SAMARENDRA NATH SINHA & ANR.

v.

KRISHNA KUMAR NAG

November 1, 1966

[K. N. WANCHOO, J. M. SHELAT AND G. K. MITTER, JJ.]

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Code of Civil Procedure (Act 5 of 1908), *ss.* 151, 152—*Court mistakenly passing preliminary decree for sale in suit for foreclosure—Subsequently correcting mistake and passing final decree for foreclosure—Power to correct such error.*

Transfer of Property Act (4 *of* 1882), *s.* 52— *Purchase of mortgaged property* pendente life—*Applicability of doctrine of* lis pendens.

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A piece of land with some constructions on it situated in district Howrah was mortgaged by conditional sale. The mortgage deed provided that in case of default in payment of the mortgage amount by the due date the sale would become absolute. Subsequently the mortgagor sold his interest to H. As the mortgage amount was not paid by the due date the mortgagee filed a suit for foreclosure which was decreed. The trial court passed a preliminary decree ordering that in case the mortgage amount was not paid within six months the plaintiff would be at liberty to apply for a final decree for sale. H filed an appeal before the High Court which was dismissed. The final decree framed by the trial Court in pursuance of the High Court's orders was for foreclosure. While the above appeal was pending the respondent in execution of a money decree against H purchased the aforesaid mortgaged properties and was given possession thereof. However after the final decree passed by the Court in the mortgage suit the mortgagee was given possession of the properties. The respondent thereupon filed an application under O. 21 r. 100 for restoration of possession to him. This application was rejected by the trial court. The respondent then filed an appeal against the final decree in the High Court. His appeal was entertained and the High Court set aside the trial court's decree on the ground that there was lack of conformity between the preliminary decree which was for sale and the final decree which was for foreclosure. The matter was remanded to the trial court and leave was given to the respondent to participate in the matter. The appellants who in the meanwhile had purchased the mortgagee's interest, appealed, with certificate under Art. 133(a) and (b) to this Court.

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HELD : (i) The High Court had held that the respondent had a *locus standi* in the matter and had directed that he was to be allowed in the remand proceedings to plead that the final decree should be one for sale thus reopening the question of redemption of the mortgage which had been extinguished by the final decree. The High Court's order as regards these matters was certainly a final order and therefore the propriety of the certificate under Art. 133 granted to the appellants could not be questioned. [24 A-C]

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(ii) There is an inherent power in the court which passes the judgment to correct a clerical mistake or an error arising from an accidental slip or omission and to vary its judgment so as to give effect to its meaning and intention. On the facts of the present case there could be little doubt that the court had no occa on to pass a preliminary decree for sale and that it was through an accidental slip or inadvertence that in

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A the penultimate part of its judgment the court used the phraseology proper in a mortgage decree for sale. Once this error had crept in the judgment it was repeated in the preliminary decree. This being the position the trial court had the power under s. 151 and s. 152 of the Code of Civil procedure to correct its own error which had crept in the judgment and the preliminary decree and to pass a proper final decree for foreclosure as intended by it. [24 E, 25 E, H]

B (iii) On the facts of the case it could not be said that the decree represented a wrong decision of the Court. [26 D-E]

(iv) The principle of *lis pendens* applies even to involuntary alienations like court sales. The respondent having purchased the mortgaged property while the appeal against the preliminary decree in respect of the property was pending in the High Court, the doctrine of *lis pendens* must apply to his purchase and he was therefore bound by the result of C the suit. [28 B-D]

Case law considered.

CIVIL APPELLATE JURISDICTION. Civil Appeal No. 707 of 1964.

D Appeal from the judgment and decree dated November 12, 1961, of the Calcutta High Court in Appeal from Original decree No. 285 of 1956.

Niren De, Addl. Solicitor-General, N. R. Basu and *E. Udayaratnam*, for the appellants.

E *P. K. Chatterjee, B. C. Mitra* and *P. K. Bose*, for the respondent.

