

1933

RAJA
AVDHESH
SINGH
v.
LACHHMAN
SINGH

court with directions that the suit be readmitted under its original number in the register of civil suits and that the said court shall proceed to determine it according to law. The appellant's costs of this appeal shall be borne by the respondents in all events. The liability for other costs hitherto incurred or hereafter to be incurred shall be determined by the lower court.

Appeal allowed.

REVISIONAL CIVIL

*Before Mr. Justice Muhammad Raza and Mr. Justice
H. G. Smith*

1933
September, 21

SHEIKH ALA BAKHSH (APPLICANT) v. THAKUR DURGA
BAKHSH SINGH (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), Sections 151 and 152, and Order 20, rule 7—Preliminary decree in mortgage suit—Decree laying down that if sale-proceeds insufficient plaintiff will be entitled to personal decree—Defendant not challenging it in appeal—Application for amendment of decree about clause for personal decree—Correction, if can be allowed—Evidence Act (I of 1872), Section 114—Presumption about correctness of court proceedings.

There is no right in any party under section 152 of the Code of Civil Procedure to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court and the discretion has to be exercised in view of the peculiar facts of each case.

Where, therefore, in a suit for sale on a mortgage a preliminary decree is prepared in the form presented by Appendix D, Form no. 4, Code of Civil Procedure, and a clause in it provides that if the net proceeds of the sale are insufficient then the plaintiff shall be entitled to a personal decree and the defendant does not question that in appeal and the decree becomes final, the defendant cannot subsequently apply for its amendment under section 152 by questioning the correctness of that clause. Even section 151 of the Code of Civil Procedure cannot help the defendant in such a case when he had his remedy in appeal, but did not avail himself of it.

*Civil Miscellaneous Application No. 238 of 1933, in First Civil Appeal No. 69 of 1924, under section 152, Order XX, rule 6, Civil Procedure Code.

Tirbeni Singh v. Mohammad Musharraff Ali (1), distinguished. *Ram Nath v. Nageshwar Singh* (2), *Suraj Bakhsh v. Munno Bibi* (3), *Lala v. Amir Haider Khan* (4), *Maqbool Ahmad v. Durga Prasad* (5), and *Raghubir Singh v. Rajeshwari Devi* (6), relied on.

A presumption arises under section 144 of the Evidence Act as to legality and correctness of a court's proceedings. Where in a suit on mortgage the plaintiff prays for sale of mortgaged property and for personal decree for the balance, if sale-proceeds are insufficient, and the court grants the decree sought for, directing decree to be prepared in Form no. 4, Appendix D, Code of Civil Procedure, retaining clause 3 of that form, the presumption is that when the Judge signed the decree he satisfied himself that it had been prepared in accordance with the judgment.

Mr. *Hyder Husein*, for the applicant.

Mr. *M. Wasim*, for the opposite party.

RAZA and SMITH, JJ.:—This is an application under section 152 and Order XX, rule 6 of the Code of Civil Procedure.

The facts relevant to this application may be shortly stated:

One Khuda Bakhsh executed a simple mortgage in favour of Sheo Ghulam Singh for Rs.7,500, bearing interest at 9 per cent. per annum, with six monthly rests, in respect of certain zamindari shares, on the 22nd of November, 1904. The mortgage was to be paid off in ten years. The mortgagor and the mortgagee, both, died some time after the execution of the mortgage. Durga Bakhsh Singh and Harpal Singh (hereinafter called plaintiffs) are the legal representatives of Sheo Ghulam Singh, mortgagee. Allah Bakhsh (hereinafter called defendant) and others are the legal representatives of Khuda Bakhsh, mortgagor. On the 17th of May, 1923, the plaintiffs brought a suit against the defendant and others to recover Rs.36,672-0-9 by sale of the mortgaged property. They prayed for the following reliefs in paragraph 7 of their plaint:

(1) (1931) 8 O.W.N., 1121.

(3) (1929) 6 O.W.N., 974.

(5) (1933) I.L.R., 9 Luck., 51.

(2) (1930) I.L.R., 6 Luck., 132.

(4) (1929) 6 D.W.N., 969.

(6) (1933) 10 O.W.N., 884.

1933

SHEIKH
ALA BAKHSH
v.
THAKUR
DURGA
BAKSH
SINGH

Raza and
Smith, JJ.

