

Mr. Shaukat Ali, the present occupant of the premises. We content ourselves with saying that if the appellants can come to an amicable arrangement with the liquidator and Mr. Shaukat Ali, with a view to the lease being terminated before the date on which it would normally expire, there is no objection on our part to their doing so.

The result is that we allow this appeal to the extent stated. The appellants are allowed their costs of the appeal which will be paid by the liquidator out of the realised assets of the insolvent company.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

SYED SAJJAD HUSAIN, RAJA (JUDGMENT-DEBTOR-APPELLANT)
v. K. B. ALI HASAN KHAN (DECREE-HOLDER-RESPONDENT)*

1935
September 2

Civil Procedure Code (Act V of 1908), sections 151, 2(2) and 47—Mortgage—Sale in execution—Order that a decree was discharged—Judge, whether competent to set aside order of his predecessor discharging a decree.

Where the effect of an order is to discharge the decree passed on the basis of a mortgage as fully satisfied, the discharge amounts to a decree under the provisions of section 47 read with section 2(2) of the Code of Civil Procedure.

A Judge has no authority under section 151 C. P. C., to set aside an order of his predecessor, the effect of which is to discharge a decree, more than three years after the order was passed when any modification or alteration of the order far from furthering the ends of justice would work serious injustice to the interest of the decree-holder as his application for a personal decree would then be time-barred. *Ram Nath v. Nageshwar Singh* (1), followed.

*Execution of Decree Appeal No. 55 of 1934, against the decree of Mr. K. N. Wanchoo, I.C.S., District Judge of Rae Bareilly, dated the 11th of May, 1934, modifying the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Partabgarh, dated the 1st of November, 1933.

(1) (1930) I.L.R., 6 Luck., 132.

1935

SYED
SAJJAD
HUSAIN,
RAJA
v.
KHAN
BARADUR
ALI
HASAN
KHAN

Mr. *Zahur Ahmad*, for the appellant.

Mr. *M. Wasim*, for the respondent.

SRIVASTAVA and ZIAUL HASAN, JJ.:—The facts of this case are that the judgment-debtor-appellant executed two mortgages, one on the 15th of November, 1920, and the other on the 7th of January, 1921. The mortgagees under both these mortgages assigned their mortgagee rights to the decree-holder on the 5th of March, 1921. The respondent brought separate suits on the basis of each of the two mortgages, and on the 20th of March, 1930, preliminary decrees for sale were passed in both the suits. Both the decrees were made final on the 8th of November, 1930. The decree-holder made separate applications for execution of both the decrees and they were sent to the Collector under section 68 for sale of the mortgaged property. The sale was carried out by the Collector, and on the 12th of August, 1932, the Collector reported to the civil Court that a sum of Rs.4,173-9-3 had been realised. On the 23rd of August, 1932, the Subordinate Judge passed an order treating the decree passed on the second mortgage as fully satisfied, and after appropriating the balance of the money realised by sale towards the decree based on the first mortgage, recorded that a balance of Rs.1,504-7 remained due in respect of the decree on the first mortgage. On the 25th of March, 1933, the decree-holder made an application under order XXXIV, rule 6 for a personal decree for the aforementioned balance. It may be mentioned that in the meantime the Subordinate Judge who had passed the order, dated the 23rd of August, 1932, had been transferred. His successor who dealt with the application under order XXXIV, rule 6 was of opinion that the order made by his predecessor was incorrect. He held that the money realised by sale should be first appropriated in payment of the decree passed on the prior mortgage and the balance, if any, towards the second decree. As the order, dated the 23rd of August, 1932, had been passed in the absence of the judgment-debtor, the Subordinate

Judge was of opinion that it was open to him to correct the order of his predecessor. He accordingly found that the decree on the first mortgage had been satisfied except for a small sum of Rs.7-9-3, and passed a personal decree under order XXXIV, rule 6 in respect of this amount. As regards the decree on the second mortgage, he held that the entire amount due under that decree remained unsatisfied. The decree-holder appealed to the learned District Judge of Rae Bareilly who was of opinion that the Subordinate Judge had no authority to set aside the order of his predecessor. Accordingly on the basis of the order, dated the 23rd of August, 1932, the learned District Judge gave the decree-holder a personal decree for Rs.2,660-7-3 against the judgment-debtor.

The main question which arises for determination in the appeal is as regards the nature of the order, dated the 23rd of August, 1932, and the powers of the Subordinate Judge to set it aside. The learned counsel for the appellant in the first place tried to show that the sale had been made by the Collector in execution of the decree passed on the second mortgage. We are satisfied that this is not so. The decree-holder had made separate applications for execution of both the decrees obtained by him and proceedings in execution were going on simultaneously in respect of both the decrees. We are therefore of opinion that the sale was made in execution of both the decrees.

