

1937

PURAN
CHAND
v.
BABU RAM

In the circumstances I must hold that the reference stands and that therefore the learned Munsif had no jurisdiction to pass the order against which the present application is directed. I am fortified in this conclusion by the decision of a Bench of this Court in the case of *Sheoambar v. Deodat* (1). Learned counsel for the plaintiffs was unable to point to any authority inconsistent with this decision. Furthermore he was unable to cite any decision in support of his contention that under the provisions of order XXIII, rule 1, after a suit has been referred to arbitration and so long as the reference subsists, the referring court may intervene and give the plaintiff in the suit permission to withdraw the suit and bring a fresh suit.

In the result the application is allowed and the order of the learned Munsif is set aside. The record will be returned to the Munsif with a direction to dispose of the case according to law. The applicant is entitled to his costs.

Before Mr. Justice Niamat-ullah and Mr. Justice Ismail

1937
September,
30

RAM SARAN DAS AND ANOTHER (DEFENDANTS) v. BANWARI LAL (PLAINTIFF)*

Civil Procedure Code, order XXXIV, rule 6—Personal decree for mortgage money—Mortgaged property ceasing to be available for sale because mortgage decree set aside on suit by member of mortgagor's joint family—Personal decree can not be passed except under provisions of rule 6—Equitable grounds—Jurisdiction—Civil Procedure Code, section 115—Delay in applying for revision.

Before a final decree for sale on a mortgage was executed it, and the mortgage on which it was passed, were declared invalid at the suit of a member of the joint family to which the mortgagors belonged, the mortgagee decree-holder being a party to the suit. The mortgaged property being no longer available for sale under the decree, the mortgagee then applied under order XXXIV, rule 6 of the Civil Procedure Code for a simple money decree. The court held that order XXXIV, rule 6 did not apply, but it passed a simple money decree on

*Civil Revision No. 86 of 1936.

(1) (1886) I.L.R. 9 All. 168.

equitable considerations: *Held*, that no such decree could be passed except in accordance with the provisions of order XXXIV, rule 6.

Order XXXIV, rule 6 empowers a court to pass a simple money decree in a suit which has been previously concluded by a final decree; there is no other rule of law under which such a simple money decree can be passed. A court can not pass a decree, on equitable grounds, which the law does not expressly empower it to pass. Where a specific provision has been made by law prescribing the conditions in which a decree can be passed, the court can act only within the limits laid down by such law and it is not justified in enlarging its powers by an appeal to equitable considerations.

Bisheshar Nath v. Chandu Lal (1), dissented from.

Ordinarily the High Court does not entertain applications for revision made after undue delay.

Messrs. *C. B. Agarwala* and *L. N. Gupta*, for the applicants.

Mr. *S. B. L. Gaur*, for the opposite party.

NIAMAT-ULLAH and ISMAIL, JJ.:—This is an application in revision under section 115 of the Code of Civil Procedure, and is directed against what purports to be a simple money decree passed in favour of a mortgagee who had obtained preliminary and final decrees for sale on foot of a mortgage, which, however, proved to be infructuous as the result of a suit brought by one of the members of the joint Hindu family of the mortgagors. The facts, so far as they are material for the purposes of the case before us, may be briefly stated.

Ram Saran Das and his son Lachmi Narain, who are the applicants before us, executed a deed of simple mortgage on the 17th of May, 1926, in favour of the plaintiff, opposite party. The latter instituted a suit for the enforcement of the mortgage and obtained a preliminary decree which was in due course followed by a final decree. Before the decree could be executed another son of Ram Saran Das, who had not joined in the execution of the mortgage deed, instituted a suit impugning

1937

 RAM SARAN
 DAS
 v.
 BANWARI
 LAL

1937

RAM SARAN
DAS
v.
BANWARI
LAL

the validity of the mortgage deed and the decrees passed on foot thereof on the usual ground that the debt evidenced by the mortgage deed had not been contracted for a purpose which justified the alienation of joint family property. This suit, to which the mortgagee was a party, was successful. The mortgagee then applied under order XXXIV, rule 6 of the Code of Civil Procedure for a simple money decree. The present applicants, the original mortgagors, objected on the ground that as no sale of the mortgaged property had taken place and as consequently no case of the sale proceeds proving insufficient had occurred, no simple money decree could be passed. The lower court definitely upheld the contention that order XXXIV, rule 6 did not apply, but nevertheless passed a simple money decree in the exercise of its equitable jurisdiction. In doing so the learned Judge relied upon *Bisheshar Nath v. Chandu Lal* (1), in which though the actual decision of the case turned on the question of limitation, the learned Judges held that the court can pass a simple money decree wholly apart from order XXXIV, rule 6, on equitable grounds. The correctness of this view has been seriously challenged before us in revision.

Learned counsel for the opposite party has taken a preliminary objection that no revision lies. It is contended that the simple money decree passed by the lower court for a sum of Rs.4,179-6-0 should have been challenged in an appeal to the District Judge and that if this had been done a second appeal would have lain to this Court. Accordingly, it is said, no revision can lie under section 115 of the Code of Civil Procedure. Learned counsel for the applicants replies that the so-called decree is not a decree as defined in the Civil Procedure Code, the same not having been passed in the suit itself but long after the termination thereof. It is pointed out that according to its definition a "decree" is

(1) (1927) I.L.R. 50 All. 321.

the formal expression of adjudication with regard to any of the matters in controversy in the suit and that the suit having been finally decided by the passing of the final decree, the so-called decree passed by the lower court, which is wholly apart from order XXXIV, rule 6, cannot be considered to be embodying an adjudication with regard to any of the matters in controversy in the suit. As against this it may be said that part of the *ratio decidendi* adopted by the learned Judges in *Bisheshar Nath v. Chandu Lal* (1) is that on an application for a personal decree being made by a mortgagee the suit is reopened and that a simple money decree passed by the court, whether under order XXXIV, rule 6 or otherwise, embodies an adjudication as regards a controversy in the suit. We do not consider it necessary to express a decisive opinion on this part of the case in view of what we are inclined to hold on the principal question involved in the case before us.

