

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge
and Mr. Justice Ziaul Hasan

SHEO PRASAD LAL (APPLICANT) *v.* MUSAMMAT
PRAKASH RANI (OPPOSITE-PARTY)*

1937
September. 22

Civil Procedure Code (Act V of 1908), section 115 and order XXXIV, rule 1—Order dismissing a person's application to be made party to a suit—Revision against the order, if lies—Transfer of Property Act (IV of 1882), section 91—Suit by prior mortgagee decreed against mortgagor but dismissed against subsequent mortgagee—Prior mortgagee's right to be made party to subsequent mortgagee's suit and to redeem it.

An order dismissing an application to be made a party to a suit, though in a sense interlocutory, does decide a case so far as it relates to the prayer of the applicant and a revision is maintainable against such an order.

Section 91 imposes no conditions or limitations on the right to redeem the mortgaged property, of any person who has any interest in the property or in the right to redeem it. Where a suit by a prior mortgagee against the mortgagor and the subsequent mortgagee is decreed against the mortgagor alone and is dismissed against the subsequent mortgagee, the prior mortgagee is, by virtue of the decree in his favour, a person who has an interest in the property and in the right to redeem the same and the fact that his suit has been dismissed against the subsequent mortgagee is no bar to his right to redeem the property under section 91, Transfer of Property Act.

A prior mortgagee who has obtained a decree as against the mortgagor is not only a proper but a necessary party to a suit by a subsequent mortgagee under order XXXIV, rule 1 of the Code of Civil Procedure even though his suit was dismissed against the subsequent mortgagee.

Messrs. *Radha Krishna* and *S. C. Das*, for the applicant.

Mr. *N. Banerji*, for the opposite-party.

SRIVASTAVA, C.J. and ZIAL HASAN, J.:—This is an application in revision against an order of the learned

*Section 115 Application No. 50 of 1936, against the order of Syed Yaqub Al Rizvi, Additional Civil Judge of Sultanpur, dated the 12th of December, 1935.

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Additional Civil Judge. of Sultanpur dismissing the applicant's application to be made a party to a suit brought by the opposite party Musammat Prakash Rani.

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On the 20th of December, 1920, a certain Musammat Raj Bibi and her son Tahir Raza executed a deed of simple mortgage in favour of the present applicant. Subsequently on the 5th of September, 1921, they mortgaged the property by way of conditional sale to the opposite party Musammat Prakash Rani. In 1923 the mortgagors brought a suit for cancellation of the applicant's mortgage but a decree was passed on the 16th of February, 1924, on a compromise by which the mortgage was held to be binding on the mortgagors. In 1926 the mortgagors sold their equity of redemption to one Kuar Prasad. In 1932 the present applicant brought a suit on his mortgage and impleaded Kuar Prasad and Musammat Prakash Rani. The suit was decreed against Kuar Prasad but dismissed as against Prakash Rani as it was held that the mortgage had not been proved against her. This decree was passed on the 22nd of April, 1933. The applicant preferred an appeal to this Court but the appeal was dismissed.

On the 5th of September, 1935, the opposite party Musammat Prakash Rani brought a suit on the basis of her mortgage of the 5th of September, 1921, and it was to this suit that the applicant wanted to be made a party. The application was dismissed by the learned Additional Civil Judge on the ground that as the applicant's suit on the mortgage of 20th December, 1920, was dismissed as against Musammat Prakash Rani the applicant was not entitled to be made a defendant to the suit brought by Prakash Rani on her own mortgage.

We are of opinion that this application must succeed. So far as the maintainability of the present application

is concerned, we think that the order of the court below, though in a sense interlocutory, did decide a case so far as it related to the prayer of the present applicant. On the merits also we consider that it was necessary that the applicant should be made a party to Prakash Rani's suit. It is not denied that the applicant holds a decree as against the mortgagor for sale of the property, the subject of Prakash Rani's suit, though that decree is not binding on her. Under section 91 of the Transfer of Property Act "any person who has any interest in the property mortgaged or in or upon the right to redeem the same" is entitled to redeem the property and it cannot be disputed that by virtue of the decree for sale in his favour, the present applicant is a person who has an interest in the property and in the right to redeem the same. Therefore, the applicant has a right of redemption under section 91 of the Transfer of Property Act and the fact that his suit was dismissed as against the opposite party is in our judgment no bar to his claiming a right to redeem the property under section 91. Section 91 imposes no conditions or limitations on the right, to redeem the mortgaged property, of any person who has any interest in the property or in the right to redeem it and we therefore see no reason why the fact that the applicant's suit was dismissed against the opposite party should be taken into consideration in judging whether the applicant has a right of redemption under section 91. The only effect of the dismissal of the applicant's suit against Prakash Rani is that he has lost priority as against Prakash Rani but that dismissal should not in our opinion deprive the applicant of his right to redeem the property if he chooses to redeem it. Under order XXXIV, rule 1 of the Code of Civil Procedure "all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage" and as it has been

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found that the applicant has an interest in the property he was not only a proper but a necessary party to Musammat Prakash Rani's suit under order XXXIV, rule 1 of the Code of Civil Procedure.

We therefore allow this application with costs and setting aside the learned Additional Civil Judge's order direct that the applicant be made a party to the opposite party's suit.

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Ziaul Hasan,
J.*

Application allowed.

FULL BENCH

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,
Mr. Justice Ziaul Hasan and Mr. Justice H. G. Smith*

1937
October, 21

MUSAMMAT ROOP RANI AND ANOTHER (PLAINTIFFS-APPELLANTS) v. BITHAL DAS (DEFENDANT-RESPONDENT)*

Court Fees Act (VII of 1870), section 7(iv)(c)—Declaratory suit—Suit for declaration that a previous decree against plaintiff was null and void—Consequential relief not claimed—Substance of claim as gathered from plaint and not relief as claimed in plaint should be looked at for determining court-fee payable—Setting aside of previous decree being necessary effect of declaration amounts to consequential relief and hence ad valorem court-fee is payable under section 7(iv)(c).

The question of the proper court-fee payable in a suit is to be determined on the substance of the claim to be gathered from the whole plaint, and not merely on the language of the relief claimed in the plaint. It is clearly the duty of a court of justice to look to the substance of the plaint, and not to allow itself to be deceived by the language used for evading the payment of proper duty by concealing the real purpose of the suit. Even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included within the declaration prayed for in the suit.

Where a person who is a party to a decree asks for a declaration about the decree being illegal and void, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of the obligations under it

*First Civil Appeal No. 133 of 1935, against the decree of Syed Shaukat Husain, Civil Judge of Mohanlalganj at Lucknow, dated the 30th of November, 1935.