

APPELLATE CIVIL

Before Mr. Justice Kisch and Mr. Justice Bajpai

BABU RAM AND OTHERS (DEFENDANTS) v. INAM ULLAH
(PLAINTIFF)*

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December, 19

Transfer of Property Act (IV of 1882), sections 55(4), 55(5), 100—Vendor's lien or charge for unpaid price—Personal liability of vendee—Suit for sale on the charge—Civil Procedure Code, order XXXIV, rule 6—Personal decree after decree for sale on a charge created by law—Civil Procedure Code, section 11, explanation V—Res judicata—Same suit—Prayer for personal decree, in future, in suit for sale—Decree silent about personal decree—Limitation Act (IX of 1908), articles 111, 116.

The terms of a sale deed mentioned that a part of the sale price was left by the vendors with the vendees for payment to a creditor of the vendors. The vendees did not make the payment, and the vendors brought a suit for sale of the property in enforcement of their statutory charge in respect of the unpaid portion of the price. In this suit they also prayed that if the sale proceeds of the property should prove to be insufficient the plaintiffs might be allowed to recover the amount from the person and other property of the defendants. No issue was struck on the question of the plaintiffs' right to a personal decree against the defendants, nor was it discussed in the judgment. A decree for sale was passed, but the decree was silent on this question. After the property was sold in execution the sale proceeds were found to be insufficient and the plaintiffs then applied for a personal decree under order XXXIV, rule 6 of the Civil Procedure Code against the defendants. The questions were whether the plaintiffs' application was barred by *res judicata*, or by limitation, and whether they were entitled to a personal decree at all: *Held—*

Although it is open to a court, while deciding a suit for sale upon a mortgage or charge, to adjudicate upon the right of the plaintiff to apply for and obtain later on, if necessary, a personal decree against the defendants, yet the court is not bound to do so, as the appropriate time for such an adjudication is when the sale

*First Appeal No. 561 of 1930, from a decree of Priya Charan Agarwal, Subordinate Judge of Budaun, dated the 8th of November, 1930.

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has been held and the proceeds have been found insufficient. Where, therefore, the court has not struck an issue on this abstract right of the plaintiff and has refrained from deciding the question although a claim was made in the plaint, it can not be said that the plaintiff is barred by *res judicata* from applying for a personal decree after the sale has taken place. Where the right of the plaintiff to obtain a personal decree has been decided, the parties will be bound by such decision ; but where there has been no actual decision on the question the plaintiff can not be barred, by the principle of explanation V of section 11 of the Civil Procedure Code, from making his claim after the sale has taken place. Explanation V would not apply unless the relief claimed was such as was obligatory on a court to grant, and it was not obligatory on a court to grant the relief of a personal decree at the time of deciding the suit for sale.

The suit having been brought within six years of the sale deed, the personal remedy was within time, the limitation being six years under article 116 of the Limitation Act. Article 111 would not be applicable because that applied to a simple case where the vendee had not paid a portion of the purchase money to the vendor and not where he had broken a contract to pay the same to a creditor of the vendor.

The charge created by section 55(4) of the Transfer of Property Act in respect of the unpaid portion of the sale price could, according to section 100 of the Act, be enforced in all respects as a simple mortgage ; therefore, as a charge holder had all the rights of a simple mortgagee, he could, when the net proceeds of the sale had proved insufficient and the balance was legally recoverable, claim a personal decree under order XXXIV, rule 6. The fact that the charge was a creation of law would not negative this right. Again, under section 55(5) of the Transfer of Property Act the purchasers were personally liable for the purchase money. Further, the defendants must be deemed to have covenanted to pay the money, which was left with them for the creditor, and to have thereby made themselves personally liable.

Mr. *Panna Lal*, for the appellants.

Messrs. *Harnandan Prasad* and *P. M. L. Verma*, for the respondent.

