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BROWN, J.

present case, the plaintiff had proved the permissive occupation by the defendants, the burden would then clearly have rested on the defendants to show that they had acquired title by twelve years' adverse possession. But it has been found as a fact that the plaintiff has failed to prove this permissive occupation. All that has been proved is that the plaintiff was at one time the owner, but that for the last 15 or 20 years the defendants have been in possession, and it seems to me that the plaintiff's claim is that the defendants obtained possession from him. That being so, the suit was a suit under Article 142, and on his failing to prove the permissive nature of the occupation the plaintiff could not succeed without at first showing that he had been in possession within twelve years of bringing the suit.

For these reasons I am of opinion that this case was rightly decided by the District Court and I dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

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Jan. 1.

C.T.A.M. CHETTYAR FIRM

v.

KO YIN GYI AND ANOTHER.*

Inherent powers of the Court to prevent injustice—Powers of the Court to amend decree in favour of party against whom it was never intended to operate—Civil Procedure Code (Act V of 1908), ss. 151, 152—Merger of lower Court's decree into that of High Court—Proper Court to grant relief—Power of Court to amend decree under O. 41, r. 33 of the Code in favour of absent parties—Power to refund court-fees on review application, when to be exercised.

A District Court's decree accidentally included the appellants' names and of other defendants as liable for mesne profits of a certain land and for costs.

* Civil First Appeal No. 234 of 1925 against the decree of the District Court of Tharrawaddy in Civil Regular No. 24 of 1920, and Civil Miscellaneous Application No. 44 of 1928 for a review.

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Appellants as mortgagees of the land were made parties to this suit for possession and mesne profits but the reliefs were claimed by the plaintiff only as against the first two defendants. The High Court on appeal by the plaintiff allowed her a larger sum for mesne profits, but the question as to who were bound by the decree was not before the High Court and was not referred to in the judgment of the High Court. Appellants did not appeal against the decree of the District Court and the High Court's decree followed the decree of the District Court so far as the parties were concerned. More than a year after the decree, appellants came to know of the decree against them and they applied to the High Court both under s. 151 of the Civil Procedure Code for a review and for amendment of the decree under s. 152 of the Code.

Held, that the decree of the District Court had merged in the decree of the High Court and therefore the High Court was the proper Court to grant the relief claimed. It was open to the High Court in the plaintiff's appeal to alter the decree in favour of the appellants under the provisions of O. 41, r. 33 of the Code, although the appellants had not appealed. This was a clear case for interference by the Court and for amendment of the decree in favour of the appellants and the absent defendants other (than the first two defendants) as plaintiff never claimed those reliefs against them and no Court ever intended to give those reliefs against them.

Held, also, that the appellants under the circumstances of the case were entitled to a refund of the stamp duty paid on their review application. The case did not fall under s. 15 of the Court Fees Act but the Court had inherent power under s. 151 of the Civil Procedure Code to order the refund in such a case as the present where the applicants were justified in making alternative applications for reliefs.

Chandradhari Singh v. *Tippan Prasad*, 3 Pat. L.J. 452 *Ma Thein* v. *Ma Mya*, Civil First Appeal 147 of 1928, H.C. Ran.—*referred to.*

K. C. Bose for the appellants.

Anklesaria for the respondents.

RUTLEDGE, C.J., and BROWN, J.—This application arises out of a suit filed by Ma Thet Pon, now deceased, in the District Court of Tharrawaddy in the year 1920. In that suit, she sued for possession of certain land and for mesne profits. The land had been in the possession of U Bauk and Ma Mwe Me, deceased, and the first two defendants were Ma Kyi Oh and Ma Ohn Kin, administrators of the estate of U Bauk and Ma Mwe Me. The present petitioners were joined as defendants because the land in dispute had been mortgaged to them by U Bauk and Ma Mwe Me. There were five other defendants joined

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for various reasons. In the plaint as finally amended, the plaint asked for possession of the land and for mesne profits as against the estate of U Bauk and Ma Mwe Me alone. The suit went to trial and was finally dismissed by the District Court. Ma Thet Pon appealed to this Court and in September 1923 her appeal was allowed and a decree for possession passed in her favour. This decree has subsequently been confirmed on further appeal to the Privy Council.

