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interference of this Court in cases like the present. I think therefore that Lal Singh had a right of appeal to the court of Session against his conviction and sentence in the present case. From one point of view it is a circumstance against the admission of the present application, that the applicant had a remedy by way of appeal. On the other hand, there is this consideration in the applicant's favour, that he did present his petition to the Sessions Judge before his sentence had expired and within the period of limitation prescribed for the presentation of a criminal appeal. The Sessions Judge might therefore have dealt with that petition as an appeal and exercised his powers so as to give prompt relief.

For the reasons stated I am disposed to accept this application and I do so accordingly. I set aside the conviction and sentence in this case and record an order acquitting Lal Singh of the offence charged. As the sentence has been served there is no necessity to pass any further order.

Application allowed.

APPELLATE CIVIL.

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April 5.

Before Mr. Justice Piggott and Mr. Justice Walsh.

UDHISHTER SINGH AND ANOTHER (DECREE-HOLDERS) *v.* KAUSILLA AND OTHERS (JUDGMENT-DEBTORS).*

Civil Procedure Code (1908), *order XXXIV, rules 4 and 5—Mortgage—Preliminary decree in favour of puisne mortgagee allowing redemption of prior mortgage—Right of puisne mortgagee on redemption to a decree absolute for sale of the property comprised in both mortgages.*

In a suit for sale by puisne mortgagees the preliminary decree gave the plaintiffs a right to redeem a prior mortgage covering other property as well as that included in the mortgage in suit. The preliminary decree did not, however, specify this property as property which the mortgagees plaintiffs were entitled, in the event of non-payment, to bring to sale.

Held, that the plaintiffs mortgagees, having paid the amount due on the prior mortgage, were entitled, notwithstanding this omission, to a final decree for sale of the property comprised in both mortgages.

THIS was a suit brought by the appellant for sale on a mortgage in his favour against the mortgagor as well as against a person named Tika Ram who held a prior mortgage over the properties

* Second Appeal No. 1844 of 1914, from a decree of H E. Holmes, District Judge of Aligarh, dated the 28th of May, 1914, confirming a decree of Abdul Hasan, Assistant Judge of Aligarh, dated the 22nd of February, 1913.

mortgaged to the appellant and also over certain other properties. On the same day this Tika Ram also brought a suit against the appellant and the mortgagor. Both the suits were tried together and preliminary decrees were passed on the 30th of November, 1910. In the appellants' suit the preliminary decree provided that in the event of the mortgagor not paying unto the appellant the amount found due on the mortgage in favour of the appellant, the appellant would be entitled to pay off the amount found due on the mortgage in favour of Tika Ram and thereupon he would be entitled to bring to sale the mortgaged property or a sufficient part thereof for the realization of the consolidated amount which should so become due to him. It appears that prior to the institution of the above mentioned suits Tika Ram had purchased the equity of redemption in all the mortgaged properties. Early in 1912, the appellant paid to Tika Ram whatever was found due on his mortgage. On the 17th of May 1912, he applied for a decree absolute under order XXXIV, rule 5, of the Code of Civil Procedure (1908), and prayed that the sale of not only the properties mortgaged to him but also of the additional properties mortgaged to Tika Ram be ordered. Tika Ram objected and thereupon the Subordinate Judge framed a decree absolute for the sale of only the properties mortgaged to the appellant.

On appeal the order and decree of the court of first instance were confirmed by the District Judge. The plaintiffs thereupon appealed to the High Court.

Munshi *Benode Behari*, for the appellant:—

Having paid off Tika Ram's mortgage the appellants have got the same rights as Tika Ram had over the properties mortgaged to him, or in other words they have been subrogated to the rights of Tika Ram. The mortgagor will not be in the least affected if the appellants be allowed to put to sale the additional properties mortgaged to Tika Ram. He had to pay off Tika Ram's dues and in default thereof all the properties mortgaged to Tika Ram would have been put to sale. As regards Tika Ram, he has got no equity in his favour, as he has got whatever was due to him and should not retain his hold upon the properties in question. The terms of the preliminary decree of

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the 30th of November, 1910, do not stand in our way. Our right to sell these additional properties did not arise from that decree but from the subsequent fact of our having paid off Tika Ram's mortgage. I rely upon an unreported judgement of GRIFFIN and CHAMIER, JJ., in the case of *Nawab Singh* v. *Tara Singh* (1). It is true that in that case there was this difference that the mortgagee had secured an amendment of the preliminary decree, but I submit that that does not make any difference; the principle adopted in that case would apply whether there was any amendment or not. I also rely upon *Gopi Narain Khanna* v. *Bansidhar* (2). Moreover, section 74 of the Transfer of Property Act is also in my favour; and the cases *Gurdeo Singh* v. *Chandrika Singh* and *Chandrika Singh* v. *Rash Behari Singh* (3), *Bisseshar Parshad* v. *Lala Sarnam Singh* (4), also support my contention. In the last mentioned case the principle of subrogation was fully discussed. In justice and equity I am entitled to have a decree for the sale also of the additional properties mortgaged to Tika Ram as I had to pay off Tika Ram's mortgage under the decree.

