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defendants second set are not the mortgagors or the representatives of the mortgagors in respect of the plots in suit and the defendants first set are some of the representatives of the mortgagors of the plots in suit and that the entries in the khataunis that the plaintiffs and defendants second set are mortgagors are incorrect.

As the point on which we have allowed the appeal was not taken in the grounds of appeal clearly, we do not consider that any costs should be allowed on account of this ground. We therefore allow the appeal only to the extent indicated above and dismiss the rest of the appeal and direct that the respondents plaintiffs shall obtain costs of the appeal.

Before Justice Sir Edward Bennet and Mr. Justice Verma

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January, 11

SUNDAR LAL AND ANOTHER (OBJECTORS) *v.* BANARSI DAS AND OTHERS (DECREE-HOLDERS)*

Provincial Insolvency Act (V of 1920), section 28(6)—Secured creditor—"Otherwise deal with his security"—Personal decree obtained by mortgagee under order XXXIV, rule 6—Such decree can be executed against property of a discharged insolvent—Such decree not a "debt provable under the Act"—Provincial Insolvency Act, sections 34(2), 44(2).

A personal decree obtained under order XXXIV, rule 6, of the Civil Procedure Code by a secured creditor is not a debt provable in insolvency and an order of discharge cannot affect the rights of the secured creditor to execute such a decree against the property of the discharged insolvent. The words "otherwise deal with his security", in section 28(6) of the Provincial Insolvency Act cover the application of the mortgagee decree-holder under order XXXIV, rule 6, and a secured creditor is entitled by this sub-section to obtain a decree under order XXXIV, rule 6 and to deal with the security by the method allowed by that rule. The order of discharge cannot take away the statutory right of the mortgagee decree-holder under order XXXIV, rule 6.

This right is not affected by any consideration of the sequence of the dates of the mortgage decree, personal decree, adjudication order, order of discharge, execution proceeding, etc. The

*First Appeal No. 405 of 1937, from a decree of Shankar Lal, Civil Judge of Muzaffarnagar, dated the 17th of July, 1937.

secured creditor is entitled to remain apart from the insolvency proceedings and rely entirely on his decree and execution proceedings and he is not in any way barred by any provisions of the Insolvency Act.

Mr. *G. S. Pathak,* for the appellants.

Dr. *K. N. Malaviya,* for the respondents.

BENNET and VERMA, JJ.:—This is an execution first appeal brought by two objectors Sundar Lal and Genda Ram against the nominal decree-holder Banarsi Das and his vendee of the decree, Shambhu Dayal. The facts so far as ascertained are that there was a decree No. 58 of 1924 in the court of the Senior Civil Judge of Ambala in favour of Banarsi Das and the decree was against Jyoti Prasad, Sundar Lal and Genda Ram, sons of Shankar Das, proprietors of the firm Shankar Das Jyoti Prasad, residents of Ambala. The final mortgage decree under order XXXIV, rule 5 was dated 20th October, 1924. On that decree there was a sale of the property mortgaged and the date of sale is not known. The sale of the property did not produce the full amount of the decree and a certificate has been sent from the Punjab court to the District Judge of Meerut for the amount of Rs.15,046-4. An application is made by the decree-holder that this amount should be realized under order XXXIV, rule 6 by a personal decree against certain property in Qasba Kairana in Meerut district, the property consisting of one haveli and one compound with certain houses situated there. An objection was taken by the present appellants in which they stated that they applied to be declared insolvents on 28th May, 1926, in Insolvency Case No. 34 of 1926 and were declared insolvents. It is further stated that there was an order of discharge by the insolvency court on 5th May, 1931. The objectors claim that they have one-third share in the house and compound and that that share is not liable to attachment and sale in satisfaction of the decree.

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The date of the decree under order XXXIV, rule 6 is given by the court below as 4th April, 1932, but is stated by the decree-holder in his reply to be 29th June, 1932. The court below in a very brief order held that the objection should be dismissed. The order of adjudication has not been produced but there is the order of discharge dated 5th May 1931. This order is in insolvency file No. 34 of 1926 and it is not quite clear from the order whether the firm of Shankar Das Jyoti Prasad was or was not concerned in the insolvency or whether it was only another firm Genda Ram Sundar Lal. If there had been any merits in the point of law this would have required further decision by the court below on production of the actual orders of adjudication. The order sets out that the assets were only sufficient to cover a small fraction in the rupee, that the discharge was granted but its operation was suspended for a further period of two years and that unless the receiver considered that there was any prospect of raising a substantial sum by sale of the Kairana property this should now be released. For the purpose of this appeal we may assume that there was an adjudication of the judgment-debtors as insolvents and that this order was one of release of those judgment-debtors from the insolvency. The point which arises for decision is whether the decree-holder is entitled to proceed under his decree of order XXXIV, rule 6 by the attachment and sale of the property of the judgment-debtors, assuming them to have been insolvents.

