

## APPELLATE CIVIL.

*Before Coldstream and Din Mohammad JJ.*

KRISHAN LAL AND ANOTHER (DEFENDANTS)

Appellants,

*versus*

SIRI JAIN MANDIR PANCHAITI, AT HANSI  
AND OTHERS (PLAINTIFFS) Respondents.

Regular First Appeal No. 439 of 1936.

*Civil Procedure Code (Act V of 1908) S. 35 and O. 34  
r. 6 — Costs in mortgage suits — Personal liability — Amend-  
ment of decree in appeal to bring it into conformity with the  
judgment — S. 151 and O. 41, r. 33.*

A suit for sale of the mortgaged property was decreed against the mortgagor who had raised all sorts of frivolous pleas in the suit. The judgment expressly made the mortgagor personally liable for the costs of the suit, but the decree, which was drawn up in the usual form, did not mention this. In appeal it was contended by the mortgagor that he could not be made personally liable for costs, especially when the right to enforce his personal liability for the mortgaged debt had become time-barred.

*Held*, that although the right to enforce the personal liability of the mortgagor for the mortgage debt was barred by time the trial Court was competent to make the mortgagor, who had raised all sorts of frivolous pleas, personally liable for costs, the discretion under s. 35, Civil Procedure Code, being absolute.

*Dost Mohammad v. Miraj Din* (1), and *Sital Das v. Punjab and Sind Bank Ltd., Lyallpur* (2), followed.

Other case law, discussed.

*Held, however*, that since what could be executed was the decree and not the judgment, it was not permissible to the decree-holder to realize the costs personally from the mortgagor so long as the decree was not brought into conformity with the judgment. The Appellate Court was competent under s. 151, as well as under O. 41, r. 33, Civil Procedure

(1) 1936 A. I. R. (Lah.) 387. (2) I. L. R. (1936) 17 Lah. 520.

Code, to amend the decree so as to bring it into conformity with the judgment even in favour of any respondent who may not have appealed.

*First appeal from the preliminary decree of Sardar Jagjit Singh, Senior Subordinate Judge, Hissar, dated 13th August, 1936, granting the plaintiffs a decree and making the mortgagor personally liable for costs.*

R. C. SONI, for Appellants.

M. L. SETHI, J. G. SETHI and MEHR CHAND SUD, for Respondents.

DIN MOHAMMAD J.—The only question that is raised in this appeal is, whether the defendant-appellant, against whom a suit for sale of the property mortgaged by him to the plaintiff-respondent was decreed, could be made personally liable for costs, especially when his personal liability for the mortgage debt was held to be time-barred.

Counsel for the appellant contends that no such liability could under the law be fixed on him and relies in support of his contention on *Maqbul Fatima v. Lalta Prasad* (1), *Kumalamma v. Komandur Narasimha Charlu* (2), *Dambar Singh v. Kalyan Singh* (3) and *Maharaj Bahadur Singh Dugar v. Basiruddin Ahmad* (4).

In *Maqbul Fatima v. Lalta Prasad* (1), a case decided by five Judges, a decree was drawn up in accordance with section 88, Transfer of Property Act, and it was further ordered that the defendant do pay to the plaintiffs the sum of Rs. 876-8-0 the amount of costs incurred by them in the High Court. It was held that the clause about costs was merely a formal compliance with the provisions of the Civil Procedure

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(1) I. L. R. (1898) 20 All. 523 (F.B.). (3) I. L. R. (1918) 40 All. 109.  
(2) I. L. R. (1907) 30 Mad. 464. (4) 1925 A. I. R. (Cal.) 1135.

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Code and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. At p. 527 of the report, however, it was made clear that the judgment in that case did not in the slightest degree indicate that the Court intended to award costs against the defendant personally. The claim in the plaint was only for a decree for the sale of the mortgaged property and the judgment directed that a decree should be prepared in accordance with section 88, Transfer of Property Act. In these circumstances the learned Judges observed:—"In our opinion, the judgment so far from indicating, negatives an intention to make the defendant personally liable for the amount of the costs."

