

**Damber Singh Vs. Chhedu Singh and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/478045](http://sooperkanoon.com/478045)

**Court :** Allahabad

**Decided On :** Nov-30-1927

**Reported in :** AIR1928All194a; 114Ind.Cas.41

**Appellant :** Damber Singh

**Respondent :** Chhedu Singh and ors.

**Judgement :**

**Lindsay, J.**

1. A preliminary objection has been taken to the hearing of this first appeal, namely, that the appeal is not competent. The objection arises in this way: There was pending before the Subordinate Judge a suit No. 135 of 1923, brought by Chhedu Singh and others against a large number of defendants. That suit was a suit for sale on a mortgage bearing the date 18th November 1913. But the plaintiffs also claimed to be entitled to bring to sale the property of the mortgagors in satisfaction of a certain decree which had been passed in favour of a prior mortgagee named Bhola Nath. The case for the plaintiffs was that this prior decree had been satisfied by them and that they were entitled, therefore, to tack on the sum they had thus paid to their claim. That claim was recognized in the judgment which bears date 26th March 1924 and suitable directions were given in order to give the plaintiffs the satisfaction to which they were entitled by reason of their having paid off the prior claim of Bhola Nath. There was also impleaded in this suit

a man named Dambar Singh who appears in the array as defendant fifth party. He is said really to be the father of the plaintiff Chhedu Singh and to be in reality one of the plaintiffs.

2. However that may be, it appeared at the time of the trial that this man Dambar Singh had bought at a sale in execution of a decree a certain share in mauza Kalauli, mahal Chhattar Mal, which formed portion of the mortgaged property with which we are concerned in the present suit. The sale certificate is printed at p. 45 of our record and shows that the purchase was made on 21st June 1922 and was confirmed on 2nd August 1922, and it is to be noted that in this sale certificate the amount of the share purchased by Dambar Singh is specified as well as its area. It is not disputed that the decree under which this sale took place was a decree obtained by one Lala Khannu Mal in respect of certain mortgages of the years 1904, 1905 and 1906 which were prior to the mortgage in suit (of 18th November 1913) and so provision was made to preserve the rights of the purchaser Dambar Singh, who bought under Lala Khannu Mal's decree. When the decree came to be prepared in the office it was necessary to specify with precision the property in Kalauli which was to be brought to sale and applied in satisfaction of the plaintiff's decree. It had been provided by the judgment that the share which had been mortgaged to Bhola Nath whose mortgage had been discharged by the plaintiffs, was to be saved from sale in the first instance and also that the share which had been purchased by Dambar Singh was to be preserved and that the remaining share of Kalauli was to be brought to sale and the proceeds applied directly to the satisfaction of the mortgage in suit.

3. At p. 28 we have a copy of the decree as prepared and it is clear that at first the share of Kalauli which was to be brought to sale was specified as follows: 5 biswas 15 biswansis 15 kachwansis 6 tanwansis and 19 nanwansis. One of the defendants in the case, a man named Madan Lal, subsequently applied for amendment of the decree. He set out certain figures and pretended that the share of mauza Kalauli, directed to be sold by the decree, was expressed wrongly. The Subordinate Judge's office made a report and in accordance with that report the Subordinate Judge amended the directions in the decree and gave an order for the sale of 7 biswas 17 biswansis odd, that is to say, a considerably larger share

than was at first directed to be sold. It is contended before us that this order for amendment was erroneously made, and after having gone into the figures which are on the record, we have no doubt whatever that there has been a mistake and that the moharrir, who prepared the report upon which the order of amendment was made, fell into error.

4. It is quite clear what happened. It is admitted on all hands that the total share of mauza Kalauli mahal, Chhattar Mal, khata khewat No. 1, with which we are concerned represents a 19 biswas and odd share. It is also admitted that out of this over 10 biswas, that is to say, about one-half had been mortgaged to Bhola Nath. It is also clear from the sale certificate on p. 45 that in the year 1922 this man Dambar Singh bought a  $\frac{1}{5}$ th share of the whole of this khata, that is to say, a  $\frac{1}{5}$ th of 19 biswas and odd. This is plain beyond all doubt, for the specification of the purchase is expressed not only with reference to shares but with reference to area. Obviously what the moharrir thought had happened after he perused the sale certificate was that Dambar Singh had purchased only a  $\frac{1}{5}$ th share of what remained of this khata after taking out the share mortgaged to Bhola Nath amounting, as we said, to about half. In substance what the moharrir did was to find that Dambar Singh, instead of purchasing  $\frac{1}{5}$ th of the entire khata, has purchased only  $\frac{1}{10}$ th. The mistake is obvious and, therefore, it ought to be corrected. It has, however, been argued before us that as the learned Judge of the Court below made this order on an application under Section 151 or Section 152, Civil P.C., we have no power to interfere inasmuch as the law does not allow an appeal from an order made under either of these sections. Mr. Bajpai's contention, however, is that he is entitled to appeal against the decree and we think this contention cannot be met by saying that he is not entitled to appeal against the decree, if the only error which he complains of is to be attributed, (as he says it is to be attributed) to a wrong order of amendment passed by the Judge.

5. We do not think that argument can be sustained because, if Mr. Bajpai's client has a right of appeal, he can, in our opinion, show any valid ground of objection to the decree. If he says that the only complaint he has against the decree, as it now stands after amendment is that it directs the sale of 7 biswas odd, whereas it ought to direct the sale of 5 biswas odd, we cannot see how we can refuse to

entertain the appeal. We have been preferred to certain cases and also to the provisions of Section 105(1). Civil P.C. We may point out, however, that in the present case we are dealing with an order which was not strictly speaking an interlocutory order at all. We understand that an interlocutory order in the proper sense is an order which is passed between the date on which the plaint is filed and the date on which the decree is drawn up. We do not think that an order passed after the decree on an application for amendment should be treated as an interlocutory order and we are, therefore, of opinion that the preliminary objection to the hearing of this appeal should not prevail. We allow the appeal but as it is clear to us that Thakur Dambar Singh did not draw the attention of the Court below to the error which we have now found when the appeal has come up before us we allow no costs. The decree, therefore, will be restored to its former shape. Dambar Singh will pay his own costs of this appeal.