

## APPELLATE CIVIL.

*Before Mr. Justice Jackson and Mr. Justice Pakenham Walsh,*

1931,  
August 3.

RAJAGOPALASWAMI NAICKER AND TWO OTHERS  
(DEFENDANTS 2 TO 4), APPELLANTS,

*v.*

PALANISWAMI CHETTIAR AND THREE OTHERS  
(PLAINTIFFS 1 AND 3 TO 5), RESPONDENTS.\*

*Costs—Suit for sale of the mortgaged properties—Preliminary decree silent about costs against a non-mortgagor-defendant—Court's power to award costs of suit even at the stage when the mortgagee applies under O. XXXIV, r. 6 of the Code of Civil Procedure.*

In a suit by the mortgagee for sale of the mortgaged properties, the Court has power to pass a personal decree for costs of the suit against defendants who had not executed the mortgage, even at the stage when he applies under Order XXXIV, rule 6 of the Code of Civil Procedure (Act V of 1908), and though the preliminary decree is silent in respect of the same.

APPEAL against the order of the Court of the First Additional Subordinate Judge of Coimbatore, dated 5th March 1930 in Interlocutory Application No. 760 of 1929 in Original Suit No. 11 of 1924.

*K. S. Venkatarama Ayyar* for appellants.

*T. M. Krishnaswami Ayyar* and *T. B. Balagopal* for first respondent.

*C. V. Mahadeva Ayyar* for second and third respondents.

*Cur. adv. vult.*

JACKSON J. JACKSON J.—The JUDGMENT of the Court was delivered by  
This is a suit for sale brought by the mortgagee against the mortgagor, first defendant, and his three sons, second, third, and fourth defendants. The

\* Appeal No. 464 of 1930.

lower Court decreed the suit, and, after the hypotheca had been sold under the decree, the plaintiff applied for a personal decree against the first defendant for the balance still due under the mortgage and costs, and against defendants two and three for the amount due for costs. The lower Court has granted a personal decree against defendants two, three, and four and hence the appeal. The point taken is that once the amount due under the mortgage, the subsequent interest, and costs, have been amalgamated into one sum, and the hypotheca has been sold, it is not open to the plaintiff to assume that costs are part of the remaining balance, or to ask for a personal decree for costs as though they were still legally recoverable from the defendants as provided by Order XXXIV, rule 6. It is not contended that in no case can defendants who are not personal parties to the mortgage be held personally liable for costs. That, under section 35 of the Code of Civil Procedure, would be within the Court's discretion; compare *Ramakrishna Ayyar v. Raghunatha Ayyar*(1). But it is contended that, unless in its preliminary decree the Court exercises its discretion, it is too late for the plaintiff to apply after the amalgamation of the amounts due by way of mortgage, interest, and costs, and the subsequent sale.

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The same point is taken in *Venugopalachariar v. Padmanabha Row*(2) where the non-mortgagor second defendant concedes that costs are legally recoverable from him under the decree but contends that there is no admissible assumption that the portion of the decree amount unsatisfied by the sale represents costs and not the mortgage money. While admitting (page 121) that in England this assumption is warranted, this Bench felt constrained by Indian Statute Law to

(1) (1929) 33 L.W. 264.

(2) (1915) 29 M.L.J. 120.

