

*Before Mr. Justice Banerji, Mr. Justice Kendall and
Mr. Justice King.*

SAT PRAKASH AND ANOTHER (APPLICANTS) v. BAHAL RAI
AND ANOTHER (OPPOSITE PARTIES).*

1930
July, 16.

*Civil Procedure Code, order XXXIV, rules 4 and 5—
Preliminary decree for sale on a mortgage—Appeal there-
from—First court passing final decree for sale before
disposal of appeal—Jurisdiction.*

Where a preliminary decree for sale on a mortgage has been passed by the trial court, and an appeal therefrom has been preferred and is pending, the trial court has jurisdiction to prepare and pass a final decree for sale notwithstanding the pendency of the appeal.

The suit does not come to an end when the court passes a preliminary decree, and the passing of the final decree is a further proceeding in that very suit.

The provisions of order XXXIV, rule 4, sub-rules (1) and (2) and rule 5, sub-rule (3), of the Civil Procedure Code, as amended by Act No. XXI of 1929, clearly indicate that the court which passed the preliminary decree is bound by these rules to proceed to pass a final decree, and it is not precluded from doing so by reason of an appeal from the preliminary decree.

Gajadhar Singh v. Kishan Jivan Lal (1), Jowad Hussain v. Gendan Singh (2) and Fitzholmes v. Bank of Upper India (3), distinguished. Khair-un-nissa Bibi v. Oudh Commercial Bank (4), approved. Lalman v. Shiam Singh (5), overruled. Anmol Singh v. Hari Shankar (6), referred to.

Mr. *Panna Lal*, for the applicants.

Messrs. *P. L. Banerji* and *K. C. Mital*, for the opposite parties.

BANERJI, KENDALL and KING, JJ. :—The question that has been referred to this Bench for decision is as follows: In a mortgage suit, where a preliminary decree has been passed by the trial court and an appeal has been preferred, can a final decree be prepared by

*Application in First Appeal No. 101 of 1930.

(1) (1917) I.L.R., 39 All., 641.

(2) (1926) I.L.R., 6 Pat., 24.

(3) (1926) I.L.R., 8 Lah., 258.

(4) (1929) I.L.R., 51 All., 640.

(5) (1925) 24 A.L.J., 288.

(6) (1930) I.L.R., 52 All., 910.

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the trial court at the end of the period allowed for payment of the mortgage debt or not?

An application under order XLI, rule 5 of the Code of Civil Procedure was presented by Mr. *Panna Lal* in First Appeal No. 101 of 1930, praying that the preparation of the final decree in a suit between Sat Parkash and another *versus* Bahal Rai and another be stayed till the decision of the appeal. The application was opposed, and during the hearing of the application it was submitted by Mr. *Panna Lal* that by reason of an appeal against the original preliminary decree having been preferred, the court that passed the preliminary decree ceased to have jurisdiction to pass the final decree. It is upon that objection being raised that the present reference was made to this Bench.

Mr. *Panna Lal* appearing for the petitioner has urged before us that under the provisions of the Code of Civil Procedure, no preliminary decree for sale on foot of a mortgage can be made final when an appeal has been preferred against that preliminary decree. In making this submission he has referred us to the definition of a decree in section 2 of the Code of Civil Procedure. Section 2 defines a "decree" as follows: "Decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final." In the explanation to the section it is stated that "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of."

Mr. *Panna Lal* urges that the preliminary decree in a suit for sale necessarily becomes inconclusive when an appeal is filed against that decree. It is difficult to accept that contention, because the definition of decree contains the words "so far as regards the court expressing it." The preliminary decree is conclusive as

regards the court that passed it and is only subject to alteration by the appellate court when an appeal is preferred against it.

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The learned advocate in support of his contention that the jurisdiction of the court which passed the preliminary decree ceases, has referred us to the case of *Lalman v. Shiam Singh* (1). His contention is that it was held by a Full Bench of this Court in the case of *Gajadhar Singh v. Kishan Jwan Lal* (2) that one and only one final decree can be passed in a suit for sale on a mortgage. He states that in the cases of *Jowad Hussain v. Gendan Singh* (3) and *Fitzholmes v. Bank of Upper India* (4) the view taken by the Full Bench has been approved of by their Lordships of the Privy Council.