“(a) that under a court’s decree, defendants 1 to 5 be ordered to pay to the plaintiffs Rs.36,672-0-9 principal and interest, with future interest at twelve annas per cent. per mensem, during the pendency of the suit, and after the decree to date of realization within a time to be fixed by the court; otherwise the mortgaged property specified in para. 2(e) hereof be sold and out of the sale-proceeds the decretal amount be satisfied;

(b) that if the sale-proceeds be insufficient to satisfy the decretal amount, then the plaintiffs’ right to realize the balance of the decretal amount be reserved under Order XXXIV, rule 6 of the Code of Civil Procedure; and

(c) that costs of the suit be made payable by the defendants.”

The suit was contested almost entirely by Allah Bakhsh.

The learned Subordinate Judge of Rae Bareilly framed several issues on the pleadings of the parties. The sixth issue was as follows:

“To what relief, if any, are the plaintiffs entitled?”

The finding on that issue was as follows:

“The plaintiffs are entitled to the *decree sought for.*”

“The result is *the suit is decreed with costs*, if defendants 1 to 5 and 7 and 8 deposit into court the sum of Rs.36,672-0-9 together with the costs of the suit and interest on the sum claimed at the contractual rate, from date of suit till the date of payment, within six months from this date, the property in suit will stand redeemed. In default, the property will be sold and sale-proceeds will be applied towards satisfaction of the decree. After the expiry of the date fixed above for payment till realization, the sum found due on the date fixed for payment will carry simple interest at six per cent. per annum.”

The plaintiffs' claim was decreed accordingly on the 31st of July, 1924.

In preparing the preliminary decree for sale, Form No. 4, Appendix D of the Code of Civil Procedure, was used, and the decree was duly signed by the learned Subordinate Judge on the 21st of August, 1924. Clause 3 of the decree runs thus:

"That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiffs shall be at liberty to apply for a personal decree for the amount of the balance."

Allah Bakhsh alone appealed from the decree on the 15th of November, 1924. In his appeal he did not question the correctness of clause 3 of the decree mentioned above. The appeal was dismissed by this Court on the 10th of May, 1926.

The final decree was passed for Rs.48,785-5-8 plus interest calculated at 9 per cent. per annum from the 19th of January, 1927, till realization. The plaintiffs took out execution and the mortgaged property was sold for Rs.35,550 on the 20th of February, 1930. It was purchased by the plaintiffs (decree-holders) themselves. The sale was confirmed by the executing court on the 1st of May, 1930. The plaintiffs (decree-holders) then filed an application under Order XXXIV, rule 6 of the Code of Civil Procedure for recovery of the balance, amounting to Rs.28,131-11-6 on the 27th of August, 1930. This application is still pending. The defendant applied to the court of first instance for amendment of the decree, questioning the correctness of clause 3 of the decree mentioned above; but the learned Subordinate Judge rejected the application on the 31st of March, 1932, on the ground that he had no jurisdiction to amend the decree of this Court. The defendant's application for revision of the order of the learned Subordinate Judge was dismissed by this Court on the 17th of March, 1933.

1933

SHEKH
ALA BAKHSH
v.
THAKUR
DURGA
BAKHSH
SINGH

*Raza and
Smith, J.J.*

1933

SHEKH
ALA BAKHSI

v.

THAKUR
DURGA
BAKHSI
SINGH*Raza and
Smith, JJ.*

The present application for amendment was then filed in this Court on the 19th of April, 1933.

We have heard the learned Counsel on both sides at some length. In our opinion there is no substance in this application and the court cannot help the applicant. We are not prepared to accept the contention that the decree which was passed by the learned Subordinate Judge on the 31st of July, 1924, does not agree with the judgment. The learned Subordinate Judge had held in express terms that "the plaintiffs are entitled to the decree sought for." "The decree sought for" was the decree for the reliefs (a), (b) and (c) in para. 7 of the plaint mentioned above. The preliminary decree for sale was duly prepared in the form prescribed by Appendix D, Form No. 4 of the Code of Civil Procedure. That form was in force at the time the decree was passed. In the decree the learned Subordinate Judge thought it proper to retain clause 3 of Form No. 4 and signed the decree which was prepared in that form. The presumption is that when he signed the decree, he satisfied himself that it had been prepared in accordance with the judgment. (See Order XX, rule 7, Schedule I of the Code of Civil Procedure). A presumption arises under section 114 of the Evidence Act as to legality and correctness of a court's proceedings. We think the learned Subordinate Judge meant to grant relief (b) in para. 7 of the plaint mentioned above, and he actually granted it by finding on the sixth issue that "the plaintiffs are entitled to the decree sought for" and then retaining clause 3 of Form No. 4 in the decree which was prepared in that form and was duly signed by him. The defendant has made the present application under section 152 and Order XX, rule 6 of the Code of Civil Procedure. "Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission," may be corrected by the court under section 152 of the Code of Civil Procedure; but there are no such mistakes or errors in

