

MISCELLANEOUS CIVIL.*Before Courtney Terrell, C.J. and Agarwala, J.*

JAGERNATH PRASAD BHAGAT

1934.

v.

July, 10.

THAKUR JAMUNA PRASAD SINGH.*

Amendment—misdescription—property misdescribed in mortgage bond—mistake repeated throughout execution proceeding—no doubt as to identity—court, power of, to amend decree.

Where a property has been accidentally misdescribed in the mortgage bond and the mistake has been repeated throughout the proceedings to enforce the mortgage but where there is no doubt as to the identity of the property mortgaged and the property sold at auction, the court has ample power to amend the decree and such a case is eminently one in which the powers of amendment should be exercised. *Aziz Ullah Khan v. Collector of Shahjahanpur*(1), followed.

Thakur Barmha v. Jiban Ram Marwari(2), explained.

The real test in cases of this description is what did the court intend to sell and what did the purchaser understand that he bought.

Pettachi Chettiar v. Sangili Veera Pandia Chinathambiar(3), referred to.

The facts of the case material to this report are stated in the judgment of Agarwala, J.

Sir Sultan Ahmad and Bindeshwari Prasad, for the petitioners.

* Miscellaneous Judicial Case no. 1 of 1934. In the matter of First Appeal no. 2 of 1926, with Civil Revision no. 476 of 1933 from an order of Babu A. K. Sahay, Offg. Subordinate Judge of Monghyr, dated the 11th August, 1933.

(1) (1932) I. L. R. 54 All. 800.

(2) (1913) I. L. R. 41 Cal. 590, P. C.

(3) (1887) L. R. 14 I. A. 84.

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S. M. Mullick (with him *N. N. Sen* and *G. N. Mukharji*), for the opposite party.

AGARWALA, J.—The facts out of which these applications have arisen are as follows.

One Thakur Baijnath Singh executed a mortgage of a certain property and the descendants of the mortgagees obtained a decree on the basis of that bond. An appeal was preferred to the High Court which was dismissed and the mortgaged property was put up for sale in execution of the decree and purchased by the decree-holders for Rs. 52,000 odd. In the bond the property was described as 3 annas 4 gandas pokhta share out of 16 annas *asli mai dakhli* of Taluka Mangrar. This patti was included in Khewat no. 2 but in the bond the Khewat number was given as 3 and this mistake was repeated in the plaint, the preliminary decree, the final decree, the petition for execution, the sale proclamation and the sale certificate. The auction-purchaser applied for amendment of the sale certificate but the application was rejected by the court below. He has now applied for amendment of the High Court decree and of the consequential execution papers and has also filed a petition in revision against the order of the court below dismissing his application for amendment.

In support of the application Sir Sultan Ahmad relies on a decision of a Division Bench of the Allahabad High Court in *Aziz Ullah Khan v. Collector of Shahjahanpur*(1) where in exactly similar circumstances, the Division Bench of the Allahabad High Court held that where a property has been accidentally misdescribed in the mortgage bond and the mistake has been repeated throughout the proceedings to enforce the mortgage but where there is no doubt as to the identity of the property mortgaged and the property sold at

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auction, the court has ample power to amend the decree and that such a case is eminently one in which the powers of amendment should be exercised.

Mr. Sushil Madhav Mullick on behalf of the opposite party contends that in the present case it is not merely a misdescription of the property that has occurred but that the identity of the property is not the same. The real test in cases of this description is that which was pointed out by Lord Watson in *Pettachi Chettiar v. Sangili Veera Pandia Chinnathambiar*(¹) where his Lordship said—"The questions are what did the court intend to sell and what did the purchaser understand that he bought."

In the sale proclamation in the present case the property advertised for sale was described as 3 annas 4 gandas pokhta share of the judgment-debtor in village Mangrar, and there followed the further description that it was in Khewat no. 2. There can be no doubt whatsoever that neither the court nor any person who had any interest in the sale was under any misapprehension that what was being sold was the property of the judgment-debtor in village Mangrar and not the proprietary interest comprised in Khewat no. 3. The mistake that has occurred is, therefore, not one of identity of the property that was being dealt with but a mistake of description which, I am of opinion, this Court has ample power to deal with. I would, therefore, adopt the reasoning of the Division Bench of the Allahabad High Court and allow the amendment in the decree of this Court, in the application for execution, the sale proclamation and the sale certificate.

Mr. Sushil Madhav Mullick referred to a decision of their Lordships of the Privy Council in *Thakur Barmha v. Jiban Ram Marwari*(²) in support of his contention that the amendment sought to be made

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(1) (1887) L. R. 14 I. A. 84.

(2) (1918) I. L. R. 41 Cal. 590, P. C.

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could not be allowed. That was a case of an entirely different nature. There what was advertised for sale was an encumbered 6-annas share in a certain property belonging to the judgment-debtor. The property that was sought to be sold, in execution of a money decree, was subject to a mortgage and what was attached was the property that was proclaimed for sale. After the sale the auction-purchaser endeavoured to persuade the court to amend the sale certificate so as to describe the property sold as the 6-annas unencumbered share in the judgment-debtor's property. This their Lordships held could not be allowed. At page 599 of the report Lord Moulton said—

“ An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description. A property fully identified in the schedule may be in some respects misdescribed, but that is not the present case. Here we find an existing property accurately described in the schedule, and the order of the Subordinate Judge grants a sale certificate which states that another and a different property has been purchased at the judicial sale.”

As I have already indicated, the facts in the present case show quite conclusively that what was being offered for sale and what was being sold was the share of the judgment-debtor in village Mangrar and not some other person's property. There is no question of the auction-purchaser attempting to obtain a property which was not put up for sale.

I would, therefore, allow the applications with costs.

We assess the hearing fee at two gold mohurs.

COURTNEY TERRELL, C.J.—I agree.

Rule made absolute.