

APPELLATE CIVIL.

1917
November, 12.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

DAMBAR SINGH (OBJECTOR) *v.* KALYAN SINGH (DECREE-HOLDER).^{*}
Civil Procedure Code (1908), order XXXI, rules 4, 5 and 10—Suit for sale on a mortgage—Form of decree—Construction of decree—Costs—Appeal

A suit for sale on a mortgage was decreed by the court of first instance, dismissed by the court of first appeal, and again decreed by the High Court. In the judgement of the High Court it was stated :—

“ We must allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs in all courts.” The decree of the High Court was drawn up on one of the High Court forms. It stated that the appeal had been allowed, the decree of the lower appellate court set aside, and the decree of the court of first instance restored. It went on to state :—“ And it is further ordered that the respondent do pay to the appellant Rs. 554-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate court.”

Held that in construing this decree it was open to the Court to consider, first, the nature of the suit, secondly, the judgement of the High Court upon which the decree was founded, and the general practice of the Court and that, considering these matters, the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. *Magbul Fatima v. Lalta Prasad* (1) and *Ambo Sahai v. Shambhu Nath* (2) followed.

THE facts of this case, so far as they are necessary for the purposes of the report, are as follows :—

Certain property was usufructuarily mortgaged to Ausaf Ali and two others in 1867. Ausaf Ali had a one-third share in the mortgage. Ausaf Ali made a sub-mortgage of his mortgagee rights to Gokul Chand whose representative by purchase was Kalyan Singh, the respondent. In execution of a simple money decree against Ausaf Ali, his mortgagee rights were sold and purchased by Dambar Singh, the appellant. The mortgage in favour of Gokul Chand was made before the purchase by Dambar Singh. Kalyan Singh brought a suit for sale on his mortgage against Dambar Singh, Ausaf Ali's heirs and the original mortgagors.

^{*} Second Appeal No. 71 of 1917, from a decree of W. F. Kirton, Second Additional Judge of Aligarh, dated the 30th of June, 1916, confirming a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 6th of May, 1916.

(1) (1898) I.L.R., 20 All., 523. (2) (1902) I.L.R., 40 All., 114 (foot-note).

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The latter were *pro forma* parties. The suit was decreed by the court of first instance; and a decree in terms of order XXXIV, rule 4, was drawn up. Dambar Singh alone appealed against Kalyan Singh only, and the appeal was decreed, the suit being dismissed. Kalyan Singh appealed to the High Court and his appeal was allowed. The decretal order in the judgement was in these words:—"We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts. We extend the time for payment by six months from this date."

The decree in the High Court was in the ordinary form in which all decrees in appeals are drawn up. As regards the costs, that decree ran as follows:—"That respondent do pay to the appellant the sum of Rs. 393-2-9 the costs incurred by him in this Court and Rs. 161-4-0 the costs incurred by him in the lower appellate court." Upon this decree being passed, Kalyan Singh applied to execute the decree for costs against Dambar Singh personally. The judgement-debtor, Dambar Singh, objected that the decree was not executable against him personally and that the costs must be realized out of the mortgaged property. The courts below repelled this objection and allowed the application for execution. Dambar Singh appealed to the High Court.

The case was referred to two Judges by KNOX J.

Babu *Piari Lal Banerji*, for the appellant:—

The courts below have erred in allowing execution against Dambar Singh personally. The High Court on appeal modified the decree by extending the time for payment, which would necessitate the taking of accounts afresh by adding interest to the original mortgage-money. The costs awarded by the High Court are also part of the mortgage-money and are to be realized out of the property. As there can be only one final decree in a suit for sale on a mortgage, these "subsequent costs" must be included in the mortgage-money under order XXXIV, rule 10; *Gajadhar Singh v. Kishan Jiwan Lal* (1). The judgement of the High Court purports to pass a decree for sale in a mortgage suit, and though the decree may run in these words "the respondent