The Judgment of the Court was delivered by

Shelat, J. One Sambhu Charan Das and Sannyashi Charan Das owned 2 bighas and 18 cottahs of land with a construction standing thereon, situated in Salkiah, District Howrah. By a F deed of mortgage by conditional sale dated June 2, 1933 the said owners mortgaged the said property to secure repayment of Rs. 2,750 advanced to them by Panchu Gopal Srimani, then a minor through his mother, Prabhavati Dassi as his certificated guardian. The said mortgage, *inter alia*, provided that if the mortgage amount was not repaid by the due date *i.e.*, April 14, 1935 the mortgage G would be considered as a deed of absolute sale and the mortgagee would be entitled to take possession of the property. On June 18, 1934 the mortgagors assigned their right, title and interest in the said property to one Satchindananda Hazra. As the said mortgagors or the said Hazra failed to pay the said mortgage amount on the due date, the mortgagee filed a suit on July 17, H 1945 for enforcement of his rights impleading the two mortgagors and the said Hazra as defendants. In that plaint the mortgagee prayed for a decree for Rs. 5,426/10/6, being the amount then due under the said mortgage and for fixing the time for payment of the

said amount. The plaint also contained a prayer that on failure to pay the decreetal amount within the time fixed by the court "the right of the defendants to redeem the mortgage may be annulled and a decree may be passed giving possession of the mortgaged property." The mortgagors filed a written statement claiming that they should be permitted to pay the mortgage amount by instalments as provided by the Bengal Money Lenders Act. The said Hazra also filed a written statement alleging that he was a *bona fide* purchaser without notice of the said mortgage. The two mortgagors did not contest the suit and it was only Hazra who contested it contending also that as the loan under the said mortgage was advanced by the guardian of the said Panchu, then a minor, without obtaining sanction of the District Judge, the said mortgage was null and void.

The Trial Court rejected these contentions and passed a preliminary decree on December 23, 1946. The said decree, *inter alia*, provided that the mortgage amount due was Rs. 5,426/10/6 and that if the said amount together with costs of the suit was not paid by the defendants within six months from the date of the decree the plaintiff would be at liberty to apply for a final decree. Though the suit was a foreclosure suit the preliminary decree passed by the Trial Court was one under O·34 r. 4(1) of the Code of Civil Procedure inasmuch as it provided that in default of payment as aforesaid the plaintiff would be at liberty to apply to the court for a final decree for sale and that if the sale proceeds on such sale were not sufficient for payment of the decreetal amount the plaintiff would be at liberty to apply for a personal decree against the defendants for the balance. Against the said preliminary decree the said Hazra filed an appeal in the High Court at Calcutta raising two contentions, (1) that the said mortgage was void on account of sanction not having been obtained by the guardian of the mortgagee before advancing the said loan and (2) that he should be permitted to pay the decreetal amount by instalments. The High Court negatived these contentions and by its judgment and decree dated March 22, 1951 dismissed the said appeal and the suit was sent back to the Trial Court for passing a final decree.

While the said appeal was pending the respondent obtained a money decree against the said Hazra and commenced execution proceedings against him. An attachment was levied on the said mortgaged property and thereafter on June 23, 1950 the right, title and interest of the said Hazra was put up for sale. The respondent was the auction purchaser and the court confirmed the said sale by an order dated February 15, 1951. The said auction sale was in respect of 1 bigha and 2 cottahs out of the said mortgagee property. According to the respondent he was given possession of the said property on May 3, 1951.

A On March 1, 1954, the said mortgagee, Panchu Gopal Srimani, applied for a final decree in the said suit. Pending this application, he assigned his right in the said decree in favour of the appellants on May 31, 1954. On July 1, 1954 the appellants applied to the Trial Court for being substituted in place of the said Panchu Shrimani. The Trial Court directed notices to be issued on the defen-
B dants, that is, the said two mortgagors and the said Hazra and they having raised no objection the court by an order dated January 5, 1955 ordered substitution and then passed a final decree. The said decree, after reciting that the said decretal amount was not paid within the time appointed by the defendants or any other person entitled to redeem the said mortgage, provided as follows:—

C "And it is hereby ordered and declared that the defendant and all persons claiming through or under him are absolutely debarred and foreclosed of and from all rights of redemption of and in the property in the aforesaid preliminary decree mentioned....and that the defendant shall deliver to the plaintiff quiet and peaceful possession of
D the said mortgaged property."