Babu *Piare Lal Banerji*, for the respondent:—

I do not contest the broader ground of subrogation. The true question is that, admitting that in equity the appellant would be entitled to have a right to bring to sale these additional properties, when should that right be claimed? He did not claim this relief in his plaint. In its decree the court has rightly or wrongly provided only for the sale of the properties mortgaged to the appellant for the consolidated amount and that decree still stands; as long as this preliminary decree stands it has to be made absolute as it is. Order XXXIV, rule 5, of the Code of Civil Procedure (1908), refers to rule 4 and that again refers back to rule 2 and from this rule we get what was meant by the expression "mortgaged property." A court making a decree absolute has got very limited powers. None of the cases cited on the other side bears on this point, excepting the unreported case, in which, however, an amendment had to be sought for. Such an amendment cannot be made at the present stage.

(1) S. A. No. 450 of 1911, dated the 16th of December, 1912.

(2) (1905) 2 A. L. J., 336, 341.

(3) (1907) 5 C. L. J., 611, 631.

(4) (1907) 6 C. L. J., 134, 137.

I rely upon the unreported judgement of BANERJI, J., in *Babu Kishen Lal* v. *Kishen Lal* (1). The error in the decree of the 30th of November, 1910, cannot be rectified at this stage. The other side will have to apply for a review. In his plaint the appellant prayed for a relief that he might be allowed to recover both the amounts, but did not pray that the consolidated amount should be made recoverable from the additional properties.

Under order XXXIV, rule 5 (2) of the Code of Civil Procedure, no option is left to the court but to pass a decree for the sale of the mortgaged property. Now where is the court to look to for a specification of the mortgaged property otherwise than to the preliminary decree? The court cannot go behind the preliminary decree. The court can amend its mistake in a proper proceeding in a proper way, that is to say, if so asked for. Moreover, it is not the case of the other side that the exercise of the powers of the court under sections 151 and 153 of the Code of Civil Procedure, are called for. They say that the preliminary decree was all right. At this stage they are asking the court to do something which the court cannot do. If they claim something other than what the preliminary decree had given them then they can bring a separate suit. It is not a case of an accidental error, but there is a clear and definite direction given in the decree. The appellant had to pay off Tika Ram according to the specific directions given in the decree and but for those directions he would have to bring a separate suit for the enforcement of his rights consequent upon that payment. The decree anticipated the consequences of that payment and provided for it and we cannot go beyond that. The appellant in the present proceedings wants the court to give effect to his compliance with the directions given in the decree and cannot seek a modification of the consequences of his compliance with those directions as the same had been anticipated beforehand and provided for in the decree.

PIGGOTT, J.—In the litigation out of which this second appeal arises there were three parties. The appellants now before this Court were subsequent mortgagees. There were certain

(1) Civil Revision No. 184 of 1912.

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defendants who were the original mortgagors, and there was one Tika Ram who held mortgages prior in date to those of the present appellants. There were separate suits instituted by Tika Ram and the present appellants, but we are concerned at present only with the suit in which these appellants were the plaintiffs. It was a contested matter between them and Tika Ram as to whether the mortgages in favour of the latter had or had not priority, but this point was decided in favour of Tika Ram. A preliminary decree was then drawn up under order XXXIV, rule 4, of the Code of Civil Procedure. The facts of the case were somewhat complicated, more particularly by the circumstance that the mortgages in favour of Tika Ram covered certain other property over and above that which was involved both in Tika Ram's mortgages and in the mortgages in favour of the appellants. The preliminary decree drawn up by the court of first instance was clumsily drafted. In substance, however, it contained the provisions prescribed by the Statute; the mortgagors were given an opportunity to pay off the plaintiffs, failing this the plaintiffs were given an opportunity of paying off Tika Ram, and in the event of plaintiffs doing so, they were to be allowed to bring the mortgaged property to sale. There was appended to the decree a specification of the property in suit, and of course the property involved in that particular suit was that covered by the mortgage in favour of the plaintiffs only, and did not include the additional property mortgaged to Tika Ram. In the result the mortgagors failed to redeem and the plaintiffs did pay off Tika Ram. They then came into Court asking for a final decree under the provisions of order XXXIV, rule 5, of the Code of Civil Procedure, and they naturally claimed that this final decree should be so drafted as to entitle them to bring to sale, not only the property originally covered by their mortgage, but the additional property included in the mortgages in favour of Tika Ram to whose rights they had been subrogated in consequence of the payment made by them subsequently to the passing of the preliminary decree. That this was a proper and valid claim has been practically conceded in argument before us, and is beyond question. Nor has it been questioned in the order passed by either of the courts below. The attitude