KISCH and BAJPAI, JJ.:—This is an appeal by the defendants against whom a personal decree under order XXXIV, rule 6 of the Civil Procedure Code has been passed by the court below.

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The facts which have given rise to this appeal are as follows. On the 15th of November, 1915, Ahmad Husain and others sold some immovable property to Babu Ram and others for a sum of Rs.12,266. Out of this, a sum of Rs.3,030 was left with the vendees for payment to one Moti Lal, a creditor of the vendors. The vendees did not pay the said amount to Moti Lal and the vendors thus obtained the right to recover the amount of unpaid purchase money from the vendees. This right was sold to Inam Ullah, the present plaintiff No. 1.

On the 16th of November, 1921, Inam Ullah together with the original vendors brought suit No. 220 of 1921 in the court of the Subordinate Judge of Budaun for recovery of a sum of Rs.3,030 together with Rs.2,727 as interest against Babu Ram and others by sale of the property which had been sold to them and it was also prayed that if the property aforesaid be not sufficient for the amount claimed, then the plaintiffs may be allowed to recover the amount from the person and other property of the defendants. On the 20th of March, 1922, the suit was decreed and it was said that in default of payment the property comprised in the sale deed or a sufficient part of it should be sold. No issue was struck on the question of the plaintiffs' right to recover any portion of the decretal amount from the person and other property of the defendants, nor was there any discussion in the judgment on that point. The decree that was framed was on a printed form and the printed words "if the sale proceeds be insufficient, the decree-holder will be entitled to obtain a personal decree" were scored out.

On the 16th of October, 1922, a final decree for sale was prepared and in execution thereof the property was

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sold on the 28th of November, 1923, for Rs.1,550 and the sale, notwithstanding the defendants' application to set it aside, was confirmed on the 8th of December, 1925, by the executing court. On the 12th of December, 1925, Inam Ullah applied for the preparation of a personal decree under order XXXIV, rule 6 against the vendees. The learned Subordinate Judge on the 6th of March, 1926, dismissed the application of Inam Ullah for the preparation of a personal decree and on the 8th of June, 1926, Inam Ullah filed First Appeal No. 296 of 1926 in the High Court against the order refusing to prepare a personal decree. Before this appeal could come up for hearing the vendees appealed to the High Court against the order of the executing court dated the 8th of December, 1925, confirming the sale in favour of Inam Ullah and on the 21st of December, 1926, the High Court allowed the appeal of the vendees against the order refusing to set aside the sale and directed a fresh sale to be held. This second sale took place on the 20th of October, 1927, and the price that was fetched at the auction sale was Rs.4,400.

First Appeal No. 296 of 1926 came up for hearing in this Court on the 28th of May, 1929, when a preliminary objection was taken on behalf of the defendants respondents. The plaintiff, Inam Ullah, therefore took time to apply for the amendment of his application, dated the 12th of December, 1925, for the preparation of a decree under order XXXIV, rule 6 on the ground that as by reason of the fresh sale a larger amount was obtained, the amount for which the personal decree was to be passed should be decreased from Rs.6,666-12-0 to Rs.5,088-7-6. Babu Ram and others objected to the amendment being granted on the ground that the original application for the preparation of a personal decree was based upon a sale that took place on the 28th of November, 1923, that was confirmed on the 8th of December, 1925, and as the said sale was set aside by the High Court on the 21st of December, 1926, "all proceed-

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ings incidental thereto and consequent upon such sale including the application for preparation of a personal decree were *ipso facto* swept aside and Inam Ullah could not legally ask for amendment of an application that has become ineffectual and inoperative". It was said that Inam Ullah could not be allowed in law to convert a cause of action that arose in 1925 into one that accrued in 1927 and "make his application of the 12th of December, 1925, relate prospectively to an event that happened about 2 years later". The defendants alleged that several questions required determination and they could be gone into only when a fresh application on the basis of the subsequent sale was made. This matter came up for hearing before this Court on the 24th of October, 1929, and it was held that the defendants' contentions were valid and the amendment could not be granted. The learned Judges said that the "first sale having been set aside, subsequent proceedings under order XXXIV, rule 6 automatically fell through" and the result was "that the parties were relegated to the position which they occupied immediately after the final decree was passed".

