

Before Sir Grimwood Mears, Chief Justice, and Mr.
Justice Sen.

1931
December,
8.

NIAZ AHMAD (APPLICANT) v. PHUL KUNWAR (OPPOSITE PARTY).*

Presidency Towns Insolvency Act (III of 1909), sections 17 and 45(2)—Secured creditor's rights not affected by order of discharge—Secured creditor obtaining personal decree under order XXXIV, rule 6 after order of discharge—Civil Procedure Code, order XXXIV, rule 6—Revision—Other remedy available.

Under section 17 of the Presidency Towns Insolvency Act an order of discharge does not affect the power of a secured creditor to realise or otherwise deal with his security: and as the debt due to a secured creditor is not a debt provable in insolvency, the order of discharge does not, under section 45(2), release the insolvent from such a debt. So, where a mortgagor has been adjudicated an insolvent and granted a discharge, that can not prejudicially affect the statutory rights of the mortgagee in respect of the mortgage debt, and the mortgagee is entitled to obtain a decree under order XXXIV, rule 6, of the Civil Procedure Code against such mortgagor.

An application for revision under section 115 of the Civil Procedure Code is not competent where another remedy, by way of an appeal to the lower court, exists.

Dr. M. H. Faruqi, for the applicant.

Dr. K. N. Katju and Mr. Bankoy Behari, for the opposite party.

MEARS, C. J., and SEN, J.:—On the 22nd of August, 1917, one Sirajuddin took a lease of certain zamindari property from Rani Phul Kunwar. A *patta* and a *qabuliat* were executed in evidence of this transaction and the lessee agreed to pay to the lessor Rs. 2,500 in certain instalments. On the same date, Niaz Ahmad stood surety for the lessee and executed a surety bond in favour of Rani Phul Kunwar, whereby he agreed to pay her Rs. 2,500 together with interest at a certain rate in case of default on the part of the lessee and hypothecated his immovable property in her favour.

* Civil Revision No. 551 of 1930.

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The lessee did not pay the stipulated instalments and a right of suit accrued to Rani Phul Kunwar against the lessee and his surety. In 1924 the surety applied to the Bombay High Court to be declared an insolvent. It is said that notice of this application was issued to Rani Phul Kunwar. We do not know why this notice was given. A copy of this notice is not on the record and we do not know its contents.

Niaz Ahmad was duly adjudicated an insolvent. Later on, he applied for his discharge. Notice of his application was given to his creditors and presumably to Rani Phul Kunwar, who was misdescribed as the "wife of His Highness Maharajah Ranjit Singh". Rani Phul Kunwar was not the *wife* but the *widow* of Rai Bahadur Chaudhry Ranjit Singh. The insolvent was duly discharged by the Bombay High Court on the 17th of August, 1926.

Rani Phul Kunwar sued on her mortgage and obtained a decree for principal and interest by the sale of the mortgaged property. The decree was passed for a sum of Rs. 4,643-9-0. A final decree was obtained against the mortgagor and in execution of this decree his property was sold for Rs. 479.

Rani Phul Kunwar applied for a decree over under order XXXIV, rule 6, of the Code of Civil Procedure. Her application was resisted by the mortgagor on the ground that the order of discharge by the Bombay High Court in the exercise of its insolvency jurisdiction completely absolved him from all debts due from him until the date of his discharge and that the order of discharge operated as *res judicata*. This plea was overruled by the Subordinate Judge of Moradabad and a decree for the balance due on the mortgage after sale of the property was passed in favour of Rani Phul Kunwar.

Niaz Ahmad has applied to this Court for a revision of this order under section 115 of the Code of

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Civil Procedure. Where a simple money decree has been passed under order XXXIV, rule 6, of the Code of Civil Procedure, the remedy of the defendant is to file an appeal. Where another remedy exists by statute, an application for revision under section 115 of the Code of Civil Procedure is not competent.

Rani Phul Kunwar being a secured creditor, the debt due to her was not provable in bankruptcy. Under section 17 of the Presidency Towns Insolvency Act, the order of adjudication "shall not affect the power of any secured creditor to realise or otherwise deal with his security" as he would have been entitled to, independently of that section.

The order of discharge has no more effect upon the right of the secured creditor than the order of adjudication. Under section 45(2) "an order of discharge shall release the insolvent from all debts provable in insolvency". The debt due to a secured creditor is not a debt provable in insolvency. The order of adjudication and the subsequent order of discharge cannot affect the rights of the secured creditor which flow from the mortgage contract.

There is no difference in this respect between the Provincial and the Presidency Towns Insolvency Acts. Where a mortgagor has been adjudicated an insolvent with reference to certain debts which were provable in insolvency, the order of adjudication and the order of discharge do not and cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were not provable in insolvency.

The mortgagee was entitled to a decree over under order XXXIV, rule 6, of the Code of Civil Procedure, if on the date of his application "the balance was legally recoverable from the defendant otherwise than out of the property sold".

The mortgaged property was sold in execution of Rani Phul Kunwar's decree after the order of discharge. The right to a decree under order XXXIV, rule 6, of the Code of Civil Procedure did not accrue till after the sale of the property. The right to a personal decree was not time barred on the date of the presentation of the application. The order of discharge cannot take away the statutory right of the decree-holder which materialised long after the order of discharge. We hold that the decree was rightly passed. Our attention has been drawn to section 128 of the Indian Contract Act. This section is irrelevant. We dismiss the application with costs.

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APPELLATE CIVIL.

*Before Sir Grimwood Mears, Chief Justice, and
 Mr. Justice Sen.*

NATHU LAL AND ANOTHER (PLAINTIFFS) v. BABU RAM
 AND OTHERS (DEFENDANTS).*

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*Civil Procedure Code, sections 109(c) and 110—Valuation—
 “Involve directly or indirectly a claim to property etc.”—
 Mere possibility of a future suit by a party is not meant
 —“Otherwise a fit case”—Appeal to Privy Council from
 a second appeal.*

The words, “must involve directly or indirectly some claim or question to or respecting property of Rs. 10,000 or upwards in value”, in section 110 of the Civil Procedure Code refer to questions arising between parties to a pending suit and not to questions relating to the title of only one of the parties which might be made the basis of a prospective suit. The reference is to suits in existence and not to suits *in gremio futuri*. The value of property which may be involved in such a future suit cannot be taken into account in computing the valuation of Rs. 10,000 required by section 110.

The High Court certified the present case, which was that of a decision in second appeal, under section 109(c) as being otherwise a fit case for appeal to the Privy Council, having regard to the substantial questions of law sought to be raised in the appeal and their vital importance to the parties.

*Application No. 28 of 1931, for leave to appeal to His Majesty in Council.