

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

INAYAT KHAN (DEFENDANT) *v.* HARBANS LAL
(PLAINTIFF)*

1935
October, 9

Civil Procedure Code, order XXIII, rule 3; order XXXIV, rules 4 and 5—Adjustment of suit after the passing of preliminary decree—Suit pending—Adjustment must be given effect to.

Inasmuch as a preliminary decree for sale does not terminate a mortgage suit, which continues till a final decree has been passed, it is open to the parties, after a preliminary decree has been passed, to enter into a compromise or otherwise agree to an adjustment in respect of the subject-matter of the suit, and the court is bound to give effect to such compromise or adjustment and can not overrule it on the ground that nothing short of payment of the mortgage money as directed by the preliminary decree can prevent the passing of the final decree. Order XXXIV, rules 4 and 5 of the Civil Procedure Code are subject to the provisions contained in order XXIII, rule 3.

Dr. M. Mahmud-ullah and Mr. Mansur Alam, for the appellant.

Mr. Gopi Nath Kunzru, for the respondent.

NIAMAT-ULLAH and ALLSOP, JJ.:—This is an appeal under order XLIII, rule 1(m) of the Code of Civil Procedure from an order passed by the learned Subordinate Judge, Meerut. The plaintiff respondent obtained a preliminary decree for sale in a suit on a mortgage. The mortgagor was directed to pay Rs.12,881-4-0 within six months from the date of the preliminary decree, the 22nd of May, 1930. An appeal from this decree to this Court was dismissed. The mortgagee applied for a final decree under order XXXIV, rule 5 of the Code of Civil Procedure. He alleged that no payment had been made in court, as directed by the preliminary decree. The mortgagor, the appellant before us, objected, by a

*First Appeal No. 60 of 1934, from an order of P. D. Pande, Subordinate Judge of Meerut, dated the 18th of November, 1933.

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petition, dated the 26th of August, 1933, on the allegation that after the dismissal of the appeal by the High Court a settlement was arrived at between the parties that if Rs.8,000 were paid by the mortgagor immediately and a sum of Rs.4,000 were paid in two instalments by the month of June, 1934, the entire mortgage money would be taken to have been satisfied, and that accordingly the mortgagor paid Rs.8,000 on the 4th of June, 1933, for which a receipt was granted by the mortgagee, and that the mortgagor was ready to pay Rs.2,000, the first of the two instalments above referred to. If this allegation is true, the time fixed for payment of the last instalment had not expired when the mortgagor preferred his objection.

The lower court dismissed the objection without recording a finding as to whether the settlement, alleged by the mortgagor, had in fact taken place. The ground on which the order of the lower court proceeds is that no payment out of court can be recognized by the court passing a final decree under order XXXIV, rule 5, as the preliminary decree, which was drawn up in terms of order XXXIV, rule 4, provides that if the mortgage money is not deposited in court a final decree for sale shall be passed. The contention which found favour with the lower court was that even if the mortgagor paid Rs.8,000, as alleged by him, he could not successfully resist the mortgagee's application for a final decree in respect of the entire mortgage money payable under the preliminary decree. It is argued on behalf of the mortgagor that a mortgage suit does not terminate with the passing of the preliminary decree, and that proceedings in such suit continue till a final decree is passed. Accordingly, it is contended, any adjustment agreed to by the parties can be recorded and must be given effect to under order XXIII, rule 3 of the Code of Civil Procedure.

Whatever may be the correct view on the question whether money paid out of court in satisfaction of the

preliminary decree, wholly or in part, can be recognized by a court when it is moved to pass a final decree—a point on which we express no opinion—it seems to us that the court cannot refuse to act under order XXIII, rule 3 if the conditions required by that rule are fulfilled, so that if a suit had been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court has no option but to order that such agreement, compromise or satisfaction be recorded, and to pass a decree in accordance therewith. This is a necessary corollary of the view taken by this Court that a preliminary decree does not terminate the suit, which continues till a final decree is passed. Once a suit is finally disposed of, order XXIII, rule 3 cannot have any application; but so long as the suit is pending, it is open to the parties to enter into a compromise or otherwise adjust their differences.