Next it was contended that the order, dated the 23rd of August, 1932, had been passed in chambers in the absence of the judgment-debtor, and that the Subordinate Judge was competent under section 151 of the Code of Civil Procedure to set aside that order in the exercise of his inherent powers to make such orders as may be necessary for the ends of justice. The effect of the order, dated the 23rd of August, 1932, was to discharge the decree passed on the basis of the second mortgage as fully satisfied. We are clearly of opinion

1935

SYED
SAJJAD
HUSAIN,
RAJA
v.
KHAN
BAHADUR
ALI
HASAN
KHAN

*Srivastava
and Ziaul
Hasan, JJ.*

1935

SYED
SAJJAD
HUSAIN,
RAJA
v.
KHAN
BAHADUR
ALI
HASAN
KHAN

*Srivastava
and Ziaul
Hasan, JJ.*

that this discharge amounted to a decree under the provisions of section 47 read with section 2, clause (2) of the Code of Civil Procedure. As there is nothing to show that any notice had been sent to the judgment-debtor and the order does not make mention of the judgment-debtor or for the matter of that the decree-holder being present at the time when the order was passed, we are prepared to agree with the appellant that the order was passed in the absence of the parties. However the fact of the order being passed *ex parte* or in the absence of the parties does not in any way detract from its being a decree. This being the position, the judgment-debtor had a right to appeal against the said decree. If he did not exercise his right of appeal, he could take steps to have the order set aside by a proper application for review. He might possibly also have applied under the provisions of order IX, rule 13 of the Code of Civil Procedure to have the *ex parte* order set aside. But he did not take any such steps. All that he did was to oppose the decree-holder's application under order XXXIV, rule 6 by means of a written statement. It is impossible to treat this written statement as an application under order IX, rule 13 because it does not make any request for the setting aside of the *ex parte* decree and was never intended as an application for that purpose.

The question then remains whether the order of the Subordinate Judge can be upheld on the ground of its having been passed in the exercise of the inherent powers of the Court under section 151 of the Code of Civil Procedure. It has been pointed out by the learned counsel for the decree-holder that both the decrees for sale obtained by him contained provisions to the effect that in case the sale proceeds are found insufficient he would be at liberty to apply for a personal decree. It has further been pointed out that under the decision of the Full Bench of this Court in *Ram Nath v. Nageshwar Singh* (1) this provision in the decree

(1) (1930) I.L.R., 6 Luck., 132 (F.B.).

constitutes an adjudication in his favour about his right to a personal decree and entitles him to a personal decree in respect of the balance remaining unrealised under either of the two decrees. The argument proceeded that the result of the setting aside of the order, dated the 23rd of August, 1932, would be to deprive the decree-holder of the right to make any application for a personal decree in respect of the balance remaining due on the second decree because of any application for that purpose being now barred by time. The contention is in our opinion perfectly correct. We are therefore satisfied that any modification or alteration of the order dated the 23rd of August, 1932, more than three years after the order was passed far from furthering the ends of justice would work serious injustice to the interest of the decree-holder. We can therefore see no sufficient ground to interfere with the order of the lower appellate Court.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and Mr.
Justice Ziaul Hasan*

BIJAI RAJ SINGH alias BHAN SINGH AND OTHERS
(OBJECTORS-APPELLANTS) *v.* RAM PADARATH AND ANOTHER
(OPPOSITE-PARTY RESPONDENTS)*

1935
September

Civil Procedure, Code (Act V of 1908), sections 11 and 53 and order II, rule 2—Hindu Law—Mortgage by Hindu—Suit against a Hindu mortgagor impleading his sons and grandsons—Suit dismissed against sons and grandsons—Decree allowed to become final—Decree not enforceable against interest of sons and grandsons in family property—Money decree against a Hindu, whether can be enforced in his lifetime against his sons and grandsons.

*Execution of Decree Appeal No. 76 of 1934, against the order of Babu Gauri Shankar Varma, Additional Subordinate Judge of Gonda, dated the 29th of August, 1934, upholding the order of Babu Mahesh Chandra, Munsif of Gonda, dated the 22nd of December, 1933.

1935

SYED
SAJJAD
HUSAIN,
RAJA
v.
KHAN
BARADUR
ALI
HASAN
KHAN

*Srivastava
and Ziaul
Hasan. J.J.*