The plaintiff's application for amendment having been rejected, the plaintiff made an oral request for the withdrawal of his appeal and the learned Judges acceded to this request. The result was that First Appeal No. 296 of 1926 was dismissed with costs on the 24th of October, 1929.

On the 11th of August, 1930, Inam Ullah applied afresh for preparation of a personal decree under order XXXIV, rule 6 against Babu Ram and others for the recovery of a sum of Rs.5,404-8-0. Babu Ram and others objected on the ground that the decree-holder was not entitled to a personal decree and that the application was barred by the rule of *res judicata*. The court below repelled the objections of the defendants and directed that a decree under order XXXIV, rule 6 be prepared against the judgment-debtors. The defend-

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ants have appealed. They contend that the present application was barred by the principle of *res judicata*, that the appellants were not personally liable, and that the application was barred by time.

The plea of *res judicata*, asserting that the plaintiff's right to obtain a personal decree has been negatived previously, is taken with reference to two proceedings. It is said that when the plaintiff brought suit No. 220 of 1921 he definitely claimed a relief to the effect that if the property, the sale of which was claimed, be not sufficient for the amount of the suit, then the plaintiff may be allowed to recover the amount of the suit from the person and other property of the defendants and as this relief was not granted, the plaintiff is not entitled to obtain the same relief at a later stage of the suit. We are of the opinion that this contention is not sound. In *Musaheb Zaman Khan v. Inayat-ul-lah* (1) the learned Judges observed:—

“It is true that the form No. 109, which is a general form of plaint for a suit for sale under a mortgage, does include in its prayers for relief a prayer that if the proceeds of the sale of the mortgaged property shall not be sufficient for payment in full of the amount to be ascertained the defendant should pay to the plaintiff the amount of the deficiency. . . . In our opinion the more correct way of drawing up a decree in a suit for sale on a mortgage would be to confine the decree for sale, i.e., the first decree to be passed, to a decree under section 88 against the mortgaged property, and that any subsequent relief to which, after that decree had been executed, it might appear that the plaintiff was entitled, should stand over for a decree under section 90. In our opinion section 13 of the Code of Civil Procedure would not apply to an application under section 90 for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the court when making the decree under section 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under section 88 had been exhausted.”

(1) (1892) I.L.R., 14 All., 513 (517).

In *Uttam Ishlok v. Phulman Rai* (1) BANERJI, J., held that "In such a suit although he (the plaintiff) may properly claim a personal decree against the defendant, the court in making its decree under section 88 should confine the decree to one for sale of the property" and the learned Judge referred to *Musaheb Zaman Khan's* case with approval. It is, however, contended by the appellants that form No. 128 which was a general form of decree for sale in a mortgage suit under the Transfer of Property Act of 1882 is very different from form No. 4 in the first schedule of the Civil Procedure Code; for whereas the previous form was confined strictly to a decree under section 99 of the Transfer of Property Act and did not include any subsequent relief, the present form contemplates the inclusion of a statement to the effect that if the net proceeds of the sale are insufficient to pay the amount, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance. But this simply means that it is open to a court, while deciding the suit, to adjudicate upon the right of the plaintiff and implies that if the court so chooses it may decide whether the plaintiff will or will not be at liberty at a later stage to apply for a personal decree. There can be even now no doubt that the appropriate time for such an adjudication is when the sale has been held and the net proceeds of the sale have been found to be insufficient. The amount for which the personal decree is to be given can under no circumstances be determined till after the sale has taken place, and before this stage is reached the court can at best determine the abstract right of the plaintiff to obtain a personal decree. Where, therefore, as in the present case, the court has not struck an issue on this abstract right of the plaintiff and has not decided the same, it cannot be said that when the sale has taken place the plaintiff is precluded from obtaining a personal decree after the sale, if he is other-

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(1) (1905) 2 A.L.J., 379.