The learned advocate for the respondent relies on the case of *Khair-un-nissa Bibi v. Oudh Commercial Bank* (5). Before we decide the point raised by Mr. *Panna Lal*, it is necessary to refer to the provisions of order XXXIV of the Code of Civil Procedure as it now stands after amendment by Act No. XXI of 1929. Rule 4 sub-rule (1) is as follows: "In a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree to the effect mentioned in clauses (a), (b), (c), (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into court and applied in payment of what has been found or declared under or by the preliminary decree as due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the

(1) (1925) 24 A.L.J., 288.

(2) (1917) I.L.R., 39 All., 641.

(3) (1926) I.L.R., 6 Pat., 24.

(4) (1926) I.L.R., 8 Lah., 253.

(5) (1929) I.L.R., 51 All., 640.

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defendant or other persons entitled to receive the same." Sub-rule (2) is as follows: "The court may, on good cause shown and upon terms to be fixed by the court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest." Sub-rule 5(3) is as follows: "Where payment in accordance with sub-rule (1) has not been made, the court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4".

In the absence of any ruling it is clear to us that the court which passed the preliminary decree was bound by these rules to proceed to pass a final decree under the provisions of rule 5, sub-rule (3). We have to examine therefore whether in view of the rulings referred to us we should hold that the court that passed the preliminary decree was precluded by reason of an appeal from passing the final decree. Whatever may have been the view before the amendment of order XXXIV by Act XXI of 1929, it is clear that under sub-rule (2) of rule 4, the court that passed the preliminary decree could on good cause being shown postpone the date fixed by the court from time to time, before the plaintiff could be entitled to ask for a final decree under the third sub-rule of rule 5. The provision of sub-rule (2) of rule 4 appears to us to have taken into consideration any practical difficulty that may arise in passing the final decree and enables the court that passed the preliminary decree to extend the time for payment. Had it been the intention of the Legislature to take away the jurisdiction of the court which passed the preliminary decree, we have no doubt that it would have provided that no final decree should

be passed if an appeal against the preliminary decree has been filed. There can be no question that the suit does not come to an end when the court passes a preliminary decree, and the passing of the final decree is a further proceeding in that very suit; see the case of *Anmol Singh v. Hari Shankar* (1).

We have now to examine the rulings referred to by Mr. *Panna Lal*.

It has been contended by Mr. *Panna Lal* that in the case of *Gajadhar Singh v. Kishan Jiwan Lal* (2) it has been laid down that there can be only one final decree in a suit for sale on a mortgage. The facts of that case are that on the 16th of May, 1911, the plaintiff obtained a preliminary decree for sale. Six months' time was allowed to the judgment-debtor to pay up the decretal amount. That decree was appealed against and on the appeal being dismissed, a second appeal was filed in this Court, which was also dismissed. It was after the dismissal of the second appeal that the plaintiff Gajadhar Singh applied for a final decree to be passed in his favour. The defendant raised the plea that the plaintiff's application was barred by limitation as having been filed beyond time, i.e. more than three years from the date when the time for payment fixed by the court of first instance had expired. It is clear to us that the point which was before the Full Bench was whether the application by Gajadhar Singh was barred by time on the date when it was made and further whether on that date Gajadhar Singh could have applied for a final decree on the preliminary decree passed by the court of first instance, or whether Gajadhar Singh had to apply for a final decree on the decree passed by the High Court in appeal. Their Lordships held that where the High Court has decided an appeal against a preliminary decree for sale it is the decree of the High Court which must be deemed to be the preliminary decree that may be made final under order XXXIV, rule 5 of the Code of Civil Procedure.

(1) (1930) I.L.R., 52 All., 910. (2) (1917) I.L.R., 39 All., 641.

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There was no question before this Court about any final decree being passed in pursuance of the preliminary decree for sale which had been passed by the court of first instance, and we are of opinion that the expression "It is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage" must mean that on the date when Gajadhar Singh presented his application praying for the final decree to be passed, there could not be more than one final decree, and as the preliminary decree of the trial court was superseded by the decree passed in appeal, the trial court could not possibly have made final the original preliminary decree which had ceased to exist.

