

(1933) 10 AHC CK 0033
In the Allahabad High Court

Aziz Ahmad and Others

APPELLANT

Vs

Riaz-ul Hasan and Others

RESPONDENT

Date of Decision : 25-10-1933

Acts Referred:

Citation : (1933) 10 AHC CK 0033

Hon'ble Judges : Sulaiman, C.J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sulaiman, C.J.—This is a defendants' appeal arising out of an application for the preparation of a final decree on the basis of a mortgage deed dated 8th October 1912 which was for a period of eight, years. A suit was filed in 1920 for sale against four defendants mortgagors. A preliminary decree was passed against all the four by the trial Court on 21st March 1922. Only two out of the four defendants mortgagors, namely, Rashid Ahmad and Majid Ahmad appealed to the High Court the other two defendants, Aziz Ahmed and Mt. Jafri Begam did not join in the appeal, but they were, however, made pro forma respondents in the appeal. The appeal was preferred against, the whole decree. Grounds were taken that the suit of the plaintiffs was not maintainable and the relief sought by the appeal was

that, the Hon'ble High Court will be pleased to set aside the decree of the Court below and dismiss the plaintiffs' suit or grant, such other or further relief as it, may deem fit.

2. While the appeal was pending in the High Court the plaintiffs decree-holders applied for and obtained a final decree from the Court below on 8th March 1923. It was after this that the appeal was dismissed by She High Court on 4th January 1926. The decree passed by the Court, was in the following terms:

It is ordered and decreed that the decree of the Subordinate Judge of Bareilly be confirmed and that this appeal be and it hereby is dismissed. And it is further

ordered that the appellants aforesaid to pay to respondents 1 to 4 aforesaid the sum of Rs. 314-6-0, three hundred and fourteen and annas six, only the amount of costs incurred by the latter in this Court. And it is further ordered that the costs incurred in the lower Court be paid with interest thereon as awarded by the said Court.

3. The plaintiffs decree-holders did not proceed with the execution of the final decree which they had first obtained from the Court below and allowed the period of limitation to expire. They then applied OQ 16th September 1926 for the preparation of a fresh final decree, which was first allowed but later on set aside on the ground that the order had been made ex parte. It was then on 5th April 1929 that the decree-holders applied to the Court below for the preparation of a final decree against all the defendants in terms of the preliminary decree of the High Court which had affirmed the preliminary decree passed by the first Court. Objection was taken to this on the ground that the application was barred by time and also on the ground that the decree-holders could not obtain a fresh absolute decree against the mortgagors. The Court below has disallowed the objection and ordered that a final decree should now be prepared. The present appeal is from this order.

4. It would be convenient to consider the case of the two sets of the defendants separately, namely the two defendants who had filed the appeal to the High Court out of whom one is now dead, and the other two defendants who did not appeal, but were made pro forma respondents.

5. As regards Rashid Ahmad, who was one of the two defendants, who had appealed to the High Court, the position is perfectly clear. It is the decree passed by the High Court, which in this case was the highest Court of appeal, which must be considered as the preliminary decree which can be made into a final decree. The mere fact that during the pendency of the appeal the Court below had passed a final decree would not in any way prevent the making of a new final decree in terms of the High Court's preliminary decree. This point is made clear by the pronouncement of their Lordships of the Privy Council in the case of *Jowad Hussain v. Gendan Singh* AIR 1926 P.C. 93, where their Lordships laid down that in a mortgage suit it is that preliminary decree which is ultimately passed by an appellate Court of final jurisdiction which can be subsequently made final in the cause between the parties, and that time under Article 181, Lim. Act, for an application for a final decree accordingly runs not from the date of the preliminary decree passed by a Court of first instance, but from the date when the appeal against that preliminary decree was dismissed by the appellate Court. Their Lordships approved of the pronouncement of the Full Bench of this Court, in *Gajadhar Singh Vs. Kishan Jiwan Lal and Others*, A similar observation was made by their Lordships in the case of AIR 1927 25 (Privy Council) Their Lordships remarked that when the High Court dismisses the appeal, the High Court has a right to determine the appeal and the decree passed by the High Court is the only preliminary decree which can subsequently be made final. There

is a single Judge case decided by one of us. namely Muhammad Yusuf Khan Vs. Mahadeo Prasad, where a preliminary decree for sale in a mortgage suit had been passed and while the appeal was pending a final decree was prepared in terms of the preliminary decree; and later on the High Court modified the decree of the first Court. It was held that in spite of the fact that a final decree had been passed in the Court of first instance the Court below could prepare a new final decree in terms of the preliminary decree passed by the High Court or may amend the previous final decree so as to bring it in accordance with the preliminary decree which in substance would be tantamount to the preparation of a new final decree.