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wise entitled. The form of the decree has now received a further modification and it runs as follows: "The plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and the law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance." Reliance is placed by learned counsel for the appellants on the case of *Uttam Ishlok Rai v. Ram Narain Rai* (1) which was an appeal under the Letters Patent from the decision in *Uttam Ishlok v. Phulman Rai* (2), wherein the learned Judges referred to the case of *Musaheb Zaman Khan v. Inayat-ul-lah* (3) and said that they did not disagree with the view taken in that case but added that where a party entitled to a charge claims not merely a remedy against the property the subject-matter of the charge, but also a personal remedy against the owner of that property, it was not premature to decide the question of liability on the hearing of the original suit and if this question has already been the subject of determination at the former trial, the rule in *Musaheb Zaman Khan's* case was too broadly stated. It would, therefore, appear that the court can, if it so chooses, determine this question at the hearing of the original suit but it is not bound to do so, and if it has refrained from deciding the question, although a claim was made in the plaint, it cannot be said that a subsequent claim to that effect at a later stage is barred by *res judicata*. Mr. Panna Lal has referred us to the cases of *Jeuna Bahu v. Parmeshwar Narayan Mahtha* (4), *Mukhram Agarwalla v. S. Ehsan Ahmad* (5), *Ram Nath v. Nageshwar Singh* (6), *Ishar Das v. Maya Mal* (7) and *Maqbul Ahmad v. Durga Prasad* (8), wherein it has been held that if there is a composite decree, that is, a decree for sale containing a declaration that if the net proceeds of the sale are insufficient to pay such amount the plaintiff

(1) (1906) I.L.R., 28 All., 365.

(3) (1892) I.L.R., 14 All., 513.

(5) (1934) 15² Indian Cases, 770.

(7) A.I.R., 1933 Lah., 329.

(2) (1905) 2 A.L.J., 379.

(4) (1918) L.L.R., 47 Cal., 370.

(6) (1930) I.L.R., 6 Luck., 132.

(8) (1933) I.L.R., 9 Luck., 51.

shall be at liberty to apply for a personal decree for the amount of the balance, there is an adjudication which is detrimental to the defendant, and if the defendant does not appeal from it he is, under section 97 of the Civil Procedure Code, precluded from disputing its correctness afterwards. Yet there are observations in some of these cases that the personal relief against the mortgagor can be asked generally only when the proceeds of the sale prove insufficient and that a composite decree like this may be valid but it is usually improper. All these cases only go to show that where the right of the plaintiff to obtain a personal decree has been decided, the parties will be bound by such decision. We have not been referred to a single case wherein it has been held that if there has been no decision on the point and if the plaintiff had claimed for such a relief in the plaint, the plaintiff would be barred from claiming under explanation V of section 11. Explanation V would not apply unless the relief claimed was such as it was obligatory on a court to grant, and the cases, including cases of this Court, to which reference has already been made show that it is not obligatory for a court to grant the relief in the nature of a personal remedy at the time of the original suit. In *Govindasamy Koundan v. Kandasamy Koundan* (1) it was held that "The fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, is not enough to say that the plaintiff is for ever after barred from asking for it." We might mention that in the written statement the defendants nowhere alleged that the plaintiff was not entitled to a personal decree.

It is then said that the plaintiff did once, on the 12th of December, 1925, ask for a personal decree and the court on the 6th of March, 1926, refused the plaintiff's application. The plaintiff's appeal against this decision having been dismissed on the 24th of October, 1929, the plaintiff is at all events now debarred from claiming a

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(1) A.I.R., 1927 Mad., 779.