In *Kamamma v. Komandur Narasimha Charlu* (1), a Division Bench remarked that it would be contrary to the scheme of the Transfer of Property Act and to the practice of the English Courts of Equity to make the mortgagor personally liable for costs in any case before the sale-proceeds have proved insufficient to satisfy the mortgage claim. They further observed that the decree under section 88, Transfer of Property Act, must not order the defendants personally to pay the costs. It might contain a declaration of the personal liability of the defendants for principal or costs but such a declaration could be enforced only under section 90, Transfer of Property Act.

In *Dambar Singh v. Kalyan Singh* (2), a decree had been drawn up in the ordinary form and it was consequently held that the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit by sale of the mortgaged property.

(1) I. L. R. (1907) 30 Mad. 464.

(2) I. L. R. (1918) 40 All. 109.

In *Maharaj Bahadur Singh Dugar v. Basiruddin Ahmad* (1), all the above-mentioned authorities were considered and followed. There the trial Court had dismissed the suit. On appeal, the suit was decreed in the following terms among others: "The appellants are entitled to costs of this Court." A decree was drawn up in accordance with this order. The decree-holder, thereafter, applied for execution of the decree of the appellate Court awarding him costs of the appeal against the person and property of the defendants. On the strength of the authorities cited above, it was held that the costs in a mortgage suit are not to be treated as independent claims by the mortgagee irrespective of the right under the mortgage and such costs should form part of the amount decreed in the mortgage suit to be realized in accordance with the procedure laid down in the Code.

Counsel for the respondents does not demur to the general proposition of law indicated above but argues that where, as in the case before us, the trying Court imposes personal liability for costs on the defendant mortgagor in express terms, the order is *intra vires* and can be executed against the person of the mortgagor apart from the sale of the mortgaged property. He places his reliance on *Sheo Darshan Singh v. Beni Chaudhri* (2), *Kannu Lal v. Bhagwan Das* (3), *Aziz Ahmad v. Riaz-ul-Hassan* (4), *Rajagopalaswami Naicker v. Palaniswami Chettiar* (5), *Lakshmi Naidu v. Gunnamma* (6), *Dost Mohammad v. Miraj Din* (7) and *Sital Das v. Punjab and Sind Bank, Ltd., Lyallpur* (8).

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(1) 1925 A. I. R. (Cal.) 1135.

(5) I. L. R. (1932) 55 Mad. 332.

(2) 1926 A. I. R. (All.) 424.

(6) I. L. R. (1935) 58 Mad. 418.

(3) 1931 A. I. R. (All.) 124.

(7) 1936 A. I. R. (Lah.) 387.

(4) (1934) 151 I. C. 294.

(8) I. L. R. (1935) 17 Lah. 520.

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In *Sheo Darshan Singh v. Beni Chaudhri* (1), a Division Bench composed of Mears C. J. and Lindsay J. observed that it is certainly competent to the Court in the exercise of its discretion to award the costs personally against the mortgagor but where the terms of the decree are ambiguous, it ought to be construed that they are a charge on the property. The learned Judges in the course of their judgment approvingly referred to the following passage in Ghose's Law of Mortgage in India.

“ But the costs of the action will as a rule be only added to the amount of the security and the mortgagor will be made personally liable for them only in very exceptional cases of misconduct.”

In *Kannu Lal v. Bhagwan Das* (2), Dalal J. remarked that unless there is in the judgment a specific direction that the costs should be recovered from the mortgagor personally, the presumption must be that the decree directed costs to be added to the mortgage amount.

In *Aziz Ahmad v. Riaz-ul-Hasan* (3), which again is a case from Allahabad, a Division Bench observed that ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where the form in which the decree was framed made the mortgagors personally liable for the payment of the costs, on the interpretation of the decree, the mortgagors were liable to pay the costs of the appeal personally.

In *Rajogopalaswami Naicker v. Palaniswami Chettiar* (4), it was remarked by a Division Bench that

(1) 1926 A. I. R. (All.) 424.

(3) (1934) 151 I. C. 294.

(2) 1931 A. I. R. (All.) 124.

(4) I. L. R. (1932) 55 Mad. 332.

in a suit by the mortgagee for sale of the mortgaged properties, the Court has power to pass a personal decree for costs of the suit against the defendants who had not executed the mortgage even at the stage when an application under Order 34, rule 6, C. P. Code, is made and though the preliminary decree is silent in respect of the same.

