

Kalian Singh Vs. Dambar Singh

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Court : Allahabad

Decided On : Jan-23-1922

Reported in : (1922)ILR44All350

Judge : Ryves and ;Gokul Prasad, JJ.

Appellant : Kalian Singh

Respondent : Dambar Singh

Judgement :

Ryves and Gokul Prasad, JJ.

1. This appeal arise out of execution proceedings. It appears that Khub Singh and others made a usufructuary mortgage of property situate in village Gokulpur Pipraut in favour of Ausaf Ali Khan and his two brothers. Ausaf Ali's rights as mortgagee were sold in execution of a simple money decree and were purchased by Dambar Singh. Prior to this purchase Ausaf Ali had mortgaged his rights as mortgagee to Dr. Gokul Chand who transferred them to Babu Kaliyan Singh, the present decree-holder. The result was that Dambar Singh was the owner of 1/3rd of the mortgagee rights and Kaliyan Singh was the mortgagee of 1/3rd mortgagee rights. Kaliyan Singh sued to recover the amount due to him as mortgagee of the mortgagee rights and obtained a decree for sale on the 30th of October, 1912. This decree was set aside on appeal on the 16th of June, 1913. On second appeal to this Court the decree of the first court was restored and the time for payment

was extended by six months from the date of the High Court's decree. On the 21st of July, 1916, Kaliyan Singh applied for a final decree for sale. For some reason or other best known to himself he did not include the costs of the lower appellate court and the High Court awarded to him to be included in the final decree. The result was that the final decree as prepared was for the amount decreed there under and the costs of the first court or, in other words, for the decree passed by the first court and not the decree of the High Court which was the final decree in the cause and which was the only decree capable of being made final. The decree-holder Kaliyan Singh made an application on the 27th of September, 1916, to execute the final decree. No objection was taken to the execution by Dambar Singh. On the other hand, on the 16th of July, 1917, he paid Rs. 1,800 and obtained further time to pay the balance. The present application in execution was made on the 30th of May, 1919, after deducting the amount so paid by Dambar Singh and adding to the balance of the amount decreed under the final decree a sum of Rs. 807 add representing the costs of the High Court and the lower appellate court. Dambar Singh objected to the inclusion of such costs as they were not mentioned in the final decree for sale. The learned Subordinate Judge found that the amount of Rs. 807 add claimed by the decree-holder was incorrect, but that the only amount chargeable against the property was a sum of Rs. 554-6-9, and disallowed the rest of the objection. The judgment-debtor went up in appeal, and the learned Judge of the court below has confirmed the decree of the first court. The judgment-debtor comes here in second appeal, and, besides raising the question which was put in issue in the court below, he has raised a further point that the final decree obtained by the decree-holder is not capable of execution, inasmuch as it was only the appellate decree of the High Court which was the final decree in the cause and which was the only decree which could be made final and then execution taken out. In our opinion this contention of the judgment debtor raised before us for the first time is barred by the rule of *res judicata*. When the first application for execution was made he did not raise this objection. He might and ought to have raised it then, and as he did not do so, he cannot be allowed to take the same objection in later execution proceedings; see *Ram Kirpal v. Rup Kuari* (1883) I.L.R. 6 All. 269.

2. As to the second objection we think this objection is bound to succeed. The amount of Rs. 554 add is not entered in the final decree for sale and it could not be recovered. The execution court can only add execution costs to a decree in the course of execution proceedings and it cannot add to or amend the decree under execution, which is here the final decree obtained by the decree-holder and to which no objection was taken by the judgment-debtor. We, there fore, allow the appeal to the extent of the amount of Rs. 554-6-9 and modify the decree of the court below accordingly. Execution of the decree will now be taken for the amount decreed under the final decree obtained by the decree-holder with such costs of execution as might be found due. We make no order as to costs of this appeal.

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