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do pay etc.," the decree does not lose its character of a mortgage-decree. The decree must be read with the judgement. In the case of *Maqbul Fatima v. Lalta Prasad* (1) the decree was exactly in the form in which it is in the present case, but the Full Bench interpreted it as a mortgage-decree in which costs form part of the mortgage-money, and it was laid down that the judgement might be referred to for the purpose. It was necessary for the respondent, Kalyan Singh, to appeal in order to secure the decree on the mortgage. It was undoubtedly possible to pass a personal decree against Dambar Singh, but that was not done in the present case. The question was also considered by STANLEY, C. J. and AIKMAN, J. in *Ambe Sahai v. Shambhu Nath*, (2) decided on the 28th of June, 1902 [unreported], and the appellate costs were to be held part of the mortgage-money and to be payable out of the mortgaged property.

He commented on and distinguished *Bansgopal Singh v. Rup Narain Singh* (3) and *Muhammad Sadiq v. Ghous Muhammad*, (4) and submitted that some of the observations of PIGGOTT, J., would not hold good in view of the Full Bench case *Gajadhar Singh v. Kishan Jiwan Lal* (5).

Babu Sarat Chandra Chaudhri, for the respondent:—

The present matter arises in execution proceedings, and as such the court executing the decree cannot go behind the decree. Consequently it is bound to execute the decree of the High Court as it is. As that decree is worded, it is one under which costs are payable by the judgement-debtor personally. The question is not what the decree ought to have been but what the decree actually is, and the decree as passed clearly directs costs to be paid personally. It is not necessary in every case for a decree-holder to have recourse to order XXXIV, rule 6, of the Code of Civil Procedure to realize a decree for costs; *Mohonya Ojha v. Bahadur Singh* (6). The appellant in the present case should have seen that the decree of this Court was properly drawn up. The decree is in the form prescribed by order XLI, rule 35, of the Code of Civil Procedure. That rule requires that a decree in appeal should

(1) (1898) I. L. R., 20 All., 523.

(4) (1913) 11 A. L. J. 975.

(2) E. S. A., No. 87 of 1900.

(5) (1917) I.L.R., 39 All., 641.

(3) (1918) Indian Cases, 384.

(6) (1911) 16 C. W. N., 731.

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state "by whom or out of what property" the costs are to be paid; and in the present case the judgement-debtor is directed to pay the costs. Further, no decree in conformity with order XXXIV, rule 4, was drawn up in the High Court, and what the decretal order in the judgement amounted to was that by it the decree of the lower appellate court was declared to be wrong and that of the court of first instance was held to be right, and in restoring the *status quo ante* costs were awarded to the then successful appellant. There was no question as to how the costs were to be paid till the decree of the High Court made that clear. The case of *Maqbul Fatima* (1) is distinguishable on two points: (1) a decree was drawn up strictly in terms of what was then section 88 of the Transfer of Property Act in the court of first instance, The direction as to costs separately was not in accordance with law, (2) there was no controversy as to the costs of appeal, as was expressly stated in the judgement. TUDBALL, J., in 19 Indian Cases, relies on this circumstance for distinguishing that case. The interpretation of order XXXIV, rule 10, Civil Procedure Code, (corresponding to section 94 of the Transfer of Property Act) as laid down in the unreported case which is certainly against the respondent, is too wide. The costs referred to in that rule are those costs which have to be incurred in working out the final decree. Even if no appeal may be preferred, these costs are allowed to the mortgagee as his costs of suit; *Mohamad Sadiq v. Jaigopal* (2). It is therefore, submitted that the lower courts are right.

Babu *Piari Lal Banerji*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises under the following circumstances. A suit was brought to realize the amount of a mortgage. The property mortgaged was mortgagee rights. The facts are somewhat complicated, but it is not necessary to mention them in detail. The court of first instance decreed the plaintiff's suit. On first appeal the decision of the court of first instance was overruled and the suit dismissed. On second appeal to the High Court the decree of the first court was restored. In its judgement the High Court says :—"We must allow the appeal, set aside the decree of the lower appellate court

(1) (1898) I. L. R., 20 All, 523. (2) (1914) 24 Indian Cases, 873.