taken up by the learned Subordinate Judge, who tried the suit in the first instance, and by the learned District Judge in appeal, is that the plaintiffs are asking the court to draw up a final decree for sale in terms inconsistent with the terms of the preliminary decree, and that this cannot be done. In fact a sort of *res judicata* is being set up against the present appellants. The contention is that they ought to have obtained in the preliminary decree itself a clear and specific statement that, in the event of their paying off Tika Ram, they would be entitled to bring to sale, not only the property covered by their mortgage, but the additional property already referred to. It is contended that they not only failed to do this, but they acquiesced in a decree which contained a specification of the mortgaged property, that this specification was limited in the manner already stated and that it cannot be added to or modified in any way in the decree absolute. Although these contentions have found favour in both the courts below, it seems to me that they have no real force. So far as the terms of order XXXIV, rule 5, are concerned these merely lay down that in a certain event the court shall pass a decree that "the mortgaged property or a sufficient part thereof" be sold. The meaning clearly is that the mortgaged property which the plaintiffs are under the particular circumstances of the case entitled to bring to sale shall be ordered to be sold. Neither rule 4 nor rule 5 of Order XXXIV says anything about the specification of the mortgaged property. It is no doubt right and proper that the mortgage decree should contain such specification, but the question before us now is whether the court was debarred from making the correct specification in its final decree under order XXXIV, rule 5, by reason of anything it had done in the decree which it passed under order XXXIV, rule 4. The court which deals with an application for a final decree is still the same court of original jurisdiction to which the plaint in the suit was presented, and it is still seized of the entire suit. It is its duty to frame a proper final decree, determining correctly once and for all the respective rights and liabilities of the parties. No doubt it would be a questionable exercise of discretion for a court to pass a final decree in terms clearly inconsistent with those of the preliminary

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decree; but so long as a court is seized of the entire case it seems to me that it is entitled to clear up any ambiguity existing in the preliminary decree, and I would go further and say that it is entitled to frame its final decree so as to put right any patent error or omission which may be discoverable in the preliminary decree. In the present case the preliminary decree simply directed that on a certain event "the mortgaged property" should be sold. The specification appended to the decree was simply that of the property mortgaged in the particular mortgage-deed on the basis of which the suit then before the court was brought. The question whether in the event of the then plaintiff's paying off Tika Ram, they would or would not become entitled to do something which they had no right to do under their own mortgage, namely, to sell the additional property mortgaged in favour of Tika Ram alone, had not been litigated before the court and I do not think it can fairly be said that it was determined by the form of the preliminary decree. I am of opinion that the court of first instance in the present case had jurisdiction, on the application made to it by the present appellants, to pass a final decree for sale in the terms desired by the appellants, and I am further of opinion that it ought to have done so. I would therefore allow this appeal with costs in all three courts, and direct that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to sale, not only the property originally mortgaged to them as specified in the preliminary decree, but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record.

WALSH, J.—I entirely agree in the result and with the reasons given by my learned brother. Mr. *Banerji* on behalf of the respondents has argued this case with considerable skill, and the candour which might be expected from him. It is only because he has been able to present such formidable arguments, and because two courts have deliberately decided in favour of the view for which he has contended, that I think it desirable to say something in addition to my brother PIGGOTT'S reason for allowing this appeal, upon some boarder and more important

