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they were members of a joint Hindu family with the defendants and were as such entitled to a declaration of their right to zamindari properties and the tenancy holdings owned by the family, held that the suit was maintainable in the civil court as it was based on a cause of action with respect to which adequate reliefs could not be granted by the revenue court: see *Sukhdeo v. Basdeo* (1). Similarly in the present case the revenue court has no jurisdiction to grant adequate relief to the plaintiffs, and therefore the whole suit can be legally tried by the civil court alone and the suit as framed is maintainable in that court. The decision of the civil court on the first issue being incidental and the revenue court having a conclusive jurisdiction to grant a declaration of right, it will be open to the party aggrieved by the civil court decision to institute in the revenue court a declaratory suit under section 121 of the Agra Tenancy Act. We therefore answer both parts of the question put to us in the negative.

APPELLATE CIVIL

*Before Mr. Justice Bennet, Acting Chief Justice, and
 Mr. Justice Verma*

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DURGPAL SINGH (JUDGMENT-DEBTOR) v. GULZARI LAL
 AND ANOTHER (DECREE-HOLDERS)*

Civil Procedure Code, order XXXIV, rule 14—Applicable only where mortgage subsists—Applicability to personal decree under order XXXIV, rule 6—Mortgagee electing to exempt one item of property from the mortgage suit—Sale proceeds of the other items insufficient—Whether the subsequent personal decree can be executed against the exempted item.

In a suit for sale upon a mortgage comprising five items of property the mortgagee exempted one item and asked for a decree as against the other four items only. A decree was passed accordingly and these four items were sold, but the sale proceeds were insufficient to satisfy the decree and the plaintiff then obtained a personal decree under order XXXIV, rule 6 of the

*First Appeal No. 476 of 1935, from a decree of M. M. Seth, Civil Judge of Budaun, dated the 3rd of August, 1935.

(1) (1935) I.L.R. 57 All. 949

Civil Procedure Code. In execution of this decree the mortgagee sought to attach and sell the item of property which he had exempted from the mortgage suit: *Held* that he was competent to do so, and order XXXIV, rule 14 did not stand in his way.

Order XXXIV, rule 14 presupposes that a valid mortgage capable of enforcement subsists; it does not create any bar where the right to sue on the mortgage security no longer subsists. The relinquishment in the mortgage suit of the claim regarding this particular item had the effect, under order II, rule 2(2), of terminating the right to enforce the mortgage against that item, and so order XXXIV, rule 14 could create no bar in respect of that item.

Order XXXIV, rule 14(1) refers to a simple money suit, for it is only in such a case that there could be any question of bringing another suit for sale in enforcement of a mortgage; it cannot apply to a personal decree under order XXXIV, rule 6, because in such a case the suit has already been brought for sale on the mortgage and no question of instituting a suit for sale on the mortgage could any longer arise.

Mr. *B. Malik*, for the appellant.

Mr. *J. Swarup*, for the respondents.

BENNET, A. C. J., and VERMA, J.:—This is an execution first appeal by a judgment-debtor. The facts are that on the 13th of September, 1912, the appellant borrowed Rs.5,000 on a simple mortgage payable in five years from one Gulzari Lal, respondent No. 1. There were five items of property mortgaged, one of which was a zamindari share in mauza Kachhore. Gulzari Lal brought suit No. 138 of 1918 under order XXXIV, rule 4 of the Code of Civil Procedure for the sale of property by enforcement of this mortgage, but in the plaint he asked that the suit should be only against four of the items of property and he exempted the zamindari share in mauza Kachhore. A final decree for sale was passed on the 21st of February, 1922, and the four items of property were sold; some balance remained. On the 9th of April, 1932, the decree-holder obtained a simple money decree under order XXXIV, rule 6. In execution of that simple money decree the decree-holder has now applied for the sale of mauza Kachhore as a part of

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the property of the judgment-debtor. The objection is taken that under order XXXIV, rule 14, the property cannot be sold because it was part of the mortgaged property. Order XXXIV, rule 14, sub-rule (1) states: "Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in order II, rule 2." By a reference to order II, rule 2, we consider that the sub-rule refers to a simple money suit because it is only in such a case that there could be any question of bringing another suit for sale in enforcement of a mortgage. We do not consider that the sub-rule can apply to a simple money decree under order XXXIV, rule 6, because in such a case the suit has already been brought for sale on the mortgage and no question of instituting a suit for sale on the mortgage could arise. The argument of the learned counsel for the appellant is that although the rule may not be intended to apply to a case like the present, still the actual wording of the rule would cover the present case. The present case is an exception to cases under rule 6, because in the present case the suit was not against all the mortgaged property but only against some of it. Such a case is a very rare exception. Rule 6 itself is an exceptional case of a simple money decree. It is most unlikely that the rule could have been intended to provide for the case of an exception to an exception. It is not a correct method of interpretation to apply a rule to a case to which it could not have been intended to apply as shown by the wording of the rule itself.

