJ.** This appeal arises out of an application under s. 89 of the Transfer of Property Act by the plaintiffs, appellants, for an order absolute for the sale of certain mortgaged property. Upon that application being made, the defendant-respondent raised an objection on the ground that the mortgage debt was paid off, after the decree under s. 88 was made. The first Court, whilst holding that the objection could be entertained, came to the conclusion, upon the evidence, that the alleged payment was not proved. On appeal by the

defendant the lower Appellate Court has reversed the finding of the first Court and held that the payment was proved; and it has accordingly refused the application under s. 89 of the Transfer of Property Act. Against this decision of the lower Appellate Court the plaintiffs have preferred the present appeal, and it is contended on their behalf, *first*, that the Courts below were wrong in holding that s. 258 of the Code of Civil Procedure was no bar to their entertaining the objection of the defendant, and, *secondly*, that, if s. 258 be held inapplicable to the present case by reason of the proceedings under s. 89 of the Transfer of Property Act not being proceedings in execution of a decree, in that case the appeal to the lower Appellate Court was incompetent, as s. 244 of the Code of Civil Procedure must in that view of the matter be inapplicable to the case.

We are of opinion that this contention is unsound. Proceedings under s. 89 of the Transfer of Property Act are not in our opinion proceedings in execution of a decree, but are proceedings in continuation of the original suit. This view is in accordance with that taken by this Court in *Tiluck Singh v. Parsotein Proshad* (1) and *Tara Prosad Roy v. Bhubodeb Roy* (2). The decision of a Full Bench of the Madras High Court in *Mallikarjunadu Setti v. Lingamurti Pantulu* (3) was cited by the learned vakil for the appellant in support of his contention that proceedings under s. 89 of the Transfer of Property Act were in the nature of proceedings in execution of a decree passed under s. 88. That, no doubt, is the opinion of the majority of the Full Bench, but with all respect for their opinion, we agree with the learned Chief Justice of Madras and Mr. Justice Moore, who took the opposite view. That being so, s. 258 of the Code of Civil Procedure is no bar to the Court's inquiring into the plea of payment raised by the mortgagor in satisfaction of the decree *nisi* made under s. 88 of the Transfer of Property Act.

Then, as for the contention that in this view of the matter s. 244 of the Code of Civil Procedure was inapplicable to the case, and the appeal to the lower Appellate Court was therefore incompetent, it is sufficient to say that an appeal lay to the

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lower Appellate Court against the order absolute that was made by the first Court under s. 540 of the Code as an appeal from an original decree.

It was urged that the appeal that was preferred to the lower Appellate Court was preferred as an appeal from an order and not as an appeal from a decree, and that the proper court-fee for an appeal from a decree was not paid. We think that it is a sufficient answer to this objection to say that it is met by the provisions of s. 578 of the Code of Civil Procedure; the error of the lower Appellate Court in entertaining the appeal being one which did not affect the jurisdiction of that Court or the merits of the case.

The result, then, is that the appeal fails and must be dismissed without costs, no one appearing for the respondent.

*Appeal dismissed.*

B. D. B.

## ORIGINAL CIVIL.

*Before Mr. Justice Ameer Ali.*

JOGINEE MOHUN CHATTERJEE

v.

BHOOT NATH GHOSAL.\*

1902  
April 15, 16,  
21, 29.

*Registration—Mortgage—Registration Act (III of 1877), ss. 17, 18, 28, 49—Registration of documents—Jurisdiction to register documents—Effect of registration by an officer not having jurisdiction—Mortgage security, ineffectuality of, by reason of defective registration—Money-decree—Limitation.*

Where registration of a deed has been effected by a Registrar having no jurisdiction in that behalf under s. 28 of the Registration Act (III of 1877), the document is not effective for the purpose for which it is created.

The Sub-Registrar of Sealdah registered a mortgage deed, dated October 10, 1896, purporting to hypothecate an immoveable property within the area of the Sealdah Registration Office. In the suit, brought on August 31, 1901, for the enforcement of the mortgage bond, the defendant contended, *inter alia*, that no such property as described in the deed ever existed; and no satisfactory evidence having been given as to its existence:

\* Original Civil Suit No. 686 of 1901