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take a contrary view. It was impressed by the circumstance that in Appendix D, under Order XXXIV, rule 6, a form of decree against a mortgagor personally is provided; but this would almost assume that Appendix D is exhaustive. Can it be said that no decree can be passed for which Appendix D provides no form, or that the decretal rules in the Code are restricted to such decrees as may be found in Appendix D? Two Allahabad cases are cited by this Bench in support of its ruling. *Ram Lal v. Sil Chand*(1) contemplates (page 441) a decree for costs being given against a non-mortgagor personally. No doubt it interprets the obsolete section 90, Transfer of Property Act, as referring only to a mortgagor: "The whole tenor and wording of section 90 abundantly show . . . that the persons affected by it are the mortgagee who has brought the property to sale, and the mortgagor . . ." (page 440). But that is of little assistance in interpreting Order XXXIV, rule 6, because the wording has changed; "amount due for the time being on the mortgage" giving place to "amount due to the plaintiff", which may well include costs from a non-mortgagor. In that case (page 441) no order had been made in the preliminary decree to the effect that the non-mortgagor should be personally liable in costs; and again in *Mata Amber v. Sri Dhar*(2) it is pointed out that the preliminary decree contained nothing justifying the application for a personal decree. Apparently that decree was in some form resembling Form 5 of Appendix D of the Code of Civil Procedure before its amendment in 1929; for it was a suit for redemption governed by section 92, Transfer of Property Act, or Order XXXIV, rule 7, Civil Procedure Code. In that Form there is no clause such as is found

(1) (1901) I.L.R. 23 All. 439.

(2) (1904) I.L.R. 26 All. 507.

in Form 4, the form of our decree, "that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree."

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Where a Court decrees "if the proceeds are insufficient to pay costs", it must contemplate costs remaining unpaid if there is any balance owing after the sale. In the present suit the mortgage amount with interest comes to over 76,000 rupees and the costs are about Rs. 3,000. It is an ingenious fiction but one to which a Court can hardly lend colour that the mortgage amount, interest and costs are as it were piled into one heap, with the costs at the top, and then the moment that some bidder at the sale has offered Rs. 3,000, the costs are cleared off, and only the mortgage amount and interest at the bottom remain to be defrayed. The heap as a matter of fact consists of "what is declared due to the plaintiffs" (paragraph 2 of decree), and if a portion of the heap remains not cleared off after the sale it is still "what is declared due to the plaintiffs", and if costs are declared due to the plaintiffs, they are justified in treating this residue as costs and in applying under paragraph 3 for their personal decree. Any other interpretation would seem to make paragraph 3 of Form 4 a dead letter as regards non-mortgagor-defendants.

This was evidently the opinion of another Bench of this Court in *Komandur Kamalammal v. Komandur Narasimhacharlu*(1), and if this be read with *Venugopalachariar v. Padmanabha Row*(2) it cannot be said that there is any binding authority upon this question to be found in the rulings.

In this view of the law we see no reason to interfere with the lower Court's judgment. The plaintiffs did not

(1) (1912) 12 M.L.T. 312.

(2) (1915) 29 M.L.J. 120.

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ask for a personal decree against fourth defendant and apparently do not want one, but it follows logically upon the argument that makes defendants two and three personally liable, and it must stand. Only the fourth defendant will not be liable to arrest. The appeal is dismissed with costs.

G.R.

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### APPELLATE CIVIL.

*Before Mr. Justice Anantakrishna Ayyar.*

1931,  
September  
17.

IN RE PATURU VENUGOPALAYYA (PLAINTIFF),  
PETITIONER.\*

*Court-fee—Alternative reliefs—Court-fee payable in respect of one of, exceeding that payable in respect of other alternative relief—Higher court-fee payable in case of.*

In the case of a plaint praying for alternative reliefs, if the court-fee payable in respect of any of the alternative prayers should exceed the court-fee payable in respect of the other alternative prayer, the plaintiff must pay the higher court-fee.

*Held*, therefore, in a case in which the plaint prayed for a declaration in respect of which a fixed court-fee of a certain amount was payable and in the alternative for another relief in respect of which an *ad valorem* court-fee of a much larger amount would ordinarily be payable, that the plaintiff was bound to pay the *ad valorem* court-fee payable in respect of the latter relief, although the plaintiff's valuation thereof was in fact lower than that of the relief for declaration.

PETITION under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Nellore, dated 20th August 1931, and made in Original Suit No. 22 of 1931.

*Ch. Raghava Rao* for petitioner.

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\* Civil Revision Petition No. 1181 of 1931.