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and restore the decree of the court of first instance with costs in all courts. We extend the time for payment to six months." The decree of the High Court was drawn up upon one of the High Court's forms. It states that the appeal has been allowed, the decree of the lower appellate court set aside and the decree of the court of first instance restored. It further contains the words "and it is further ordered that the respondent do pay to the appellant Rs. 5 4-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate court." The decree of the court of first instance which was restored by the High Court was the ordinary mortgage decree in the form prescribed by order XXXIV. The plaintiff applied to execute the decree of the High Court for costs personally against Dambar Singh, (the appellant in the lower appellate court and the unsuccessful respondent in the High Court). Dambar Singh objected that the costs were not payable by him personally and that the decree-holder could only obtain them by bringing the property to sale. Both courts overruled his objection. Dambar Singh comes here in second appeal.

There can be no doubt that, ordinarily speaking, the plaintiff in a mortgage suits gets his costs if successful against the mortgaged property and not personally against the defendant. It could not be contended that under the decree of the court of first instance (subsequently restored by the High Court) the plaintiff could get his costs personally against Dambar Singh. If the decree of the High Court had expressly followed the judgement, we do not think it could be contended that Dambar Singh was personally liable for the costs. Accordingly the respondent is driven to rely upon the words which we have quoted from the decree of the High Court. There cannot be the least doubt that there is no intimation in the judgement that the High Court intended to make Dambar Singh personally liable. It seemed almost certain that under ordinary circumstances in a case similar to this the plaintiff in a mortgage suit would add the costs incurred by him in the High Court to his costs incurred in the court below and sell the property to realize those costs. We think that we are entitled in construing the decree in the present case to consider first the nature of the suit,

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secondly, the judgement of the High Court upon which the decree is founded and the general practice of the Court. Considering these three matters, it seems to us quite clear that the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. It is contended that we are bound by the actual words of the *decree* itself and we are not entitled to consider any other matter. The very same question seems to have arisen in the case of *Maqbul Fatima v. Lalta Prasad* (1). In that case a decree which had been drawn up in accordance with the requirements of section 88 of the Transfer of Property Act contained a further clause that the defendant should pay to the plaintiffs a sum of Rs. 876, the amount of costs incurred by them. The majority of the Court held that the costs could not be recovered personally against the defendant and that the Court in construing the decree was entitled to consider the terms of the judgement. The same point seems to have arisen in an unreported case Execution Second Appeal No. 871 of 1900*, when two Judges arrived at a similar conclusion. We have been referred to the case of *Muhammad Sadiq v. Ghous Muhammad* (2) and also to the case of *Bansgopal Singh v. Rup Narain Singh* (3). In the first case an authority was

*E. S. A. No. 871 of 1900, decided on the 28th June, 1902.

STANLEY, C. J., and AHKMAN, J.—This is an appeal by a judgement-debtor against the orders of the two lower courts. The decree-holder obtained a decree for sale on foot of a mortgage. An appeal was taken to the District Judge and the District Judge affirmed the decree of the lower court and dismissed the appeal with costs. In the decree, in addition to the dismissal of the appeal with costs, there are the two following directions, namely that the appellant do pay to the respondent the sum of Rs. 225, the amount of costs incurred by him in this court and that the defendants do pay to the plaintiff the sum of Rs. 538-2-0, the costs incurred by him in the lower court. The costs incurred in the court of first instance were by the order of that court properly added to the plaintiff's demand and the property directed to be sold in default of payment of principal, interest and costs. It was therefore entirely unnecessary for the District Judge to have ordered payment by the defendants of this sum which had already been provided for by the decree of the court of first instance. The decree-holder applied for execution in respect of the sum of Rs. 225, the amount of costs so awarded to him, *against the property of the judgement*