The case referred to above was quoted with approval by their Lordships of the Privy Council in the case of *Jowad Hussain v. Gendan Singh* (1). In that case also the application for the final decree was presented to the court after the preliminary decree had ceased to exist by reason of an appellate preliminary decree superseding it. The question before their Lordships was whether on the date when the plaintiff applied for the preliminary decree to be made final the plaintiff's right to apply for a final decree had ceased by reason of the application being barred by time. There was no final decree passed by the court of first instance in that case, nor could the court of first instance pass a final decree when its preliminary decree had been superseded by the preliminary decree passed by the High Court.

In the case of *Fitzholmes v. Bank of Upper India* (2), which follows the case of *Jowad Hussain v. Gendan Singh* (1), the point is made further clear, as we find that in that case further time was granted by the appellate court when it confirmed the preliminary decree passed by the court of first instance. The plaintiff applied for the preliminary decree passed by the court to be made final, and as six months had not expired since the decree

(1) (1926) I.L.R., 6 Pat., 24. (2) (1926) I.L.R., 8 Lah., 253.

of the High Court, the defendant urged that no final decree could be prepared and the High Court accepted that contention. Their Lordships of the Privy Council held that if the preliminary mortgage decree passed by the first court is superseded by the preliminary mortgage decree passed by the appellate court, it is the decree of the appellate court that can be made final.

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We have already stated that the preparation of the final decree was a continuation of the proceedings after the preliminary decree. A reference to order XLI, rule 5 of the Code makes it clear that an appeal does not operate as a stay of proceedings under a decree or order appealed from. The proceedings relating to the passing of a final decree in a mortgage suit must be held to be included in the words "proceedings under a decree." If the Legislature intended to oust the jurisdiction of the trial court as soon as an appeal was filed against the preliminary decree, it would not have been necessary to provide for "stay of proceedings" by rule 5 of order XLI which specifically lays down that, merely by reason of an appeal, further proceedings are not to be stayed. Hence we cannot accept the contention of Mr. *Panna Lal* that the trial court ceases to have jurisdiction to proceed with the case simply on the ground that an appeal had been filed.

The correctness of the decision in *Lalman v Shiam Singh* (1) has already been doubted by a Bench of this Court in *Khair-un-nissa Bibi v. Oudh Commercial Bank* (2), and in our opinion the former decision should not be accepted as a correct statement of the law.

We think that our view is confirmed by the recent amendment of the Code of Civil Procedure by Act XXI of 1929, by which a provision has been inserted in rule 4 of order XXXIV of the Code of Civil Procedure to the effect that the court in passing a preliminary decree shall "further direct that, in default of the defendant

(1) (1925) 24 A.L.J., 288.

(2) (1929) I.L.R., 51 AL. 640.

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paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree" and by which the court, i.e., the trial court has been empowered under sub-rule (2) of rule 4 to extend the time fixed for the payment of the amount on good cause shown.

The answer of the question is therefore in the affirmative.

PRIVY COUNCIL.

J.C.*
1931
March, 10.

SHANKAR AND ANOTHER (PLAINTIFFS) v. DAOOJI MISTR
AND OTHERS (DEFENDANTS).

[On Appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Minors—Alienation—Absence of necessity—Ostensible owner—Consent of persons interested—Purchaser from alienee—Transfer of Property Act (IV of 1882), section 41.

The adult members of a Mitakshara joint family, including the father of a minor member, are not competent to give on behalf of the minor express or implied consent to a transferee of property of the joint family being the ostensible owner of it, so as to enable a purchaser from him to claim the protection of section 41 of the Transfer of Property Act, 1882.

Decree of the High Court reversed.

APPEAL (No. 125 of 1929) from a decree of the High Court (May 14, 1928) reversing a decree of the District Judge of Benares which affirmed a decree of the Additional Subordinate Judge.

The appellants, and their father Paltu (*pro forma* Respondent No. 7), brought a suit against respondents Nos. 1 to 6 to recover a house in Benares which had formed part of the ancestral property of their Hindu joint family. Paltu's father, who died in 1919, had transferred the house to his son-in-law Phalgu, as the plaintiffs alleged by a deed which was fictitious and without consideration. The defendants were in possession under a purchase in 1919 from Phalgu. The appellants were both minors in 1919.

*Present: Lord BLANESBURGH, Lord ATKIN, and Sir LANCELOT SANDERSON.