considerations which to my mind are raised. I think it is high time that the attention of the lower courts was again drawn to the powers conferred on them by sections 151, 152 and 153 of the Code of Civil Procedure. Those sections are just as applicable to courts of first instance as to courts exercising appellate jurisdiction. Without enlarging upon their scope, it is sufficient to say that the powers conferred upon all courts exercising jurisdiction under the Code by those sections are wide, salutary and intended to enable the court, by curing breaches of technical rules, to give effect to the real rights of the parties and to prevent multiplicity of suits. I quite agree with what Mr. *Banerji* has said, that a mere attempt by a court to do what it is pleased to think "justice between man and man" without regard to form at all, is just as likely to produce a miscarriage of justice as a slavish adherence to rules of procedure, and it is obviously difficult to define by a general proposition the dividing line between form and substance. But in this particular case there is no difficulty. It was admitted by Mr. *Banerji* that by law the appellants in this case were entitled to be subrogated, in respect of this surplus piece of property which is in dispute, to the rights of Tika Ram. Not only so, but it was also admitted by him with equal candour that unless in some way or other they could assert and obtain recognition of those admitted rights in the proceeding now before us, they would be confronted, in an independent suit brought in order to assert them, by a plea of *res judicata*. In other words, the effect of the order of the court below, which we are asked to affirm, was so to hold a party to the *t's* which he has crossed and the *i's* which he has dotted as to deprive him of his actual rights admitted by the party opposed to him in the suit. It is in such cases that a court is not only entitled, but in my judgement, is bound to brush aside a mere technicality which stands in the way of justice, and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial rights of the parties. I will cite in support of the view I hold in this matter what has been laid down and recognized for years in the courts in England. The provisions of the English law are to be found in order XXVIII of the rules of the Supreme Court,

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which correspond roughly with the first schedule of the Code of Civil Procedure, and in sub-section 7 of section 24 of the Judicature Act of 1873. The recognized principles upon which those provisions have been administered are contained in the sentences which I am going to quote from judgements of recognized authority in the English Court of Appeal at different epochs. "My practice," said Lord BRAMWELL, "has always been to give leave to amend unless I have been satisfied, that the party applying was acting *malâ fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission," said Lord ESHER, "and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to th other side. There is no injustice if the other side can be compensated by costs." "An amendment ought to be allowed if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided." Again the Court of Appeal has said that under these provisions every Judge has full power of his own motion (that means to say when he sees that the party himself has not recognized the amendment which is neceesary, but that amendment is desirable) to make any amendment which he deems necessary for the purpose of determining the real question at issue between the parties. I do not myself profess to have followed very closely what possible alternative might have been suggested to the courts below for the purpose of correcting what was not so much an omission, as a want of foresight in the original drawing up of the provisional decree. It must be borne in mind that in drawing up such orders as this, the priority of the mortgages in question, the contingency to arise in the event of the first mortgage being paid off either by the mortgagor or the subsesequent mortgagee, and a variety of other details, have to be considered and worked out, and judges, officials and counsel themselves would be more than human if mistakes were not made by even the most highly qualified person entrusted to carry out the work. It is of the highest importance for the administration of justice that when the real rights of the parties

are clear and definite, as in this case they are admitted to be, the Court of its own motion, without waiting for any application to be put in by a party, should adopt the necessary course to give effect to such admitted rights. It is for that reason that I have not referred to section 114 of the Code of Civil Procedure, which gives the power of review. That is also a salutary provision, but having regard to the provisions relating to the procedure contained in order XLVII, it imposes upon a party who is suffering from a mistake the task of taking some fresh independent steps of a technical nature which may lead to some unforeseen difficulty. I think myself that the powers under the sections already referred to are sufficient for a court, and that they should be kept in mind by the lower courts when such controversies arise as have arisen in this matter. It only needs to be added that in all such cases where it is clear to an appellate court that it was open to the first court or any lower court to have taken such steps by way of amendment, the appellate court ought to do what the lower court might have done.

BY THE COURT.—The appeal is allowed with costs in all three courts and it is ordered that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to sale not only the property originally mortgaged to them as specified in the preliminary decree but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record.

Appeal decreed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SURAJ BHAN AND OTHERS (DECREE-HOLDERS) *v.* BOOT AND EQUIPMENT FACTORY, AGRA (JUDGEMENT-DEBTOR) *

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April, 5.

Act No. VII of 1913 (*Indian Companies Act*), *section* 207—*Voluntary liquidation—Decree passed against company prior to liquidation—Stay of execution—Jurisdiction.*

A decree had been obtained against a company which subsequent to the passing of the decree went into voluntary liquidation. The decree-holder applied for execution of the decree which was granted by the court of first

* Second Appeal No. 1027 of 1915, from a decree of D. R. Lyle, District Judge of Agra, dated the 20th of April, 1915, reversing a decree of Abdul Ali, Subordinate Judge of Agra, dated the 15th of February, 1915.