The decree of this Court directed that the respondent-defendants should make over possession of the land in dispute to Ma Thet Pon, and it then proceeded to say :—

"And it is further ordered that as to the rents claimed the case be remanded to the District Court of Tharrawaddy for disposal on the following issues, and that the said District Court of Tharrawaddy do then pass a final decree for the amount due to the appellant plaintiff :—

(1) what quantity of paddy was received as rent by Ma Mwe Me and the administrators after U Bauk's death ?

(2) what was the market value of the paddy at the time of the harvest ?

(3) what sums were paid as land revenue ?"

As a result of this decree, the District Court held an enquiry on the question of mesne profits and passed final orders on the 5th of May 1925. In this enquiry, the administrators of the estate of U Bauk and Ma Mwe Me were the only contesting parties. The District Judge in his judgment found : "The amount the plaintiff is entitled to receive from the defendants is therefore Rs. 9,808-7-7. There will be a decree with costs accordingly in favour of the plaintiff."

A decree was then drawn up and that decree includes all the original defendants as defendants and directs that the defendants jointly do pay the amount found due. Against this decree Ma Thet Pon filed an appeal in this Court claiming that she should have been allowed a larger sum. This appeal was decided by us in June 1927. We found that a small sum of Rs. 372 should have been allowed in excess of the amount decreed and the final order we passed was as follows :—"We direct that Rs. 372 be added to the sum decreed as mesne profits by the District Court with proportionate costs, and for the rest we dismiss this appeal." The question as to who were to be bound by the decree was not before us and was not referred to by us at all in our in judgment. A decree was then drawn up which so far as the parties were concerned followed the decree of the District Court and directed that "the decree of the District Court of Tharrawaddy be and the same is hereby modified by directing that respondents-defendants do pay to the appellant-plaintiff the sum of Rs. 10,180-7-7, being the amount of the mesne profits." The date of our judgment was the 14th of June 1927. The application now before us is an application for amendment of this decree and is dated the 4th of May 1928. The delay in filing the application is explained in an affidavit filed by the petitioners. In that affidavit, Thiruvenkatam Pillay, clerk and sub-agent of the C.T.A.M. Firm, deposes that they engaged an advocate, Mr. Krishnaswami, to represent them in the appeal before us and that on our judgment being pronounced the Chettyar firm was informed by Mr. Krishnaswami that the appeal against them had been dismissed and a decree for the further sum of Rs. 375 had been passed against the 1st and 2nd respondents,

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and it was only on the 16th of April 1928 that the firm knew that there was any decree against them when they received notice to pay up the decretal amount.

It is urged on behalf of the petitioners that it is quite clear that it was never the intention of any Court to pass a decree against them for mesne profits, that the inclusion of their names in the decree was entirely accidental and that this is a proper case for the interference by this Court under the provisions of section 152 of the Code of Civil Procedure.

The decree in the first instance was a decree of the District Court and against this decree the petitioners never appealed. It is, however, contended on their behalf that although they did not appeal, it was open to this Court on the appeal of Ma Thet Pon to alter the decree in their favour under the provisions of Rule 33 of Order 41 of the Code of Civil Procedure. In these circumstances, although the original decree was that of the District Court that decree must now be held to be merged in the decree of this Court and this Court is therefore the only Court which can grant the relief now claimed.

