

## FULL BENCH.

*Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Lindsay, Mr. Justice Sulaiman, Mr. Justice Dalal and Mr. Justice Pullan.*

ASKARI HASAN (JUDGEMENT-DEBTOR) *v.* JAHANGIRA MAL AND OTHERS (DEGREE-HOLDERS).\*

1926  
November,  
10, 15.

*Civil Procedure Code, order XXXIV, rule 4—Mortgage—Compromise decree providing for payment of mortgage money in instalments—Application for a final decree not necessary.*

Where a compromise decree provides for the payment of mortgage money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, of the Code of Civil Procedure has no application to the case; and consequently it is unnecessary to apply for a final decree in the terms of order XXXIV, rule 5.

*Jagarnath Umar v. Ram Karan Singh* (1), distinguished. *Bechu Singh v. Bicharam Singh* (2) and *Ishan Chandra Kundu v. Nilratan Adhikari* (3), referred to.

THIS appeal was sent up to be referred to a Full Bench for determination of a point of law, the nature of which is apparent from the order below:—

DALAL and PULLAN, JJ. :—In this appeal a question arises as to whether the respondents' right has abated owing to the death of Bilas Rai, who was the original decree-holder in a mortgage suit. The decree which was passed was a compromise decree and allowed for payment of the mortgage money in instalments. According to the view taken by the Allahabad High Court in *Jagarnath Umar v. Ram Karan Singh* (1), the proceedings were not concluded by that decree but it was necessary to go on and obtain a final decree under order XXXIV, rule 5, of the Code of Civil

\*First Appeal No. 316 of 1923, from a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 5th of May, 1923.

(1) (1922) 20 A.L.J., 575.

(2) (1909) 10 C.L.J., 61.

(3) (1923) A.I.R. (Pat.), 375.

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Procedure. If this view is followed, the present suit must be held to have abated, as the applicants did not have their names put on record within three months of the death of Bilas Rai. The lower court has followed a ruling of the Calcutta High Court—*Beehu Singh v. Bicharam Singh* (1), and certain other rulings, both of the Calcutta and the Patna High Courts, which appear to be in direct conflict with the ruling of the Allahabad High Court to which we have referred. The Patna High Court ruling is reported in *Ishan Chandra Kundu v. Nilratan Adhikari* (2). In view of this conflict of authority we are of opinion that the matter should be referred to a larger Bench. We, therefore, submit the case to the Hon'ble the Acting CHIEF JUSTICE with a request that he will constitute a Bench for the determination of the following question:—

Whether in a compromise decree passed for payment of mortgage money in instalments, and not on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, applies, and it is necessary to apply for a final decree under rule 5.

The appeal was accordingly laid before a Bench of five Judges.

Pandit *Uma Shankar Bajpai*, for the appellant.

Babu *Piari Lal Banerji* and Munshi *Kailas Chandra Mital*, for the respondents.

The judgement of the Full Bench (WALSH, A. C. J., and LINDSAY, SULAIMAN, DALAL and PULLAN, JJ.) was as follows:—

The question referred for the opinion of the Full Bench of this Court is as follows:—“Whether in a compromise decree passed for payment of mortgage

(1) (1909) 10 C.L.J., 91.

(2) (1923) A.I.R. (Pat.), 375.

money in instalments, and not on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, applies, and it is necessary to apply for a final decree under rule 5." We have heard the arguments of counsel in this case and our answer to the reference is as follows:—Where the compromise decree provides for the payment of mortgage money in instalments, and does not provide for payment on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, has no application to the case; and consequently it is unnecessary to apply for a final decree in the terms of order XXXIV, rule 5.

[On receipt of the opinion of the Full Bench, the original Bench, after setting out the answer of the Full Bench, delivered the following judgement:—]

DALAL and PULLAN, JJ. :—Thus the suit before us was not really an application for preparation of a final decree but an execution application. Consequently there was no question of abatement, and the only point to decide is whether, regarded as an execution application, this was within time. It has been argued before us that the terms of the compromise decree were not observed by the judgement-debtor and that there was actually a non-payment of two instalments on the 15th of November, 1918, and that, therefore, the present application which was made on the 14th of November, 1922, was beyond time. But we do not find that there has ever been a failure on the part of the judgement-debtor to pay two instalments. No doubt the instalment due on the 15th of May, 1918, was paid late, that is, on the 19th of May, and the succeeding instalment due on the 15th of November, 1918, was also paid late, namely, on the 23rd of December. But at that time only one instalment was due, because the instalment of the 15th of May

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had been paid and was no longer in default. We find, therefore, that regarded as an application for execution, the present application was within time, and we see no reason to amend the decree of the lower court on a purely technical point.

We, therefore, dismiss the appeal with costs, but as this has been regarded now as an appeal in execution, costs will be calculated accordingly.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Mr. Justice Dalal and Mr. Justice Pullan.*

1926  
November,  
18.

BENGAL AND NORTH-WESTERN RAILWAY (DEFENDANT) v. MATRU RAM AND ANOTHER (PLAINTIFFS) AND BOMBAY, BARODA AND CENTRAL INDIA RAILWAY (DEFENDANT).\*

*Act No. IX of 1890 (Indian Railways Act), section 47(f)—Rule framed by railway company—Sale of goods consigned to a railway company for transport without waiting for expiry of prescribed time—Illegal conversion.*

Where goods which had been consigned to a railway company for carriage were sold by the company, on account of refusal to take delivery, without waiting for the expiry of the time prescribed by the rules framed under section 47 (f) of the Indian Railways Act, 1890, and without a proper bill for wharfage having been presented by the company, it was held that the action taken by the company amounted to illegal conversion and the owner of the goods was entitled to damages.

THIS was a Second Appeal arising out of a suit for damages against a railway company on account of the alleged illegal conversion of certain goods belonging to the plaintiffs. The facts of the case are stated in the judgement of the High Court.

\* Second Appeal No. 852 of 1924, from a decree of Baij Nath Das, Second Additional Judge of Gorakhpur, dated the 10th of March, 1924, modifying a decree of Jogendra Nath Chaudhri, Subordinate Judge of Gorakhpur, dated the 11th of September, 1923.