It will be noted that the insolvency order of discharge was dated 5th May, 1931, and was suspended for a period of two years and that the decree under order XXXIV, rule 6 was subsequent, on 4th April, 1932. But we do not think that the case need be decided on any point of time in regard to these debts. The argument for appellants was that section 34 of the Provincial

Insolvency Act, Act V of 1920, provides as follows:

"(1) Debts which have been excluded on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act."

"(2) Save as provided by sub-section (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act."

Appellants claimed that the decree under order XXXIV, rule 6 is a personal decree arising out of the mortgage, which mortgage was a debt to which the debtors were subject when they were adjudged insolvents, and therefore that debt was a debt coming under section 34 (2) as a debt provable under the Act. Learned counsel next referred to section 44(2) which states: "Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act." He claimed then that this sub-section provides that the order of discharge releases the insolvent from all debts provable under the Act. The debt in question is not one of the debts mentioned in sub-section (1) of section 44. The claim, therefore, for the appellants was that by virtue of these two sections the personal decree would be a debt provable under the Act, and being such a debt, the insolvent would be discharged from liability for that debt by the order of discharge.

Secured creditors are treated by the Act as follows. In section 2(1) (*e*) there is a definition which states: " 'Secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor or any part

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thereof as a security for a debt due to him from the debtor."

Section 28(2) provides: "On the making of an order of adjudication ..... no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding ....." This is the section which bars creditors from execution proceedings. Section 28(6) provides: "Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." This sub-section states that secured creditors are exempted from the operation of sub-section (2).

Learned counsel for the appellants argued that the effect of sub-section (6) was merely to allow a secured creditor to realise his security by execution proceedings of sale of the mortgaged property and that that sub-section did not authorise a secured creditor to obtain a decree under order XXXIV, rule 6, and proceed against other property of the judgment-debtor. Now the words used in this sub-section are, "to realise or otherwise deal with his security." The words "realise his security" are no doubt applicable to proceedings by auction sale. The interpretation placed for the appellants on the words "otherwise deal with his security" was that this allowed the secured creditor to sell the security. We do not think that the expression bears this meaning because section 28 does not prohibit any creditor, secured or otherwise, from transferring or selling his security during the pendency of insolvency proceedings. What sub-section (2) prevents is the execution proceedings or other proceedings by a creditor, and sub-section (6) provides that a secured creditor is exempt from that bar imposed by sub-section (2). In

our opinion the words "otherwise deal with his security" do cover the application of the decree-holder under order XXXIV, rule 6, and a secured creditor is entitled by this sub-section to obtain a decree under order XXXIV, rule 6 and to deal with the security by the method allowed by that rule. The argument of learned counsel then resolved itself into this that although a secured creditor could proceed under order XXXIV, rule 6, from the time of the adjudication till the time of discharge, still by virtue of the language used in section 44(2) the order of discharge would release the insolvent from such proceedings. We do not think that the section can possibly bear this meaning. It is to be noted that section 47 makes provision for a secured creditor to come under the Act if he chooses, but the provision is optional and if the secured creditor does not choose to come under the Act and apply in the insolvency court he may remain apart and rely upon his security in ordinary proceedings by suit and execution.

The view which we take has been taken by a Bench of this Court in *Niaz Ahmad* v. *Phul Kunwar* (1). In that case there was a very similar proceeding where a mortgagee applied under order XXXIV, rule 6 and it was held that the debt due to a secured creditor was not a debt provable in insolvency and an order of discharge could not affect the rights of the secured creditor and further that the order of discharge could not take away the statutory right of the decree-holder under order XXXIV, rule 6. It is true that in that case there was a reference to the dates of various events but we do not think that this question of dates is important. In our view the secured creditor is entitled to remain apart from the insolvency proceedings and rely entirely on his decree and execution proceedings and he is not in any way barred by any provisions of the Insolvency Act.

For these reasons we dismiss this execution first appeal with costs.

(1) (1931) I.L.R. 54 All. 428.