

Mahadev Parshad Vs Mst. Mungi and Another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: July 27, 1959

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 34 Rule 5, Order 48 Rule 3, 99

Citation: AIR 1959 P&H 565

Hon'ble Judges: A.N. Bhandari, C.J; G.L. Chopra, J

Bench: Division Bench

Advocate: D.D. Chawla, for the Appellant; Gurbachan Singh, for the Respondent

Final Decision: Allowed

Judgement

A.N. Bhandari, C.J.

This appeal must, in my opinion, be allowed as it seems to me that the learned Single Judge has taken a view of the law which cannot possibly be supported.

2. A preliminary mortgage decree in a sum of Rs. 16,484/6/- was passed against the judgment-debtor on 16-12-1944 and a final decree

was passed against him on 8-4-1946. These decrees were later confirmed by this Court on 15-2-1948 by means of a composite order which was

in the following terms :

It is ordered that the appeal be accepted and the preliminary and the final decrees of the Senior Subordinate Judge, Delhi, dated 16-12-1944,

and 8-4-1946, respectively as described overleaf be and the same are hereby modified by decreasing the decretal amount by a sum of Rs. 1,000/-

. The plaintiff shall now be entitled to recover a sum of Rs. 14,200/- by sale of the mortgaged property. Future interest for a period of four months

shall be computed at the rate of 7 1/2 per cent per annum and thereafter at the rate of 6 per cent per annum. In every other respect the preliminary

decree and the final decree be confirmed.

3. The decree-bolder applied for the execution of the decree on "31-8-1948 and a proclamation for the sale of the mortgaged property was made

on 16-5-1949. On 20-5-1949 the judgment-debtor presented an application to the executing Court in which he objected to the execution of the

decree on the ground that there was in fact no mortgage decree which could be executed. The sale of the mortgaged property took place on 13-6-

1949 and the judgment-debtor's objection to the execution of the decree was dismissed by the executing Court on 20-8-1949.

4. The judgment-debtor was dissatisfied with the order of the executing Court and preferred an appeal to this Court which came up for hearing

before a learned Single Judge of this Court. The learned Single Judge set aside the order of the Executing Court on two grounds, namely, (1) that

the executing Court had failed to dispose of the objection of the judgment-debtor even though it was taken before the confirmation of the sale, and

(2) that the decree passed by this Court was not drawn up in accordance with the provisions of the CPC and the forms given therein. It is against

this order that the present appeal has been filed under Clause 10 of the Letters Patent.

5. The form prescribed under Order 34, Rule 5 of the CPC runs as follows :

It is hereby ordered and decreed that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the

plaintiff shall produce before the Court all documents in his possession or power relating to the mortgaged property.

6. Rule 3 of Order 48 of the CPC provides that the forms given in the appendices, with such variation as the circumstances of each case may

require, shall be used for the purposes therein mentioned. It is desirable that a decree should be drawn up in the form prescribed in the Code of

Civil procedure; but a failure on the part of the Court to follow strictly the language of the form is not necessarily fatally defective.

The validity of a decree depends upon the authority by which it is issued and the mandate that it contains and not upon the extent to which the

language prescribed by the Code has been reproduced. We should look rather to the substantial effect intended by the decree than to the pre-cise

form of words which the Court has used. Substantial conformity with the language of the form is sufficient. The law does not favour frivolous

objections in regard to the form of the decree, for Section 99 of the CPC declares that no decree shall be reversed or substantially varied in appeal

on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

7. The principle propounded in Section 99 has been applied in several cases. Chhaganlal Sakarlal Vani Vs. Jayaram Deoraj Thakar, a question

arose whether a preliminary decree which was not made final was capable of being executed. It was held that though the final decree had not been

formally drawn up on the terms of the preliminary decree which had been made absolute, that decree coupled with the order might be taken under

the circumstances to be the final decree and the omission to draw a formal final decree could be condoned u/s 99 of the Code of Civil Procedure.

In the course of their order the learned Judges observed :

In its ultimate analysis, it is only a formal defect. It is conceivable that a formal defect of this nature may lead to a real difficulty in the way of

execution; and it is necessary to see that even such a formal defect does not creep in, and that a formal decree is drawn up when the decree is

made final. But under the circumstances of this case, we are not prepared to hold that there is no executable decree. The result of allowing a

contention of this nature at this distance of time, will be that a decree will have to be drawn up formally now and a fresh beginning will have to be

made in the way of execution after the lapse of so many years.

That is a result which should be avoided so far as it is legally possible to do so....

It seems to us that an omission of this kind may be condoned where the terms of the decree sought to be executed are otherwise ascertained or

clearly ascertainable, as they are in this case. Section 99 of the Code of Civil Procedure would cover such an error or irregularity, as under

circumstances such as we have in this case, it does not affect the merits of the case or the jurisdiction of the Court." A similar view was taken in

Banumal v. Paras Ram 92 Ind Cas 254 : AIR 1925 Lab 640 and Bashisht Narain Singh Vs. Ram Pukar Singh and Others, Technical objections to

the form in which the decrees were drawn up were overruled in Mancherji Hormusji v, Thakordas Harikisondas 5 BomLR 389 at p. 392,

Dhanpat Rai v. Nathe Khan AIR 1926 Lah 364 at p. 365. and Moti Ram v. Basheshar Nath AIR 1939 Pesh 34.

8. A decree must show on what judgment it is based, for and against whom it is issued and the amount to be taken from the latter for the benefit of

the former. A mortgage decree must further direct that the mortgaged property be sold and that the money realised by such sale shall be duly

applied for payment of the amount payable to the plaintiff under the preliminary decree. If therefore the decree specifies, as in the present case, the

precise amount which is to be recovered from the judgment-debtor and if it directs that the recovery shall be made by the sale of the mortgaged;

property, the intention of the Court is not left in doubt, even though the precise language used by the Code has not been employed.

I agree that legal justice should be determined by fixed rules and positive statutes and not by the abstract and varying notions of equity entertained

by each individual, but it must be remembered that merely technical objections not affecting the merits of the case should not be allowed to defeat

justice when the provisions of law have been substantially complied with. It is unfortunate that although this decree was passed by this Court

several years ago the decree-holder has not been able to recover a single penny on account of the wholly technical and frivolous objections which

have been raised by the judgment-debtor.

9. For these reasons I would accept the appeal, set aside the order of the learned Single Judge and restore that of the executing Court. The

decree-holder will be entitled to costs here and below

G.L. Chopra, J.

10. I agree.