

Before Mr. Justice Burkitt.

1898  
May 10.

BAGESHRI DIAL (DECREE-HOLDER) v. MUHAMMAD NAQI (JUDGMENT-DEBTOR)  
*Act IV of 1882, s. 90.—Meaning of the term "legally recoverable."*

A decree-holder having obtained separate decrees against his judgment-debtor on two unregistered bonds each for a sum of less than Rs. 100, hypothecating one and the same property, took out execution on one bond and brought to sale the hypothecated property, which was purchased by a third party. The sum for which that property was sold was only sufficient to satisfy one decree; and the decree-holder accordingly, within three years from the date when the latter of the two bonds fell due, applied for a decree under s. 90 of the Transfer of Property Act.

*Held* that under the above circumstances there was a balance legally recoverable otherwise than out of the property sold and that the decree-holder was therefore entitled to a decree under s. 90. *Musahib Zaman Khan v. Inayat-ullah* (1), referred to.

The fact of this case sufficiently appear from the judgment of Burkitt, J.

Munshi Jwala Prasad, for the appellant.

Maulvi Ghulam Mujtaba, for the respondent.

BURKITT, J.—In this case it appears that the decree-holder, appellant, Bageshri Dial, had obtained from the judgment-debtor, respondent, Syed Muhammad Naqi, two un-registered bonds each for a sum of money under Rs. 100, hypothecating one and the same property as security for the loans. The mortgagee instituted suits on both the bonds and on each obtained a decree directing the sale of the hypothecated property in default of payment of the sum due. Execution was taken out on one decree and the property was sold and purchased by a party other than the decree-holder. The purchase-money was found sufficient to satisfy one only of the decrees. The decree-holder now comes to Court and, alleging that there is no mortgaged property left from which he can recover the debt due on the decree now under execution, asks for a decree under s. 90 of the Transfer of Property Act. For certain reasons which it is unnecessary here to discuss further, the District Judge has

\* Second appeal No. 380 of 1892, from a decree of P. C. Wheeler, Esq., District Judge of Jaunpur, dated the 18th December 1891. Confirming a decree of Maulvi Amjad-ul-lah, Munsif of Marahm, dated the 21st March 1891.

1893

BAGESHRI  
DIAL  
v.  
MUHAMMAD  
NAQI.

refused the application. As to the decision of the District Judge, I may briefly say the great distinction between the case he cites and the present case is, that in the former the decree-holder was the purchaser. Such is not the case here. In s. 90 of the Transfer of Property Act the conditions on which a decree under that section can be passed is that the balance sought to be recovered by that decree is one legally recoverable from the judgment-debtor otherwise than out of the property sold. Those words "legally recoverable," have been considered by this Court in the case of *Musahab Zaman Khan v. Inayat-ullah* (1), and are interpreted to mean "that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold, or a balance the recovery of which is not barred by limitation, *e. g.*, the suit might have been brought at a period of time when, if the plaintiff was relying on his personal remedy against the defendant his suit for the personal remedy would be barred by time, although within time as a suit for sale on the mortgage."

Now, applying the above ruling to the present case, I have got to see whether the appellant's personal remedy against the judgment-debtor was barred at the time the suit was instituted. The facts are these: the bond sued on was dated the 25th of September 1885, and being payable after four months it became due on the 24th of January 1886. The suit was instituted on the 19th of January 1889, and as that date is less than three years after the due date of the bond, it follows that on that date the plaintiff's, now decree-holder's, personal remedy, as explained in the case cited above, was not barred as against the defendant, now judgment-debtor. That being so, I hold that the amount, a decree for which is now sought, is legally recoverable from the respondent otherwise than out of the property sold. It follows therefore, that the appellant is entitled to the decree for which he asks. I accordingly allow the appeal. I set aside the order of the lower Courts, and I give the appellant, decree-holder, a decree as provided by s. 90 of the Transfer of Property

(1) I. L. R., 14 All., 513.

Act against the person and property of the judgment-debtor, other than that sold. The appellant is entitled to the costs of all three Courts.

1893

BAGESHRI  
DIAL  
v.  
MURHAMMAD  
NAQI.

*Appeal decreed.*

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Aikman.*

DAULAT RAM AND OTHERS (DEFENDANTS) v. DURGA PRASAD AND OTHERS  
(PLAINTIFFS). \*

1893

*May 13.*

*Costs—Second appeal—Exercise of discretion of Court as to apportionment of costs.*

An appeal as to costs will lie from an appellate decree when the Court has exercised its discretion as to costs arbitrarily, and not according to general principles. *Khooda Buksh v. Elahee Buksh* (1) and *Assa Ram v. Kashmeeree Dass* followed.

The facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

EDGE, C. J. and AIKMAN, J.—This appeal, which is from an appellate decree, relates to costs. It is urged on behalf of the respondent that no such appeal lies under s. 584 of the Code of Civil Procedure. That proposition is too broad. No doubt Civil Courts have full discretion as to costs, but that discretion must be exercised according to general principles and not arbitrarily. That is the effect of what was decided by the Full Bench of the Sadr Diwani Adalat of these Provinces, 1861, in the case of *Khooda Buksh v. Elahee Buksh* (1) and by the Full Bench of this Court in 1867 in the case of *Assa Ram v. Kashmeeree Dass* (2). The Munsif in the present case had decreed the plaintiffs' claim, but having rightly found that the plaintiffs were responsible for the litigation by reason of their refusal to produce certificates to collect debts, or other documents showing that they alone of the representatives of

\* Second appeal No. 89 of 1890, from a decree of Maulvi Akbar Husain Khan, subordinate Judge of Cawnpore, dated the 30th September 1890, modifying a decree of Bābu Banke Behari Lal, Munsif of Haveli, dated the 28th June 1890.

(1) S. D. A., N.-W. P., 1861, Vol. 1 p. 235.

(2) N.-W. P., H. C. Rep., F. B. 1866-67, 90.