6. We are, therefore, of opinion that there is no force in the contention that time as against Rashid Ahmad should run from the date of the first preliminary decree and not from the date when the High Court affirmed that decree. It is also clear to us that the mere fact that the Court below had passed a final decree in terms of the original preliminary decree passed by it, would not preclude it from now passing a fresh final decree in terms of the preliminary decree passed by the High Court which must be deemed to have been passed when the decree of the Court below was affirmed. Indeed, the Court below is the only Court which can pass the new final decree in terms of the preliminary decree of the Court of appeal.

7. As regards the case of Aziz Ahmad and Mt. Jafri Begam who did not appeal to the High Court but who had been made merely pro forma respondents the position is slightly complicated. But as pointed out above the appeal by the other defendants was against the whole decree and the whole suit and the relief claimed was for the dismissal of the entire suit not only as against the two defendants who had appealed but against all, and the appeal was in the interest of all. Under Order 41, Rule 4, it is open to one of several defendants, where the decree appealed from proceeds on any ground common to all of them, to appeal from the whole decree. When such other defendants are also made parties, it is open to the appellate Court to pass a decree under Order 41, Rule 33, in favour of persons who have not appealed. The illustration to that rule also makes it clear that in a certain contingency a decree may be passed which may be prejudicial to those defendants who have not appealed and who are made pro forma respondents. For instance, if in a mortgage suit only two out of several mortgagors appeal to the High Court and their appeal succeeds, the necessary result is that the liability for the payment of the entire mortgage debts falls exclusively on the remaining defendants who have not appealed. In that way their liability is increased by the exemption of the defendants-appellants and the result is, therefore, prejudicial to their interest. We might add that such defendants if they had not been made parties originally can be made parties by the Court under Order 41, Rule 20.

8. An appeal from the whole decree was pending before the High Court. The relief claimed was not only that the appeal should be allowed and the suit

dismissed as against the appellants but that the whole suit should be dismissed. The form which the decree in the High Court took was that the decree of the Subordinate Court be confirmed and that the appeal be dismissed. The High Court did not say that the decree of the first Court be confirmed as against the two appellants. The order for the payment of costs had of course to be made as against them only because it was these defendants who had moved the Court. But the Court further directed that the costs incurred in the lower Court were to be paid with interest thereon as awarded by the said Court.

9. This view is in no way inconsistent with the principle that there should not be two decrees in a mortgage suit. It was explained in the Full Bench case of *Sat Parkash and Another Vs. Bahal Rai and Another* that when it is said that it is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage, it must be meant that on the date when the decree-holder presented his application praying for the final decree to be passed, there could be no more than one final decree, and it cannot mean that when the preliminary decree of the trial Court has been superseded by the decree passed in appeal, the trial Court cannot pass a fresh final decree. Indeed, sometimes it may happen that a decree is passed against only some of the defendants who do not appeal and the decree against whom is left undisturbed, whereas the decree against the other defendants is modified in appeal, in which case there cannot be one decree against all the defendants.

10. There, however, remains the question whether the costs awarded by the High Court on the previous occasion should be taken to have been awarded against the two defendants personally or were intended to form part of the mortgage debt and to be a charge on the entire mortgaged property. The words of the decree were simply that "the appellants aforesaid do pay to the respondents 1 to 4 aforesaid the sum of Rs. 314-6-0." No doubt, 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 in this case only two of the defendants had filed the appeal and the form in which the decree was framed made them personally liable for the payment of the costs, and there was no mention made of the other defendants who were pro forma respondents at the time. We accordingly think that on the interpretation of this particular decree we must hold that the defendants-appellants were made liable to pay the costs of the appeal personally. To this extent the appeal is modified.

11. The Court below should bear the last observation in mind when preparing the final decree, and if the same has been prepared it should be amended in accordance with the order passed in this appeal. In other respects the appeal is dismissed with costs. We direct that the appellants should pay the costs of this appeal to the respondents.