Before Mr. Justice Bennet and Mr. Justice Verma

UMA SHANKAR RAI (JUDGMENT-DEBTOR) *v.* RAM AGYAN THAKUR AND OTHERS (DECREE-HOLDERS)* 1938 *December, 22*

Civil Procedure Code, sections 151, 152, 153—*Amendment of accidental error—Alleged misdescription of mortgaged property in mortgage deed, plaint and decree—Evidence not admissible to prove that a larger extent of property was intended—Evidence Act (I of* 1872), *section* 94.

After the final decree for sale had been passed in a suit on a mortgage the decree-holder made an application, under sections 151, 152 and 153 of the Civil Procedure Code, praying for amendment of the mortgage deed, the plaint, the preliminary decree and the final decree, on the allegation that the extent of the mortgaged property had by mistake been wrongly described in the mortgage deed as "five pies" whereas what was intended was "five shares" and that this mistake was repeated in the plaint and the decrees; this allegation was contested by the judgment-debtor: *Held,* that the case was governed by section 94 of the Evidence Act; that even if the allegation had been raised in the suit itself evidence would be inadmissible to show that the property was "five shares" instead of "five pies" as entered in the mortgage deed; and the decree-holders could not be allowed to obtain by the application for amendment what they could not have obtained in the suit itself.

Mr. *A. P. Pandey*, for the applicant.

Mr. *R. K. Malaviya,* for the opposite parties.

BENNET and VERMA, JJ.:—This petition in revision arises out of an application made in the court below by the respondents, Ram Agyan Thakur and others, under sections 151, 152 and 153 of the Code of Civil Procedure praying that a mistake, which, it was alleged, had crept into a simple mortgage deed executed in their favour and was also to be found in the plaint of the suit filed by them for the enforcement of that mortgage as well as in the decrees, preliminary and final, passed in the suit, be corrected. The application has been granted by the court below. The petitioner for revision before us, Uma Shankar Rai, is a subsequent transferee from the mortgagor.

On the 19th of July, 1916, one Bhagirathi Rai borrowed a sum of Rs.615 from the predecessor in title

*Civil Revision No. 398 of 1937.

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of the decree-holders and executed a deed of simple mortgage in his favour hypothecating certain property which was described thus: "*Hissa zail mai zamin abadi, parti, mazrua, ghair mazrua, dih, basgit . . .*" At the foot of the deed the specification of the property was given as follows: "*Tafsil hissa mustagharqa: nam mauza, mauza Barwa Ratanpur; taedad hissa mustagharqa, mawazi panch pai mauqua mahal No.* 4." Thus the property that was hypothecated as security for the loan was specified as a 5 pies zamindari share situated in mahal No. 4 in village Barwa Ratanpur together with abadi, parti and all other rights appertaining to that zamindari. In the year 1928 Ram Agyan Thakur and others, the respondents before us, filed a suit for sale on foot of this mortgage and on the 31st of October, 1928, obtained a preliminary decree for sale. Subsequently on 22nd August, 1931, a final decree was passed. The plaint in the suit asked for the sale of five pies zamindari share, situated in mahal No. 4 in village Barwa Ratanpur, alleging that that was the property mortgaged under the deed sued upon. The preliminary and the final decrees ordered the sale of that property. Later on, the mortgagees decree-holders filed the application out of which this petition in revision has arisen, alleging that what the mortgagor really intended to mortgage was not a five pies share, but his entire zamindari property in mahal No. 4 of that village, that it should have been described in the mortgage deed as "five *shares*" and that it was described in the deed as "five *pies*" by mistake. It was asserted that that mistake was repeated in the plaint also. It was prayed that the alleged mistake be corrected. not only in the decrees and the plaint, but also in the mortgage deed, by changing "five pies" to "five shares". The mortgagor having, subsequent to the execution of the mortgage of the 19th of July, 1916, transferred his property in this mahal to third parties, the application was opposed by the present applicant before us, who was one of such transferees. The court