On April 19, 1955 the appellants applied for and obtained possession of the said mortgaged property. According to the respondent, however he learnt about the possession of the said mortgaged property having been delivered to the appellants for the first time on May 25, 1955 and thereupon filed an application under O. 21
E r. 100 of the Code for restoration of possession to him. On September 27, 1955 the Trial Court rejected that application. The respondent then filed on January 3, 1956 a Revision Application against the said dismissal. On August 23, 1955 the respondent filed a second application under section 151 of the Code for setting aside the said final decree. On the same day he also filed an appeal in the High Court being Appeal No. 285 of 1956 against the said
F final decree but without impleading the said mortgagors or the said Hazra, who still was partially interested in the equity of redemption in the said property. In the meantime, the Trial Court dismissed the respondent's application under section 151 by its order dated February 14, 1956. The High Court also by its order dated May 12, 1961 discharged Civil Rule No. 2 of 1956 issued in the revision
G application filed by the respondent against the dismissal of his application under O. 21 r. 100.

Appeal No. 285 of 1956 came on for hearing on May 12, 1961 before a Division Bench of the High Court. The High Court set aside the final decree observing :

H "It is common case that the preliminary decree was for sale. The prayer by the respondents was for a final decree in terms of the preliminary decree. This was allowed, but the final decree as drawn up turned out to be one for

foreclosure. It is this disconformity between the preliminary decree and the final decree which is being challenged by the appellant."

The High Court ordered :

"We should in the result set aside the final mortgage decree and allow the appeal by remitting the matter back to the Court below to be dealt with in accordance with law. The appellant is given liberty to participate in the matter."

Against the said judgment and decree the appellants applied for and obtained a certificate under Art. 133(1)(a) and (b).

It is manifest that the High Court's judgment meant that the respondent had sufficient interest to maintain the said appeal and participate in the proceedings before the Trial Court on the said remand for considering the question whether the said preliminary decree should be altered or not and if not whether the respondent had still the right to redeem the said mortgage, though the time for payment fixed under the said preliminary decree had expired, that is, six months from December 23, 1946, long before the respondent became a purchaser of part of the said equity of redemption on February 15, 1951. There is no dispute that the valuation test for a certificate is satisfied in the present case. The judgment and decree passed by the High Court is also not one of affirmance as the High Court set aside the said final decree. There can be no dispute also that the question whether the appellant who was the auction-purchaser *pendente lite* had the *locus standi* to maintain the appeal was finally decided and he was given liberty to participate in the proceedings for correcting the preliminary decree and was enabled thereby to contend that he was still entitled to redeem the said mortgage and retain possession of the mortgaged property. The Trial Court was bound to allow him to participate in those proceedings as the High Court's judgment specifically directed it to deal with the case in accordance with the directions contained in the said judgment. The judgment and decree of the High Court thus, besides setting aside the said final decree meant that the respondent had still sufficient interest entitling him to challenge the appellants' claim to have a final foreclosure decree and to maintain that the question of redemption was still open and he had the right to redeem the mortgaged property.

Counsel for the respondent however contended that the certificate granted by the High Court was not competent and was liable to be vacated as the judgment passed by the High Court was not a judgment, decree or final order inasmuch as what the High Court had done was only to remand the case to the Trial Court and the Trial Court had yet to decide the question whether a final decree for foreclosure should be passed or whether the final decree should