the judgment or the decree passed in the present suit. Order XX, rule 6 of the Code of Civil Procedure also cannot help the defendant in this case, as the decree in question agrees with the judgment. It should be borne in mind that the defendant appealed from the decree in question, but he did not question the correctness of clause 3 of the decree passed against him. He has come to this court now some nine years after the passing of the decree, and questions the correctness of the provision for a personal decree which has become final. We think the defendant is not entitled to ask the court to exercise its discretion in amending the decree under section 152 of the Code of Civil Procedure in the circumstances of the present case. It should be borne in mind that there is no right in any party under that section to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court and the discretion has to be exercised in view of the peculiar facts of each case. If this application be granted, the plaintiffs will be deprived of the advantage which they have already gained by the defendant's omission to question the said provision in the decree, in the appeal filed by him. The decree has become final and it is now too late for the defendant to question the validity or correctness of any provision of the decree. We think even section 151 of the Code of Civil Procedure cannot help the defendant in this case when he had his remedy in appeal, but did not avail himself of it. It was held by a Full Bench of this Court in the case of *Ram Nath v. Mageshwar Singh* (1) that a preliminary decree for sale on a mortgage passed exactly in the form of decree laid down in No. 4 of Appendix D, of Act V of 1908 of the Code of Civil Procedure, declaring that:

"if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance."

1933

SHEIKH
ALA BAKHSH
v.
THAKUR
DURGA
BAKSH
SINGH

*Raza and
Smith, JJ.*

1933

SHEIKH
ALA BAKHSH
v.

THAKUR
DURGA
BAKHSH
SINGH

*Raza and
Smith, J.J.*

constitutes an adjudication which is detrimental to the defendant, and which must be regarded as awarding the plaintiff a personal decree in the event of the proceeds of the sale being insufficient, but merely leaving it open to him to apply for a personal decree in such event, and if a party aggrieved by a preliminary decree does not appeal from it, he is, under section 97, precluded from disputing its correctness afterwards. If a court passes a composite decree, combining a decree for sale and a personal decree, the decree is valid, and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt. See also *Suraj Bakhsh v. Munno Bibi* (1), *Lala v. Amir Haider Khan* (2) and *Maqbool Ahmad v. Durga Prasad* (3). Having failed to question the correctness of the clause in question (that is, clause 3 of the preliminary decree mentioned above), in his appeal from the decree, the defendant now wants to gain his object in a round-about way by making the present application for amendment of the decree. In our opinion he should not be allowed to do so. The defendant's learned Counsel has referred to a decision of a Bench of this Court in *Tirbeni Singh v. Mohammad Musharraf Ali* (4). That case is distinguishable from the case before us. In that case the decree was passed on the basis of a compromise, and it was held that when it is perfectly clear that the intention of the Judge who passed a decree was merely to pass the decree in terms of a compromise entered into in a mortgage suit, and there was nothing in the compromise to indicate an intention on the part of the mortgagor to make himself personally liable for any deficiency arising after the sale of the mortgaged property, a clause in the preliminary decree providing that if the net proceeds of the sale are insufficient to pay the decretal amount, the mortgagee shall be at liberty to

(1) (1929) 6 O.W.N., 974.

(2) (1933) I.L.R., 9 Luck., 51.

(3) (1929) 6 O.W.N., 969.

(4) (1931) 8 O.W.N., 1121.

apply for a personal decree for the amount of the balance, is contrary to the judgment, and contrary to the terms of the compromise, and an application for amendment of the preliminary decree must succeed under section 152 of the Code of Civil Procedure. There is no such decree (compromise-decree) before us in the present case. The decision of a Bench of this Court (to which one of us was a party) in the recent case of *Raghubir Singh v. Rajeshwari Devi* (1), helps the plaintiffs in the present case.

The applicant's learned Counsel has argued before us that the present case is a very hard case. It may be a hard case, but hard cases must not be allowed to make bad law.

We express no opinion as to the form of the decree which is to be passed by the learned Subordinate Judge under Order XXXIV, rule 6 of the Code of Civil Procedure, against the defendant who is the legal representative of the mortgagor, deceased, and was impleaded as such in the suit which was brought on the basis of the mortgage. It will be for that court to decide that question.

The application, therefore, fails, and must be dismissed.

Hence we dismiss the application, but in view of the facts of the case we make no order as to costs.

Application rejected.

(1) (1933) 10 O.W.N., 884.

1933

SHEKH
ALA BAKSH
v.
THAKUR
DURGA
BAKSH
SINGH

*Raza and
Smith, JJ.*