below has granted the application and has ordered that the correction prayed for be made. The court remarks that the applicants have produced no direct evidence to show what the real intention of the parties to the mortgage deed in question was. It has, however, relied on two circumstances for holding that the real intention of the parties at the time of the execution of the mortgage deed of 19th July, 1916, must have been that the entire zamindari property of the mortgagor in the mahal in question should be hypothecated. The first circumstance mentioned by the court is that the entries of the mortgagor's zamindari property in the khewats produced did not describe it in terms of annas and pies, but that the entry is "five shares". At the same time the court found that the heading of the mahal in question in the khewats is "mahal of 16 annas". The court below itself expresses the opinion that the khewat entries by themselves do not show anything definitely. The second circumstance relied upon by the court below is that if the share mortgaged be taken to be five pies, then its area, having regard to the total area owned by the mortgagor in this mahal, would come to $3\frac{1}{2}$ acres approximately, and, according to the court below, the value of this area in the year 1916 was insufficient as security for an advance of Rs.615. For arriving at this conclusion the court below took into consideration certain sale deeds of the year 1921 and found that the price of one acre of land in this mahal in 1921 was from Rs.108 to Rs.131, and expressed the opinion that the value of zamindari property in 1916 was much lower than that prevailing in 1921. It is admitted that there are absolutely no materials on the record to justify this latter observation, and we are unable to agree that the value of zamindari property in 1916 was lower than its value in 1921. Further, the learned Munsif, when entering into these calculations, entirely failed to notice that the entire area owned by the mortgagor in this mahal, as mentioned by the court below itself, was 31·9 acres and that its value

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according to the calculation of the court below would have been in the neighbourhood of Rs.4,000. It is impossible to believe that it was intended by the parties to the mortgage transaction that property of this value should be hypothecated in lieu of an advance of Rs.615. This shows that the basis on which the court below has proceeded is not a reliable one.

The learned counsel appearing for the applicant has contended that the court below had no jurisdiction to pass the order in question. We are of opinion that this contention is well founded. The point arose in the recent Full Bench case of *Gauri Shankar* v. *Shyam Sundar Lal* (1), but was not decided as it was found that the case could be disposed of on another point. The learned counsel has relied on the ruling in *Shujaatmand Khan* v. *Govind Behari* (2). That ruling supports his contention. The learned counsel appearing for the respondents decree-holders has relied on the case of *Aziz Ullah Khan* v. *Collector of Shahjahanpur* (3). In that case it was found that the mortgagor's zamindari property was situated in a village called "Nawadiya Zamania Nagla", but the name of the village was written in the deed as "Nagla Zamania Nawadiya". It was admitted by the parties that there was no village of the name of "Nagla Zamania Nawadiya" or, at least, there was no village of that name in which the mortgagor ever had any interest. It was further found that there never had been any doubt as to the identity of the property mortgaged. In those circumstances it was held that the application of the mortgagee to amend the decree could be granted. It was held that section 95 of the Indian Evidence Act applied and that the court had jurisdiction to call evidence for the purpose of showing that the mortgage deed did in fact relate to the property in Nawadiya Zamania Nagla. In our opinion that is a very different matter from the one that we have before

(1) [1938] A.L.J. 854. (2) A.I.R. 1934 All. 100.
(3) (1932) I.L.R. 54 All. 800.

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us. This is a case which in our judgment is governed by the rule laid down in section 94 of the Evidence Act. If the mortgagees had, in the suit filed by them for the enforcement of their mortgage, asked for the sale of the entire property of the mortgagor in this mahal, namely "five shares", instead of "five pies" as given in the mortgage deed, and had made the allegations which they have now made in their application for correction, the court could not, in view of section 94 of the Evidence Act, have allowed evidence to be produced to prove their allegations. We are of opinion that the mortgagees cannot be allowed to obtain by this application, made after the passing of the decree, what they could not have obtained in the suit itself.

For the reasons given above we allow this petition in revision, set aside the order of the learned Additional Munsif, dated 31st July, 1937, and dismiss the application made by the mortgagees decree-holders for amendment praying that the description of the property be changed from "five *pies* share" situated in mahal No. 4 with all rights appurtenant to that share situated in mauza Barwa Ratanpur, into "five *shares*" situated in mahal No. 4 with all rights appertaining to the said share situated in village Barwa Ratanpur. The petitioner before us shall have his costs of these proceedings in this Court as well as in the court below.

Before Mr. Justice Bennet and Mr. Justice Verma

MAHBOOB KHAN (JUDGMENT-DEBTOR) *v.* MAJID HUSAIN (AUCTION PURCHASER)*

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Civil Procedure Code, order XXI, rule 89—Setting aside auction sale on deposit—Application by tender for deposit of the decretal amount and 5 per cent. of purchase money—Separate application "to set aside the sale" whether necessary.

Where, within 30 days after a sale in execution, the judgment-debtor made an application, in the form of a tender, for the deposit of the decretal amount and also the 5 per cent. of the purchase money as required by order XXI, rule 89 of the Civil Procedure Code and deposited the money in the treasury, and

*Civil Revision No. 244 of 1937.