A be one for sale enabling the respondent to redeem the said mortgage. In support of his contention he relied on *Sardar Syedna Tahar Saifuddin Saheb* v. *State of Bombay*(1) where this Court held that the certificate granted therein was incompetent as it could not be granted in respect of an interlocutory finding. The order appealed against in that case was a decision as to the validity of the Bombay B Prevention of Excommunication Act, 1949 (Bombay XLII of 1949). That being one of the several issues the decision did not dispose of the suit as the rest of the issues still remained to be tried and it was for this reason that it was held that the said order was not a judgment, decree or final order. *M/s. Jethanand & Sons* v. *The State of Uttar Pradesh*(2) was again a case of remand directing the C Trial Court to frame fresh issues and give opportunity to the parties to produce evidence. In fact it was an order for a Trial *de novo* on fresh pleadings and on all issues that might arise on such pleadings. Evidently any decision given by the High Court in the course of its order would not be binding on the Trial Court as the case had to be tried afresh by it. In these circumstances it was held that the order of remand was not a judgment, decree D or final order as it did not amount to a final decision relating to the rights of the parties in dispute.

In our opinion, these decisions cannot help Mr. Chatterjee as the position here is not the same as in those two decisions. The High Court has given its judgment and in pursuance thereof passed a decree setting aside the said final decree. If the High Court E had held that the respondent in the circumstances of the case had no right to maintain his appeal, the final decree would have become a concluded decree and his right of redemption, if any, would have been totally extinguished. It is true that the High Court remitted the case to the Trial Court but it was obviously not an order of remand *simpliciter*. The decision of the High Court was not on F a preliminary issue leaving undecided other issues to be tried by the Trial Court. It will be observed that the respondent was not a party to the suit—he could not be because when the preliminary decree was passed he was not on the scene. Though he became an auction-purchaser while the appeal against the preliminary decree was pending, he did not apply for being brought on record. G The appellants or their predecessor-in-title would not be aware of his purchase and therefore could not implead him in the suit or in the appeal. The respondent filed his appeal against the said final decree and two questions arise in that appeal : (1) whether being a purchaser *pendente lite* he had *locus standi* to file an appeal and challenge the final decree and (2) whether the Trial Court had jurisdiction to pass the final decree which was not in confor-H mity with the preliminary decree. The judgment of the High Court is unfortunately laconic and one wishes that the learned Judges

(1) [1958] S.C.R. 1007. (2) [1961] 3 S.C.R. 754.

had taken us a little more into confidence by giving some reasons at least. Nonetheless, it is clear that they decided both the questions by holding that the respondent had still sufficient interest in the matter and therefore had *locus standi* and by setting aside the final decree and directing the Trial Court to decide the question as to whether it could correct the said preliminary decree in accordance with the directions given by them they held that the respondent was entitled to participate in those proceedings and plead that the final decree should be one for sale and consequently he was entitled to redeem the said mortgage. There can be no question that the two questions raised in the appeal before the High Court were disposed of finally inasmuch as the said final decree was set aside as not being valid and binding on the respondent and the question of redemption by him which was extinguished by that final decree was reopened entitling the respondent to contend that he had the right to redeem and to hold the said property. In these circumstances the preliminary objection raised by Mr. Chatterjee cannot be sustained and the certificate must be held to be competent.

On merits, two questions were raised : (1) whether the Trial Court was competent to pass a final decree for foreclosure though the preliminary decree was for sale and (2) whether the respondent had the right to contend that he was entitled to redeem the said mortgage in view of the fact that he was the execution purchaser of part of the equity of redemption *pendente lite*.

Now, it is well-settled that there is an inherent power in the court which passed the judgment to correct a clerical mistake or an error arising from an accidental slip or omission and to vary its judgment so as to give effect to its meaning and intention. "Every court," said Bowen L. J. in *Mellor* v. *Swira*,(1) "has inherent power over its own records so long as those records are within its power and that it can set right any mistake in them. An order even when passed and entered may be amended by the court so as to carry out its intention and express the meaning of the court when the order was made." In *Janakirama Iyer* v. *Nilakanta Iyer*(2) the decree as drawn up in the High Court had used the words "mesne profits" instead of "net profits". In fact the use of the words "mesne profits" came to be made probably because while narrating the facts, those words were inadvertently used in the judgment. This court held that the use of the words "mesne profits" in the context was obviously the result of inadvertence in view of the fact that the decree of the Trial Court had specifically used the words "net profits" and therefore the decretal order drawn up in the High Court through mistake could be corrected under sections 151 and 152 of the Code even after the High Court had granted certificate and appeals were admitted in this court before the date of the

(1) 30 Ch. 239. (2) A.I.R. 1962 S.C. 633.

