will be added interest at six and one-fourth per cent per annum as per the directions in our judgment. The plaintiff will also be entitled to his costs as directed in the judgment in the main appeal. The appropriate figures calculated on the above basis will be inserted in the decree to be passed in the appeal.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Pandrang Row.

NILAKANTA PRABHU (PETITIONER—PLAINTIFF), APPELLANT,

1938, September 22.

v.

APPU NAIKA AND THREE OTHERS (RESPONDENTS 2 TO 5—DEFENDANTS 2 TO 5), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 6—Personal remedy against mortgagor—Omission to consider, or to provide for it in preliminary decree—If operates as res judicata *as regards application under O. XXXIV, r. 6.*

Though the practice in mortgage suits is to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, the omission to consider it or the omission to provide for it in the preliminary decree will not operate as *res judicata*, because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim.

APPEAL against the order of the Court of the Subordinate Judge of South Kanara, dated 3rd July 1933 and

---

* Appeal No. 182 of 1934.

NILAKANTA v. APPU NAIKA.

made in Registered Interlocutory Application No. 315 of 1933 in Original Suit No. 84 of 1928.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondents.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of an order passed by the lower Court on an application under Order XXXIV, rule 6, Civil Procedure Code. In that application, the plaintiff asked for a decree against defendants 2 to 4 and against the assets of the first defendant in the hands of these defendants. The lower Court passed a decree only against the assets of the first defendant in the hands of defendants 2 to 4 but dismissed the application so far as it asked for a decree against defendants 2 to 4. It is this latter portion of the order that is complained of in the appeal.

Defendants 2 to 4 are the grandsons of the first defendant by a predeceased son. That son had executed a mortgage in favour of a third person and that mortgagee obtained a decree and brought to sale the mortgaged properties. As the father of defendants 2 to 4 was dead by that time, the grandfather, who was acting as guardian of his grandsons, though he had become divided from them, executed a mortgage in favour of the present plaintiff to raise money and stave off that sale. This later mortgage was executed by the grandfather for himself and as guardian of defendants 2 to 4. On this later mortgage, the plaintiff instituted a suit, obtained a decree for sale and has sold the properties covered by the mortgage. As the sale proceeds were not sufficient to satisfy the decree amount, he made this application under Order XXXIV, rule 6, Civil Procedure Code. The learned Subordinate Judge has dismissed the application so far as it sought relief against defendants 2 to 4 on some ground of *res*

judicata which it is not easy to follow. What he seems to have held is that though there has been no prior decision on this point, the omission to reserve the personal liability of these defendants in the preliminary decree precludes the plaintiff from claiming any relief against them under Order XXXIV, rule 6, Civil Procedure Code. We do not think that this is a proper position.

It is no doubt the practice in mortgage suits to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, but the omission to consider it or the omission to provide for it in the preliminary decree will not operate as *res judicata* because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim. There can be no suggestion in this case of any question of limitation as regards personal liability, but as defendants 2 to 4 were minors at the time of the execution of the suit mortgage, there can be no question of personal liability in the sense of their being arrested or their self-acquired properties being proceeded against. The utmost that the mortgagee would have been entitled to is that not merely the mortgaged properties but also other family properties in their hands should be held liable for their father's debt and it is only in that sense that the application under Order XXXIV, rule 6, can be granted against them.

Mr. Adiga, who appears for these defendants before us, points out that the mere absence of any scope for the plea of limitation does not conclude the question of their liability because the Court did not on the former occasion consider whether the other joint

NILAKANTA v. APPU NAIKA.

VARADACHARIAR J.

family properties in the hands of defendants 2 to 4 could be held liable for the debt contracted by the guardian. This question will have to be decided in the light of the principle laid down in *Ramajogayya* v. *Jagannadhan*(1).

We accordingly set aside the decree of the lower Court and send the case back for disposal in the light of the above observations. We would however add that as the appeal has been limited to Rs. 800 the properties of the minor defendants 2 to 4 will not, in any event, be held liable for more than Rs. 800. Costs of this appeal will abide the result. Any application for relief under the Madras Agriculturists Relief Act will have to be made to the lower Court to which the case has been remanded.

Court-fee paid on the memorandum of appeal will be refunded.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Krishnaswami Ayyangar.

1938, August 29.

BODA VIRARAJU (PLAINTIFF), APPELLANT,

v.

VETCHA VENKATARATNAM AND TWENTY-FOUR OTHERS (DEFENDANTS 1 TO 19 AND 21 TO 24 AND NIL), RESPONDENTS.*

Hindu law—Widow—Nature of estate owned by—Powers of alienation of.

A Hindu widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the

(1) (1918) I.L.R. 42 Mad. 185 (F.B.).
* Appeal No. 288 of 1932.