We are of opinion that this contention is correct. There can in our opinion be no question whatever as to the merits of the present application. The respondent in her final plaint made no claim whatsoever against the applicants for mesne profits and it seems to us perfectly clear that the decree against the applicants on this point was entirely due to accident and that it was never the intention of the District Court or of any Court to direct the petitioners to pay the sum decreed. The only point which requires consideration is whether we have the power to interfere now. Mr. Anklesaria contends that the error can be traced back to the decree of this Court of

September 1923. We are, however, unable to agree with this contention. That decree does direct all the defendants to deliver up possession, but it contains no order at all as to who is to pay the mesne profits and no order on that point was necessary as no claim on the point had ever been made except against the first two defendants. In our opinion, it was not until the decree of the District Court of May 1925 that there was any order at all against the petitioners for payment of mesne profits. As we have already said, that decree, in our opinion, now merges in the decree of this Court and that decree so far as it directs anyone but the first two defendants to pay mesne profits was clearly never in accordance with the intention of the judgment of the District Court, and it was certainly not in accordance with our intention when the case came before us on appeal. It would be a gross injustice to allow a decree for so large an amount to stand when based on no legal claim of any kind whatsoever, the decree being due entirely to a mistake on the part of the Court. We are of opinion that we have power to interfere either under the provisions of section 152 or under the provisions of section 151 of the Code of Civil Procedure. The order we propose to make is quite clearly one which is necessary for the ends of justice and to prevent abuse of the process of the Court. The application before us has been made by the Chettyar defendants only, but it is clear that there has been a similar mistake as regards all the other defendants except the first and second.

We direct that the decree of this Court in Civil Appeal No. 234 of 1925 be amended into a decree directing that the first two respondent-defendants, the legal representatives of the estate of U Bauk and Ma Mwe Me, deceased, alone be directed to pay the

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appellant-plaintiff the sum of Rs. 10,180-7-7, being the amount of the mesne profits. There will be a similar modification of the decree as regards the payment of costs of the enquiry in the District Court. These costs will be borne by the first two defendants alone. The respondents will pay the costs of the petitioners in this application, advocate's fee seven gold mohurs.

After the above order for amendment of the decree, their Lordships directed that the application for review being no longer necessary be dismissed without costs. Mr. Bose applied for a refund of the court-fee paid on the review application.

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RUTLEDGE, C.J., and BROWN, J.—We have given Mr. Bose an opportunity to show that the Court has power to order a refund of the Stamp Duty payable upon the review application in this case, and he relies upon section 15 of the Court Fees Act. We are not satisfied, however, that section 15 by itself would give us power to make such an order in the present case. It is true that the application for review of judgment was admitted in the case, but it is not accurate that on the re-hearing the Court reversed or modified its former decision on the ground of mistake of law or fact. It granted, however, all the reliefs which the applicants asked for in a concurrent proceeding for the amendment of the decree under Order XLI, Rule 33 of the Civil Procedure Code.

On the facts of the case, however, we consider that this is a case where it is necessary, for the ends of justice or to prevent the abuse of the process of the Court, that we should apply the inherent powers of the Court referred to in section 151 of the Civil Procedure Code. It is no doubt only in rare and

exceptional circumstances that this power can be invoked, but we consider that this is one of those exceptional cases.

The error referred to in our judgment in this case delivered yesterday shows that the error was one of the the Court's in not specifying that it was only the contesting defendants-respondents who were liable for the mesne profits. In these circumstances an injustice was done to the applicants and an amount was decreed against them which had never been claimed.

In these circumstances they were quite justified on making alternate applications for relief, as it was difficult on the complicated proceedings to state which was their proper remedy.

We are confirmed in the view we take by a decision of a Bench of the Patna High Court, of which the late Chief Justice was a member, in the case of *Chandradhari Singh* v. *Tippan Prasad Singh* (1), and also by a recent order of this Court in the case of *Ma Thein* v. *Ma Mya and one* (2).

We accordingly direct that the court-fees paid on this application to review be refunded to the application.

(1) (1918) 3 Patna Law Journal 452.
(2) Civil First Appeal No. 147 of 1928.