A correction. It is true that under O. 20 r. 3 of the Code once a judgment is signed by the Judge it cannot be altered or added to but the rule expressly provides that a correction can be made under section 152. The Rule does not also affect the court's inherent power under section 151. Under section 152, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein B from any accidental slip or omission may at any time be corrected by the court either on its own motion or on an application by any of the parties. It is thus manifest that errors arising from an accidental slip can be corrected subsequently not only in a decree drawn up by a ministerial officer of the court but even in a judgment pronounced and signed by the court.

C As already pointed out, the mortgage in question was one by conditional sale empowering the mortgagee to take possession of the mortgage security if the monies due thereunder were not paid by the due date. The suit filed by the mortgagee was also for a foreclosure decree. The tenor of the judgment of the Trial Court shows that the court meant to pass such a foreclosure decree es- D pecially as the plaint contained no prayer for a decree for sale or for a personal decree against the mortgagors or the said Hazra if the sale proceeds were found insufficient. The written statements of the defendants did not raise any contention against the mortgagees' right for a foreclosure decree, their defence being only that they were entitled to pay the mortgage amount by instalments. There can therefore be little doubt that the court had no occasion E to pass a preliminary decree for sale and that it was through an accidental slip or inadvertence that in the penultimate part of its judgment the court used the phraseology proper in a mortgage decree for sale. Once this error had crept in the judgment it was repeated in the preliminary decree and this error was not even noticed by the High Court when it dismissed Hazra's appeal and F confirmed that decree. The error was later on noticed by the appellants as is seen from the order passed by the Trial Court dismissing the respondent's application under section 151 for setting aside the final decree. That order states that the Subordinate Judge who tried the suit through oversight passed a preliminary decree for sale overlooking the fact that it was a suit for foreclosure and possession, that it was also apparent that this mistake of the G Trial Court went unnoticed in the High Court which confirmed the decree of the Trial Court and

> "therefore, this court, when it passed the final decree being apprised of the apparent mistake in the form of the preliminary decree, corrected the initial mistake and did H justice by passing a final decree for foreclosure and for possession which was the only scope of this suit."

This being the position the Trial Court had the power under section 151 and section 152 to correct its own error which had crept in the

judgment and the preliminary decree and pass a proper final decree for foreclosure as intended by it.

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Mr. Chatterjee, however, raised two contentions; (1) that a judgment or decree cannot be varied when it correctly represents what the court decided though it may be wrongly nor can the operative or substantive part of the judgment be varied and a different one substituted and (2) that a judgment or decree cannot be varied where there has been intervention of rights of third parties based on the existence of the decree and ignorance of the mistake therein. In such a case the exercise of power to correct the mistake would be inequitable or inexpedient.

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No one can quarrel with these propositions. But considering the nature of the mortgage, the cause of action and the prayers in the suit, the absence of any contest as regards that cause of action and the prayers, and the tenor of the judgment until it came to its penultimate part, there can be no doubt that the intention of the Trial Court was to pass a preliminary decree for foreclosure as prayed for and that was what the court had decided. It was therefore through an accidental slip that in that final part of the judgment the Subordinate Judge used the phraseology used in a preliminary decree for sale. Therefore, there is no question of a wrong judgment having been passed by the Judge or the preliminary decree correctly representing that which was wrongly decided by the Judge. If that had been so, neither the judgment nor the decree could be corrected and the obvious remedy would be by way of an appeal. In *Barhamdeo Singh* v. *Harnam Singh*(1) though only one of the defendants appeared and contested the suit the order made was that "the suit be decreed with costs." This was allowed to be altered on the ground that it was contrary to the intention of the court, that such an intention had to be gathered from the judgment as a whole and that the decree following the concluding portion of the judgment awarding costs against all the defendants was not in accord with the true intention of the court.