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In *Lakshmi Naidu v. Gunnamma* (1), a Division Bench at page 426 of the report said, "As regards the direction for costs in the lower Court's decree, it is no doubt true that in mortgage suits the amount of costs is usually directed to form part of the mortgage money to be realized by sale of the mortgaged property, but when one of the defendants disputes the right of the mortgagee or raises other contentions calculated to negative his right to maintain the suit, this rule cannot be insisted on. The lower Court was right in directing that he and those who sided with him must pay the costs of the plaintiffs."

In *Dost Mohammad v. Miraj Din* (2), a Division Bench made the mortgagors personally liable for the amount of the costs incurred in the preliminary decree even though the personal remedy in respect of the mortgage debt was barred.

In *Sital Das v. Punjab and Sind Bank, Ltd., Lyallpur* (3), in a similar case, it was observed that the discretion of the Judge trying the suit could not be limited and that the discretion under section 35, Civil Procedure Code, was absolute.

It would be clear, therefore, that the trend of authority is in favour of the proposition advanced by

(1) I. L. R. (1935) 58 Mad. 418. (2) 1936 A. I. R. Lah. 387.

(3) I. L. R. (1936) 17 Lah. 520.

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the respondent, and even the judgments relied upon by the appellant do not go against it.

It is difficult to hold in the face of these authorities that the trial Court could not make the mortgagors personally liable for costs, even if the personal remedy against them was barred, especially when the mortgagors had raised all sorts of frivolous pleas in the suit. There is, however, one consideration which cannot be ignored in the present case. Although the judgment does impose this liability in express terms, the decree has been drawn up in the usual form and it nowhere imposes any personal liability on the mortgagors for costs. What is executed is the decree and not the judgment and unless the decree is brought into conformity with the judgment, it will not be permissible to the decree-holder to realize the costs in suit personally from the mortgagors. The question then arises, whether we can and should amend the decree to avoid multiplicity of proceedings. Order 41, rule 33, invests an appellate Court with plenary powers and authorises the Court to pass any decree or order as the case may require and even in favour of any respondent who may not have appealed. Even otherwise under section 151, C. P. Code, the inherent powers of this Court to make such orders as may be necessary for the ends of justice are unlimited. I would, therefore, order that the decree be brought in conformity with the judgment and dismiss this appeal with costs.

Before concluding, I would draw the attention of the Court to Order 34, rule 4 and Order 34, rule 6, C. P. Code, as well as to Appendix D where the forms to be used in cases of mortgage decrees are set forth and impress upon it the necessity of imposing the personal liability, if any, at the proper stage. In this connec-

tion, *Sahu Radha Krishna v. Tej Saroop* (1) may be perused with advantage.

COLDSTREAM J.—I agree.

A. N. K.

*Appeal dismissed.*

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**APPELLATE CIVIL.**

*Before Tek Chand and Abdul Rashid JJ.*

KARAM CHAND (DEFENDANT) Appellant,

*versus*

RAM SINGH (PLAINTIFF)  
SOBHA SINGH AND OTHERS  
(DEFENDANTS)

} Respondents.

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June 3.

**Regular First Appeal No. 424 of 1936.**

*Mortgage — Subrogation — Sale of property subject to several mortgages — vendee paying off the first mortgage being the only one brought to his knowledge — Whether subrogated in place of first mortgage — Presumption that vendee's intention was to keep the mortgage alive.*

*Held*, that the rule laid down by their Lordships of the Privy Council in *Malireddi Ayyareddi v. Gopalakrishnayya* (2), *viz.*, that where there are several mortgages on a property, the owner of the property may, if he pays off an earlier charge, keep the incumbrance alive for his benefit and thus come in before a later mortgagee, applies to the vendee from the mortgagor of a property which was sold to him as being subject only to one mortgage (which he paid off out of the purchase money) while in reality there was another subsequent mortgage.

Also, that ordinarily, by the rule of justice, equity and good conscience, the intention of the vendee must, in the absence of express evidence of it, be presumed to be, to keep the mortgage (which he paid off) alive for his own benefit.

*Gokaldas Gopaldas v. Purnamal Premsukhdas* (3), relied upon.

Other case law, discussed.

(1) I.L.R. (1930) 52 All. 363 (F.B.). (2) I.L.R. (1924) 47 Mad. 190 (P.C.).

(3) I. L. R. (1884) 10 Cal. 1035 (P.C.).