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personal decree by his present application. This is the second proceeding with reference to which the plea of *res judicata* is taken and strong reliance is placed on the case of *Hook v. Administrator-General of Bengal* (1), where their Lordships held that section 11 of the Code of Civil Procedure is not exhaustive of the circumstances in which an issue is *res judicata* and it was observed that the binding force of an adjudication at one stage of the suit depends not necessarily upon section 11 but upon general principles of law and that if it were not binding there would be no end to litigation. In an administration suit it was held that a certain gift over was invalid as creating a perpetuity and in further proceedings in the suit the validity of the gift over was attempted to be re-agitated and their Lordships held that this could not be done. We have, in an earlier portion of our judgment, referred at some length to the circumstances under which the plaintiff withdrew his appeal and we are of the opinion that as a result of the decision by the High Court the plaintiff's right to obtain a personal decree has been expressly reserved and that the defendants cannot be permitted to say that the plaintiff should not now be allowed to claim a personal decree on the ground of *res judicata*, if under the law he is entitled to it. The first sale after which the claim was made for a personal decree was set aside by the High Court. The plaintiff had appealed against the decision of the learned Subordinate Judge disallowing the plaintiff's application for a decree under order XXXIV, rule 6 and the defendants raised a preliminary objection that the appeal had then become infructuous, and when the plaintiff wanted to amend his application they strenuously resisted the same and this Court definitely said that by reason of subsequent events the parties had been relegated to the position which they occupied immediately after the final decree was passed. In our opinion the defendants cannot be permitted to take up

(1) (1921) I.L.R., 48 Cal, 499.

now a contrary position on general principles of law, and if anything has been decided between the parties by this Court it is that the plaintiff has obtained a fresh right to apply.

We now proceed to decide the question whether the plaintiff can obtain a personal decree. Mr. *Panna Lal* contends that under section 55, sub-section (4), clause (b) of the Transfer of Property Act the plaintiff has a charge upon the property sold to the defendants to the extent of the unpaid purchase money and he must confine himself to that property alone; he cannot claim any relief against the person and other property of the defendants. He has, however, to meet the provisions of section 100 of the Transfer of Property Act which provides that "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge." If a charge holder has all the rights of a simple mortgagee, he can, when the net proceeds of the sale have proved insufficient and if the balance is *legally recoverable* from the defendant, claim a personal decree for such amount. It is said that where a charge has been created by operation of law the charge holder is not clothed with the rights of a simple mortgagee *qua* a personal remedy. Reliance is placed on the case of *Corporation of Calcutta v. Arun Chandra Singha* (1); but the facts of that case were entirely different. Their Lordships held that section 67A of the Transfer of Property Act did not apply where a charge has been created under section 205 of the Calcutta Municipal Act. Reference was also made to the judgment of RICHARDS, J., in *Uttam Ishlok v. Phulman Rai* (2); but BANERJI, J., the other member

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(1) (1934) I.L.R., 61 Cal., 1047.

(2) (1905) 2 A.L.J., 379.

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of the Bench, was of a contrary opinion and we feel inclined to agree with his view for the reasons given by him. It is worthy of note that there was an appeal against this decision and although the decision of the Letters Patent Bench proceeded on a different point, STANLEY, C.J., observed that if it were necessary to determine the question of the right of a charge holder to obtain a personal decree, they would have difficulty in resisting the forcible reasoning to be found in the judgment of BANERJI, J. It is conceded that if the plaintiff had brought a suit in the first instance for the recovery of the unpaid purchase money from the defendants personally, there could have been no defence. In the sale deed in favour of the defendants there was an express stipulation that Rs.3,030 was being left with the vendees for payment to one Mool Chand, a creditor of the vendors. In India agreements between two contracting parties are evidenced by the execution of a single document by one of the parties alone and yet, if the contract has been agreed upon, the parties are bound by the rights conferred and the liabilities imposed by the document. The defendants, therefore, must be deemed to have covenanted to pay the sum of Rs.3,030 to the creditor, and as they broke the contract the article applicable would be 116 of the Limitation Act, the document being a registered one, and the period of suit would be six years. Article 111 of the Limitation Act would not be applicable because that applies to a simple case where the vendee has not paid a portion of the purchase money to the vendor and not where he has broken a contract to pay the same to a creditor of the vendor. There can be no doubt that the vendee made himself personally liable and the amount therefore is legally recoverable within the meaning of order XXXIV, rule 6 and the mere fact that a charge also has been created by operation of law does not disentitle the charge holder from pursuing the personal remedy.