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The second contention is based on the observations of Lord Herschell in *Hatton* v. *Harris*(2) where he stated:—

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> "that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to shew that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made."

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(1) 18 C. W. N. 772.

(2) [1892] A.C. 547 at 558.

A It is true that the respondent purchased part of the equity of redemption from his judgment-debtor, Hazra, after the preliminary decree was passed. It is also true that that decree was not in the form of a foreclosure decree but of a mortgage decree for sale. But according to Lord Herschell's observations, the intervening interest of third parties must be based on the existence of the decree and B ignorance of any circumstances which would tend to show that it was erroneous. No such thing has happened and indeed it was never the case of the respondent that he purchased the interest of the said Hazra because he was aware that a preliminary decree for sale has been passed and that under that decree he would be entitled to redeem the mortgaged property or that he was ignorant of the mistake in that decree. That being the position it is difficult C to see how the case of *Hatton* v. *Harris*(1) can apply to the present case. In this view, the Trial Court had the power to correct the accidental slip which had crept in its judgment and correct that error by passing the final decree in accordance with its true intention. The final decree was passed after notice to the mortgagors and the said Hazra and after hearing them. The respondent was not made D a party to that application as the appellants were never made aware of his purchase. The respondent also had not cared to be brought on record in substitution of or in addition to the said Hazra from whom he derived his interest in the equity of redemption. In our view, both the contentions raised by the respondent in this behalf must be rejected.

E What then is the position of the respondent once it is held that the final decree for foreclosure was validly passed by the Trial Court ? Could he challenge that decree in an appeal against it in the High Court on the basis that he was entitled to redeem the said mortgage? Section 91 of the Transfer of Property Act provides that besides the mortgagor any person other than the mortgagee F who has any interest in or charge upon the property mortgaged or in or upon the right to redeem the same may redeem or institute a suit for redemption of such mortgaged property. An execution purchaser therefore of the whole or part of the equity of redemption has the right to redeem the mortgaged property. Such a right is based on the principle that he steps in the shoes of his G predecessor-in-title and has therefore the same rights which his predecessor-in-title had before the purchase. Under section 59A of the Act also all persons who derive title from the mortgagor are included in the term "mortgagor" and therefore entitled to redeem. But under section 52 which incorporates the doctrine of *lis pendens*, during the pendency of a suit in which any right to an immovable property is directly and specifically in question such H a property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any

(1) [1892] A.C. 547 at 558.

other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose. Under the Explanation to that section the pendency of such a suit commences from the date of its institution and continues until it is disposed of by a final decree or order and complete satisfaction or discharge of such a decree or order has been obtained. The purchaser *pendente lite* under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in *Radhamadhub Holdar* v. *Monohar*(1) where the facts were almost similar to those in the instant case. It is true that section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well-established that the principle of *lis pendens* applies to such alienations. (See *Nilkant* v. *Suresh Chandra*(2) and *Motilal* v. *Karrabuldin*)(3). It follows that the respondent having purchased from the said Hazra while the appeal by the said Hazra against the said preliminary decree was pending in the High Court, the doctrine of *lis pendens* must apply to his purchase and as aforesaid he was bound by the result of that suit. In the view we have taken that the final foreclosure decree was competently passed by the Trial Court, his right to equity of redemption was extinguished by that decree and he had therefore no longer any right to redeem the said mortgage. His appeal against the said final decree was misconceived and the High Court was in error in allowing it and in passing the said order of remand directing the Trial Court to reopen the question of redemption and to allow the respondent to participate in proceedings to amend the said preliminary decree.

In the result, we allow the appeal, set aside the judgment and decree passed by the High Court and restore the judgment and decree passed by the Trial Court. The respondent will pay the appellants' costs all throughout.

G. C. *Appeal allowed.*

(1) 15 I.A. 97.

(2) 12 I.A. 171.

(3) 24 I.A. 170.