That a court can pass a simple money decree, wholly apart from the provisions of order XXXIV, rule 6, is a view which found favour with the learned Judges who decided *Bisheshar Nath v. Chandu Lal* (1). This Court has, however, repeatedly held that a simple money decree under order XXXIV, rule 6 can be passed when and if the sale has taken place and the sale proceeds have proved insufficient for the satisfaction of the mortgage money. Order XXXIV, rule 6 empowers a court to pass a simple money decree in a suit which has been previously concluded by a final decree. There is no other rule of law under which such a simple money decree can be passed. With great respect we point out that a court cannot pass a decree, on equitable grounds, which the law does not expressly empower it to pass. Where a specific provision has been made by law prescribing the conditions in which a decree can be passed, the court can act only within the limits laid down by such law. It is not justified in enlarging its powers by

1937

 RAM SARAN
 DAS
 v.
 BANWARI
 LAL

(1) (1927) I.L.R. 50 All. 321.

1937
 RAM SARAN
 DAS
 v.
 BANWARI
 LAL

an appeal to equitable considerations. This Court has held in several cases that a simple money decree cannot be passed unless the contingency contemplated by order XXXIV, rule 6, has occurred; see for instance, *Bihari Lal v. Bisheshar Dayal* (1), observations in the Full Bench case of *Sahu Radha Krishna v. Tej Saroop* (2), *Darbari Mal v. Mula Singh* (3) and *Babu Lal v. Raghunandan* (4). If a simple money decree can be passed, wholly apart from order XXXIV, rule 6, its provisions are rendered absolutely nugatory. If we accept the correctness of the view taken in *Bisheshar Nath v. Chandu Lal* (5), we feel that we will have to disregard the view taken in the cases noted above, in which the right of a mortgagee to obtain a simple money decree, without an attempt to sell the mortgaged property, was negatived. We think, therefore, that we are justified in not considering *Bisheshar Nath v. Chandu Lal* (5) as good law.

The next question is whether we should set aside the decree passed by the lower court in the exercise of our revisional jurisdiction. Assuming that the preliminary objection, to which we have already referred, is not well founded, we have to consider whether we should interfere with the order passed by the lower court. The suit in which the mortgage and the decrees passed on foot thereof were challenged was decided on the 7th of May, 1934. The mortgagee lost no time in applying to the court for a simple money decree on the 9th of May, 1934. In that application he stated that the preliminary and the final decrees passed in the mortgage suit had been annulled and that the suit had been re-opened. He quoted in his application the case of *Bisheshar Nath v. Chandu Lal* (5) and a ruling of the Lahore High Court to the same effect. The lower court passed a decree relying upon those rulings. It was obviously not in a position to take the view of the law which we have taken.

(1) (1912) 9 A.L.J. 569.

(2) (1929) I.L.R. 52 All. 363.

(3) (1920) I.L.R. 42 All. 519.

(4) [1932] A.L.J. 311.

(5) (1927) I.L.R. 50 All. 321.

The lower court passed the decree on the 14th of May, 1935. The present application for revision was not made till the 26th of February, 1936. Ordinarily this Court does not entertain applications for revision made after undue delay which is manifest in the present case. An affidavit has been filed before us that the applicant Ram Saran Das was in jail all the time; but the other applicant, Lachmi Narain, his son who looked after the affairs of the family, could have acted with greater promptitude. The personal liability of the executants of the mortgage deed apparently subsists. In all the circumstances of the case we do not think this is a fit case in which this Court should interfere in the exercise of its revisional jurisdiction. Accordingly we dismiss this application but make no order as to costs.

1937

RAM SARAN
DAS
v.
BANWARI
LAL

Before Mr. Justice Niamat-ullah and Mr. Justice Ismail

MUKAND SARUP (PLAINTIFF) v. KRISHNA CHANDRA SINGH AND OTHERS. (DEFENDANTS)*

1937
Septem. 21

U. P. Encumbered Estates Act (Local Act XXV of 1934), section 7(1)(a)—Stay of suit—Composite suit on several causes of action and for several reliefs—Should be stayed as regards the causes of action and reliefs in respect of "debts"—Separate trial as regards the other causes of action and reliefs should continue—Civil Procedure Code, order II, rule 6—U. P. Encumbered Estates Act, section 2(a)—"Debt"—Mesne profits, whether "debt"—Civil Procedure Code, section 115—Material irregularity—Staying whole suit instead of a part.

Where the pending suit, to which the provisions of section 7 (1)(a) of the U. P. Encumbered Estates Act relating to the stay of pending suits are to be applied, is a composite suit comprising several causes of action and several reliefs, only some of which relate to "debts" as defined by the Act, the provisions of order II, rule 6 of the Civil Procedure Code should be applied and the court should order separate trial of the suit so far as it relates to the causes of action and reliefs in respect of "debts", and as regards these the suit should be