Great stress is laid on behalf of the respondent on the imperative language of the preliminary decree that if the amount declared due by the preliminary decree is not paid in court on or before the date fixed for payment, "the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property, or a sufficient part thereof, be sold." It is argued that the payment not having been made in the manner directed by the preliminary decree, the plaintiff has an absolute right to apply for a final decree being passed. Reference is also made to order XXXIV, rule 5 (3), which provides for the consequences of non-payment in the manner laid down by the preliminary decree, namely that the court "shall pass a final decree directing that the mortgaged property or a sufficient portion thereof be sold". The provisions contained in this rule should, however, be read with other parts of the Civil Procedure Code, including order XXIII, rule 3, which is equally imperative and gives

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no discretion to the court where an agreement, compromise or satisfaction of the suit wholly or in part has taken place. It may be that where all that is alleged by the defendant in a mortgage suit is payment out of court, which does not necessarily amount to an adjustment of the suit wholly or in part, the court required to pass a final decree may ignore it leaving the mortgagor to pursue his remedy by other appropriate means; but where both parties deliberately agree to a compromise or otherwise agree to an adjustment in respect of the subject-matter of the mortgage suit, the court is bound to give effect to such compromise or agreement. To hold otherwise would be to introduce serious anomalies in the application of law to cases in which preliminary decrees are passed. Such decrees are passed in suits for partition, dissolution of partnership, for accounts, in administration suits and others. We do not think it can be seriously contended that where a preliminary decree is passed directing that a partition shall take place, or that accounts shall be taken between the parties, it is not open to the parties amicably to settle their differences before a final decree is passed. If a mortgagee has agreed with the mortgagor, after the passing of the preliminary decree, that the rights and liabilities of the parties would stand differently from what they are declared to be by the preliminary decree, he is clearly estopped from going behind that arrangement. To take an extreme case, suppose a mortgagee accepts the sale of part of the mortgaged property in lieu of the entire mortgage money, but subsequently repudiates the sale on some ground and applies for a final decree, we do not think that the mortgagor's plea that the whole suit has been adjusted by sale of part of the mortgaged property can be overruled by the court on the ground that nothing short of payment of the mortgage money in court declared due by the preliminary decree can prevent the passing of a final decree for recovery of the amount declared due by the preliminary decree. For these reasons we are of opinion

that order XXXIV, rules 4 and 5 of the Code of Civil Procedure are subject to the provisions contained in order XXIII, rule 3 of the Code of Civil Procedure.

In the case before us, the petition of objection filed by the appellant clearly alleged not a mere payment but an adjustment between the parties. The respondent denied having agreed to the adjustment of the suit alleged by the appellant. The lower court did not inquire into the truth of the appellant's allegation and threw out the objection on a preliminary ground. The appellant's allegation should have been inquired into and given effect to if it was found to be true. In these circumstances we allow the appeal, set aside the order of the lower court and remand the case to that court for disposal according to law as herein indicated. Costs shall abide the result. The court fee paid in this Court shall be refunded.

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 FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Bennet

DISTRICT BOARD, ALLAHABAD (DEFENDANT) v.
BEHARI LAL (PLAINTIFF)*

 1935
October, 14

District Boards Act (Local Act X of 1922), section 192—"Act done or purporting to be done in official capacity"—Refusal to pay a contractor—Suit by contractor for price of materials supplied and work done—Whether six months' limitation applies—U. P. General Clauses Act (Local Act I of 1904), section 4(2).

A suit brought by a contractor against a District Board for price of materials supplied and work done and for refund of security deposit is not governed by the provisions of section 192 of the District Boards Act, and the rule of six months' limitation does not apply to it.

According to section 4(2) of the U. P. General Clauses Act, 1904, it would appear that the word "act" would include an illegal omission when the word was used with reference to