Order II, rule 2(2) provides: "Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." It is clear, therefore, that as the plaintiff relinquished

his claim in the mortgage suit so far as the share in mauza Kachhore is concerned, the plaintiff cannot now bring any mortgage suit against that share and his right to enforce the mortgage against that share has terminated.

Learned counsel referred to a number of cases, one of which is *Khan Chand v. Ghasita* (1). That ruling was in a somewhat different case where there was a usufructuary mortgage and the plaintiff while in possession sued for a simple money decree. The simple money decree contained certain words: "The plaintiffs will have no title or concern left with the mortgaged property after the passing of this decree." This Court held in the ruling: "All these words in the decree were entered so as to make it certain that the mortgagees may not continue in possession of the property in spite of the money decree. In reality those directions brought an end to the possession of the mortgagees but not to their title to recover money under the mortgage." The Court therefore held that order XXXIV, rule 14 was a bar in that case because the right to sue on the mortgage still subsisted. The Court stated on page 161: "We think that the test applicable to these cases would consist of an inquiry whether the mortgage security did or did not exist at the time the simple money decree was obtained. If it did exist, the provisions of order XXXIV, rule 14 of the Civil Procedure Code must be given effect to. If it did not, then it will be found possible in certain cases to sell the mortgaged property in execution of the money decree." The present case is one where the mortgage security no longer subsists, as under order II, rule 2 the relinquishment prevents the plaintiff from suing on that security against the share in question. Therefore, under this ruling order XXXIV, rule 14 would not be a bar to the sale of this property. The same view has been held in the case of *Sheo Prasad Singh v. Mufassil Bank* (2), where on page

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(1) [1931] A.L.J. 159.

(2) [1929] A.L.J. 958.

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959 it was stated: "Order XXXIV, rule 14 presupposes that a valid mortgage capable of enforcement subsists and that, if the mortgaged property is sold in execution of the simple money decree, the encumbrance created by the mortgage will continue to subsist." Learned counsel for the appellant admits that he cannot produce any ruling where the bar under order XXXIV, rule 14 was ever applied to a simple money decree under rule 6. In the case of *Kishan Lal v. Umrao Singh* (1) it was laid down, following an earlier ruling, that where the mortgage still subsists, order XXXIV, rule 14 bars the sale. The earlier ruling is in the case of *Madho Prasad Singh v. Baij Nath* (2). That was a case where the mortgagee elected to proceed on his personal remedy and to ask for a money decree only against the mortgagor, which he obtained, and it was held that he was barred from bringing the mortgaged property to sale without bringing a mortgage suit as the right to do so still subsisted.

We consider that the order of the lower court is correct, and accordingly we dismiss this execution first appeal with costs.

Before Mr. Justice Collister and Mr. Justice Bajpai

1938
January, 11

GOBIND RAO AND ANOTHER (PLAINTIFFS) v. GOBIND RAO
AND OTHERS (DEFENDANTS)*

Court Fees Act (VII of 1870), schedule I, article 1; schedule II, article 17(iii)—Declaration—Cancellation of instrument—Suit for a declaration that a certain mortgage decree was void and ineffectual—Cancellation of the mortgage deed sought, though not expressly, but in effect—Plaint as a whole may amount to a prayer for cancellation—Ad valorem court fee payable—Civil Procedure Code, section 149—Grant of time by appellate court to pay deficiency, for non-payment of which the plaint had been rejected.

Where a plaintiff asks that a certain decree obtained on a mortgage deed should be declared to be null and void, and

*First Appeal No. 300 of 1934, from a decree of M. A. Nomani, Civil Judge of Gorakhpur, dated the 31st of July, 1934.

(1) (1908) I.L.R. 30 All. 146.

(2) Weekly Notes 1905, p. 152.