

joint property and should have been partitioned. The learned Subordinate Judge considers that the provisions of the will ought to be given effect to, which specifically gave the village of Lalpur to the plaintiff and that this house ought to be regarded as an appurtenant of that village. We see no reason to differ from the view taken by the learned Subordinate Judge. On full consideration of the entire case, we think the decree of the court below ought to be affirmed in its entirety. We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

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## REVISIONAL CIVIL.

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*Before Mr. Justice Chanier and Mr. Justice Piggott.*

SALLADEO GIR (PETITIONER) v. DEO DUTT MISIR AND OTHERS (OPPOSITE PARTIES).\*

*Civil Procedure Code (1908), section 152—Refusal of Court to correct an accidental mistake in the drawing up of a decree—Revision—Jurisdiction.*

In a suit for sale on foot of a mortgage one of the defendants pleaded a prior mortgage. An issue was expressly struck on the point and was found in favour of the prior mortgagee. The operative portion of the judgement directed that a decree for sale should be prepared in accordance with the provisions of Order XXIV, rule 4, of the Code of Civil Procedure; but the decree which was drawn up was one for sale of the property in suit, without any reference to the prior mortgage. The prior mortgagee presented an application under section 152 of the Code of Civil Procedure to the court which passed the decree to have it amended. *Held* that the prior mortgagee, whether or not he had preferred an appeal from the decree, was entitled, with reference to section 152, to have it amended, and the court in refusing to amend had failed to exercise a jurisdiction vested in it by law.

THE facts of this case were as follows :—

In a suit for sale upon a mortgage one of the defendants pleaded a prior encumbrance. An issue was framed on this plea and the court found that he had priority. Neither the judgement nor the decree, however, made any express provision for securing the prior right. The preliminary decree was passed on the 18th of February, 1911, and on the 1st of March 1913, the said defendant applied for correction thereof. That application was rejected on the 2nd of April 1913, on the ground that the decree was not at variance with the judgement. A decree absolute was passed on

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the 2nd of August, 1913. On the 21st of February, 1914, the defendant aforesaid applied under section 152 of the Civil Procedure Code for correction of the judgement and the decree by the insertion of the words "subject to the prior encumbrance, &c." after the words "by sale of the hypothecated property" in the judgement and the decree. This application being rejected the applicant came in revision to the High Court.

Babu *Sital Prasad Ghose* (with Babu *Jogindra Nath Chaudhri*), for the applicant.

It was distinctly found that the applicant had priority; the question had been specifically raised and decided. The omission to give practical effect to the priority was purely accidental. It was a mere oversight. Such an error comes within the scope of section 152, of the Civil Procedure Code and the court has inherent jurisdiction to correct such mistakes made by it in its judgement. It was the plain intention of the court to give effect to the prior right. The lower court has failed to exercise a jurisdiction vested in it by law and the case is a fit one for revision. *Sheo Balak v. Sukhdei* (1) and *Ashik Husain v. Mahdi Hasan* (2).

The Hon'ble Mr. *Abdul Raoof*, for the opposite party:—

This is not a case of an accidental slip or omission within the meaning of section 152. Upon the findings arrived at by the court it could have done one of two things. It could either have ordered the plaintiffs to redeem the prior mortgage of the applicant, or have ordered the sale subject to the prior encumbrance. It is not certain which course the court intended to adopt, and it cannot be said that the proposed correction represents the intention of the court. The form of decree (No. 8 of Appendix D of the Civil Procedure Code prescribed for a suit such as the one out of which the present application has arisen provides for redemption of the prior mortgage and not for sale subject to it; and there would be no justification for assuming that the court did not intend to draw up the decree consistently with the form prescribed. The applicant had another remedy open to him, namely, by way of appeal against the decree. Upon these considerations no case for section 152 or for interference in revision has been made out. The lower court has not refused to exercise

(1) (1914) 12 A. L. J., 185.

(2) (1910) 13 Oudh cases, 114.

jurisdiction vested in it by law. It entertained the application, but was of opinion that section 152 could not help the applicant for the reasons given by it.

