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trial, as soon as the Magistrate decides under section 347 to commit the accused for trial in the court of session. The accused has exercised every right he could have exercised in an inquiry under chapter XVIII. He will be tried in the court of session where he will have the opportunity of cross-examining all the prosecution witnesses over again. All his defence witnesses will also be examined over again. If he now wishes to produce fresh defence witnesses, whose names did not occur to him when he was asked for a list under section 211(1), the Magistrate has discretion to summon such fresh witnesses.

In my opinion the procedure was not illegal or irregular and the accused has not been prejudiced in any way. I reject the reference. The order of commitment will hold good.

APPELLATE CIVIL.

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March, 9.

Before Mr. Justice Pullan and Mr. Justice Niamat-Ullah.

TULSHI PRASAD (DEFENDANT) *v.* DIP PRAKASH AND OTHERS (PLAINTIFFS) AND MIHIN LAL (DEFENDANT).*

Civil Procedure Code, order XXXIV, rule 6—Mortgage bond executed by mortgagor and sureties jointly—Sureties undertaking only a personal liability—Decree passed against all, but only for sale of mortgaged property—Sale proceeds insufficient—Personal decree can then be passed against the sureties.

A simple mortgage deed was executed by a person who hypothecated his property and also by his sureties who undertook only a personal liability. A suit for sale on the mortgage was instituted against all the executants and a decree was passed for sale of the mortgaged property. The sale proceeds of the property proving insufficient, the mortgagees applied under order XXXIV, rule 6 of the Civil Procedure Code and a personal decree was passed against the executants, including the sureties. *Held*, that under order XXXIV, rule

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Second Appeal No. 1001 of 1928, from a decree of Ali Ausat, Additional District Judge of Aligarh, dated the 9th of March, 1928, modifying a decree of Tirloki Nath, Subordinate Judge of Etah, dated the 5th of December, 1927.

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6 a personal decree could be passed against the sureties, and not merely against the mortgagor alone; all that the rule required being that the balance should be legally recoverable from the defendants otherwise than out of the property sold.

Mr. *N. P. Asthana*, for the appellant.

Mr. *P. L. Banerji*, for the respondents.

PULLAN and NIAMAT-ULLAH, JJ. :—This appeal arises out of proceedings under order XXXIV, rule 6 of the Civil Procedure Code. The appellant is the son and legal representative of one Ram Narain. It appears that Asaf Ali, who owned certain properties, executed a deed of simple mortgage on the 20th August, 1918, hypothecating his property in favour of the present respondents. Five other persons, including Ram Narain, joined as executants of that deed, though they had no interest in the mortgaged property and were in fact only sureties. The deed makes it clear that they are personally liable for the debt contracted by Asaf Ali. The respondents instituted a suit for sale of the mortgaged property under order XXXIV, rule 4 of the Civil Procedure Code, impleading all the executants or their representatives in interest, obtained preliminary and final decrees and had the mortgaged property sold. The sale proceeds proved to be insufficient for satisfaction of the mortgage money. They then applied, under order XXXIV, rule 6 for a personal decree being passed against the executants of the mortgage deed or their representatives in interest. The present appellant objected to a personal decree being passed against him. The lower appellate court overruled his objection and passed a simple money decree against him jointly with others. Hence this second appeal.

It is contended by the learned advocate for the appellant that a decree under order XXXIV, rule 6 cannot be passed except as against the mortgagor, i.e., one who had interest in the hypothecated property the sale of which has already taken place. It is argued that in so far as no more than a personal undertaking had been

given by the executants other than Asaf Ali, a simple money decree should have been passed in the first instance against them and no decree under order XXXIV, rule 6, would in that case be necessary. Assuming that a composite decree of this kind could have been passed in the first instance, we are unable to hold that the language of order XXXIV, rule 6, precludes the court from passing a decree on the sale proceeds proving insufficient for satisfaction of the mortgage money. All that that rule requires is that the balance should be legally recoverable from the defendant otherwise than out of the property sold. It is not disputed that, so far, at any rate, as Ram Narain was concerned, the whole of the mortgage money, which would of course include the balance, was personally recoverable from him. We find nothing in any rule of law which prevents the mortgagee from obtaining a personal decree under order XXXIV, rule 6, in circumstances like these. The liability of a surety is, in general, co-extensive with that of the principal debtor. Indeed Ram Narain made himself one of the principal debtors by joining in the execution of the bond. The learned advocate for the appellant has not been able to refer us to any authority in support of his contention. We are clearly of opinion that the lower appellate court took a correct view in applying order XXXIV, rule 6 to the circumstances of the present case.

It is next contended that the son of Ram Narain, as the appellant is, is not responsible for surety debts of his deceased father who, it is not disputed, was a member of a joint Hindu family with the appellant. So far as this Court is concerned, it is settled law that ordinarily a son is liable for the surety debt of his father, unless it is shown that the debt is tainted with immorality. It is not suggested that such is the case here. Under these circumstances, we are satisfied that the decree passed by the lower appellate court is correct in every respect. It is accordingly upheld and this appeal is dismissed with costs.