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Mr. Harnandan Prasad on behalf of the respondent has referred us to *Raghukul Tilak v. Pitam Singh* (1). This case fully supports the respondent both on the point of *res judicata* and on the question of the plaintiff's right to obtain a personal decree. It was held that where title has passed to the purchaser as the result of the purchase, the purchaser is personally liable for the purchase money under section 55(5), clause (b) of the Transfer of Property Act, irrespective of the personal liability created by the sale deed, and that this personal liability is apart from the liability imposed on the property purchased by him under section 55(4), clause (b). The learned Judges said that where a charge is the result of a contract, there may also be a personal remedy to be found. While discussing the plea of *res judicata*, they observed as follows:

"The question of *res judicata* arises in this way. The plaintiff, when he brought his suit, appended the following prayer as relief (b) to his plaint: 'If the proceeds of the sale be insufficient to pay up the decretal amount due to the plaintiff at the time, he may be authorised to apply for a decree for the balance.' Exception was taken on behalf of the defendants to the reliefs sought by the plaintiff. But nothing specifically was said about the particular relief which we have quoted above. No issue was framed. . . . The learned Subordinate Judge who tried the case does not mention even the existence of this relief in his judgment. He contented himself with passing a decree under order XXXIV, rule 4 of the Civil Procedure Code. The decree that was framed followed the form no. 8, Appendix D to schedule I and gave the plaintiff liberty to apply for a personal decree for the amount of the balance.

"On behalf of the appellant it has been contended that this decree having become final, the plaintiff's right to apply under order XXXIV, rule 6 has been recognized once for all and the decree cannot be departed from.

"We are of opinion that section 11 of the Civil Procedure Code does not in terms apply to this case. The present proceedings are only a part of the original proceedings and it cannot be said that the matter was decided either specifically or

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by implication in a previous suit. The rule of *res judicata* has been applied to subsequent proceedings when the points raised in the subsequent proceedings were raised in the earlier proceedings and were specifically decided. In the circumstances we do not think that we are in a position to apply the rule of *res judicata* and to hold that the plaintiff's right has been settled once for all and in his favour."

The case before us is, if anything, stronger on facts and we also, as we said before, are not prepared to hold that the plaintiff's right has been so settled once for all when the preliminary decree was passed against him. We are, therefore, of the opinion that the plaintiff is entitled to a personal decree and there is no bar either of *res judicata* or of any other principle of law to his obtaining such a decree.

Finally it was contended that the plaintiff's application for the preparation of a personal decree was barred by time. There is no force in this contention. As stated before, the article applicable to the facts of the present case is article 116 of the Limitation Act. The sale deed was executed on the 15th of November, 1915, and the suit was brought within 6 years of that date on the 16th of November, 1921, because the 15th of November, 1921, was a holiday.

For the reasons given above we have come to the conclusion that the decision of the court below is correct and we dismiss this appeal with costs.

REVISIONAL CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Harries

BRITISH INDIA CORPORATION, CAWNPORE (PETITIONER) v. SHANTI NARAIN (OBJECTOR)*

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December, 21

Companies Act (VII of 1913), sections 54, 153—Re-organization of capital—Consolidation of ordinary and deferred shares—Alteration of rights of classes of shareholders laid down in memorandum of association—Provision for such alteration contained in the memorandum itself—Sanction of court not

*Civil Revision No. 27 of 1934.