Babu *Sital Prasad Ghosh*, replied.

CHAMBER and PIGGOTT, JJ.—This is an application in revision brought under peculiar circumstances. The petitioner was a prior mortgagee. He had brought a suit against the mortgagor and the subsequent mortgagees upon his mortgage and had obtained a decree. Later on, the subsequent mortgagees brought a suit impleading the mortgagor and the present petitioner, and asked for a decree for sale. The petitioner pleaded his prior mortgage. An issue was expressly struck on the point and was found in the petitioner's favour. The operative portion of the judgement directed that a decree for sale should be prepared in accordance with the provisions of order XXXIV, rule 4, of the Civil Procedure Code, allowing six months for payment. In the absence of any express direction in the judgement that this decree was to be for sale of the property in suit subject to the petitioner's prior mortgage, no order to that effect was embodied in the decree. The decree passed was, therefore, one for sale of the property as it stood, without reference to the petitioner's prior mortgage. That decree was not appealed against, and to this extent the petitioner may have been guilty of laches. When, however, it came to the petitioner's knowledge that the opposite party was seeking to execute that decree as it stood, he went to the court which passed the same and sought to obtain its amendment. The application with which we are concerned was one presented under section 152 of the Civil Procedure Code. The court below refused to go into the matter on the merits. It held that the case was not one to which the provisions of section 152 aforesaid applied. We are unable to concur in the reasoning of the learned Judge of the court below. In our opinion, this was a clear case of an error arising from an accidental slip or omission. The court should have been prepared to correct that error, either of its own motion or on the application of any of the parties. There has been a refusal to exercise what in this case was a necessary jurisdiction, and this refusal is based on a misunderstanding of the powers conferred on the court below by the section

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aforesaid. We accept this application, and direct that the judgement be amended by the insertion of the express words directing the sale of the property in suit subject to the prior mortgage of this petitioner, and that consequential amendments be made in the preliminary decree for sale, as also in the decree absolute. As we think that the petitioner might have been more watchful over his own interest and should have taken action earlier than he did, we direct that he do bear the costs of the opposite side in the present proceedings both here and in the court below.

*Application granted.*

*Before Mr. Justice Chamier and Mr. Justice Piggott.*

AFZAL BEGAM (DEFENDANT) v. AKBARI KHANUM AND OTHERS  
(PLAINTIFFS).\*

1915  
March, 10.

*Civil Procedure Code (1908), order XXIII, rule 1—Appellate court, powers of  
—Withdrawal of suit.*

*Held* that an appellate court can, under order XXIII, rule 1, of the Code of Civil Procedure (1908), give a plaintiff whose suit has been dismissed by the court of first instance permission to withdraw his suit and give him leave to institute a fresh one. *Ganga Ram v. Data Ram* (1) followed. *Choragudi Chinna Kotayya v. Raja Varada Raja Appa Row* (2) and *Elnath v. Ranaji* (3) dissented from.

THE facts of this case were as follows :—

The plaintiff brought a suit for partition of property which originally belonged to one Moti Begam. She omitted to implead certain heirs of her as defendants. The contesting defendants took an objection on this score and urged that the suit was not maintainable. No issue, however, was framed with respect to it and ultimately the court set apart the share of those heirs and gave the plaintiff a decree for her share in the remainder. The plaintiff appealed as regards the part of her claim which had been disallowed and the contesting defendants preferred a cross-objection again raising the plea that the suit was not maintainable for non-joinder of necessary parties. Thereupon the plaintiff applied to the appellate court saying that as her suit might fail by reason of a formal defect, she prayed for permission to withdraw the suit with liberty to bring a fresh suit. The appellate court granted the application. The defendant filed a revision in the High Court from that order.

\*Civil Revision No. 157 of 1914.

(1) (1885) I. L. R., 8 All., 82.

(2) (1914) 27 M. L. J., 244.

(3) (1911) I. L. R., 35 Bom., 261.