(1) (1898) I. L. R., 20 All., 523. (2) (1913) 11 A. L. J., 975,

(3) (1913) 19 Indian Cases, 884.

relied upon by the learned Judge which has since been dissented from. The other case seems to turn upon the particular facts of the case and the view which the learned Judge, sitting alone, took as to the construction of the decree. If these cases are inconsistent with the Full Bench decision and the decision of the Divisional Bench we are bound to follow the latter. While we decide in favour of the appellants, we think it right to say that the form used by the High Court is not strictly correct as applied to mortgage suits. Order XL, rule 35, prescribes what a decree of the appellate court shall contain, and it would seem that it is more accurate that in mortgage suits where it is the intention of the court that the costs should be recoverable out of the property and not personally against the party, the decree of the High Court should so state. It perhaps may also be considered whether in mortgage suits in which the High Court is making a decree for sale the High Court's decree instead of merely being a dismissal or affirmation of the decree of the lower court, should not be in the form prescribed by order XXXIV directing the

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debtor other than that which was comprised in the mortgage. This judgement-debtor objected, contending that the costs awarded against him in the appellate court should be added to the decree-holder's demand and realized out of the mortgaged property in the first instance. Now section 94 of the Transfer of Property Act provides that in a case of sale under a mortgage, in adjusting the amount to be paid to the mortgagee, "the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment." Under this section it was the duty of the Judge to add to the mortgage money the costs of the appeal. We are asked to say that the District Judge in this case has not done so. Both the lower courts seem to have ignored the provisions of Section 94 and allowed the execution by attachment of the property of the judgement-debtor other than the property comprised in the mortgage. We think that the true construction of the decree is that, just as in the case of the costs in the court of first instance, so in the case of the costs awarded in the lower appellate court both sets of costs should be added to the mortgage money and be payable out of the mortgaged property in the first instance and not that a personal decree for these costs was intended. In regard to a small sum of Rs. 64, the judgement-debtor also appealed. In regard to this sum the appeal has not been pressed. So far as regards the sum of Rs. 225, we allow the appeal. But as regards the sum of Rs. 64, the appeal is disallowed. The parties are to pay and receive the costs of these proceedings both here and in the courts below proportionate to their failure and success.

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property to be sold and stating the amount which is to be recovered from the property including costs. In a recent Full Bench case it was decided that the High Court's decree in a mortgage suit is the decree which is to be subsequently made absolute, and not the decree of the court below. We wish also to say that we do not desire to be understood as holding that it is not open to the court in mortgage suits to provide in its decree, under special circumstances, that costs are to be paid personally by a party instead of being recovered as part of the mortgage-debt. We allow the appeal, set aside the orders of both the courts below and dismiss the application for execution with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR v. KHUSHALI RAM *

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Criminal Procedure Code, sections 476 and 478—Commitment made by a Munsif in the United Provinces to the court of a Sessions Judge in the United Provinces in respect of offences alleged to have been committed in Bengal—Jurisdiction.

Where in the course of a judicial proceeding before the Munsif of Fatehabad in the district of Agra certain offences under sections 193, 209, 210, 467 and 471 of the Indian Penal Code, which appeared to have been committed in Bengal were brought under the notice of the court, and the Munsif committed the person suspected of such offences for trial to the court of Session at Agra, Held that the court had jurisdiction under section 478 read with section 476 of the Code of Criminal Procedure to make the commitment.

THIS was a reference, made under section 185 of the Code of Criminal Procedure by the Sessions Judge of Agra, in the matter of a commitment made to his court by the Munsif of Fatehabad in that district. The following is the order of reference:—

“Khushali Ram has been committed to this court by the Munsif of Fatehabad in the Agra district on charges under sections, 467, 471, 193, 209 and 210 of the Indian Penal Code. The offence under section 467 is alleged to have been committed at Sirajganj in Bengal and the other offences are alleged to have been committed in the court of the Munsif of Sirajganj. It is pleaded by the accused that this court has no jurisdiction to try

* Criminal Reference No. 872 of 1917.