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in effect renounced his tenancy right and was now barred from asserting it. This plea was rejected both by the Second Munsif and by the Subordinate Judge and was disregarded in the judgment of the Chief Court of Oudh. Their Lordships are of opinion that there is no substance in the contention. A plea founded on the Limitation Act has also properly been repelled.

The result is that their Lordships will humbly advise His Majesty that the judgment of the Chief Court of Oudh be reversed and the judgment of the Second Munsif, Lucknow, as affirmed by the Subordinate Judge, Mohanlalganj, be restored. The appellant will have his costs here and below.

Solicitors for appellant :—*T. L. Wilson & Co.*

FULL BENCH.

Before Mr. Justice Wazir Hasan, Chief Judge, Mr. Justice Muhammed Raza and Mr. Justice Bisheshwar Nath Srivastava.

1930 *May*, 7.

SHYAM BEHARI (APPELLANT) *v.* MUSAMMAT MOHANDEI (RESPONDENT).*

Civil Procedure Code (Act V of 1908), order XXXIV, rule 6—Personal decree under order XXXIV, rule 6, when obtainable—Decree for sale on foot of mortgage—Property not sold under that decree under order XXXIV, rule 5—Application for personal decree under order XXXIV, rule 6 where no sale in pursuance of order XXXIV, rule 5, whether maintainable.

Held, that on an interpretation of order XXXIV, rule 6 of the Code of Civil Procedure, there can be no doubt that an application for a personal decree under that rule is not maintainable unless a sale in pursuance of order XXXIV, rule 5 of the Code of Civil Procedure has as a matter of fact taken place.

*Second Civil Appeal No. 348 of 1929, against the decree of I. M. Qidwai, District Judge of Gonda, dated the 7th of September, 1929, confirming the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 27th of April, 1929.

Jeuna Bahu v. *Parmeshwar Narayan Mahtha* (1), distinguished. *Darbari Lal* v. *Mula Singh* (2), and *Chand Mall* v. *Ban Behari Bose* (3), relied on. *Sheo Din* v. *Bhawani Bakhsh* (4), *Ram Raghubir* v. *Imami Begam* (5), *Brij Behari Lal* v. *Indarpal Singh* (6), *Syed Wasi Ali* v. *Jang Bahadur Singh* (7), *Adhar Chandra Noskar* v. *Sarnwamoyi Dasi* (8), and *Sahu Bisheshar Nath* v. *Chandu Lal* (9), referred to.

The case was originally heard by a Bench consisting of the Hon'ble the Chief Judge and Mr. Justice Muhammad Raza, who, considering the question involved to be of importance referred it to a Full Bench for decision. The referring order of the Bench is as follows :—

HASAN, C. J. and RAZA, J. :—The circumstances of this case are as follows :—

The appellant obtained a decree for sale on the 25th of September, 1922, on the foot of a mortgage of the 4th of March, 1916. The decree was made final on the 8th of September, 1923, but before the appellant could proceed to bring the mortgaged property to sale in pursuance of his decree the mortgaged property was sold in the year 1927 under another mortgage decree held by a prior mortgagee. It may be mentioned that the decree obtained by the prior mortgagee was one to which the appellant was a party. On the 23rd of April. 1928. the appellant made an application to the court which had passed the mortgage decree in his favour for a decree under order XXXIV, rule 6 of the Code of Civil Procedure for the amount of the mortgage money to be recovered from the defendant-respondent otherwise than out of the mortgaged property. Originally the application was rejected on the ground of bar of limitation but in appeal the order of rejection was set aside and now

(1) (1918) L.R., 46 I.A., 294.
(2) (1920) I.L.R., 42 All., 519.
(3) (1923) I.L.R., 50 Calc., 718.
(4) (1911) 14 O.C., 62.
(5) (1909) 14 O.C., 217.
(6) (1928) 23 O.C., 145.
(7) (1915) 2 O.L.J., 614.
(8) (1928) 32 C.W.N., 1160.
(9) (1927) 25 A.L.J., 1042.

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both the lower courts have dismissed the application on the ground that it does not lie having regard to the terms of rule 6 of order XXXIV of the Code of Civil Procedure. The chief reason for the view taken by the courts below is that there has been no sale under the appellant's mortgage decree and consequently the requirements of rule 6 of order XXXIV of the Code of Civil Procedure are not fulfilled. There are a large number of decisions on the point raised by the courts below and they are conflicting in their nature. There has been no decision of this Court on the point. We, therefore, think that the question raised is one of sufficient importance to be decided by a Full Bench of this Court. We accordingly refer the following question to such a Bench for decision :—

"Is the application of the 23rd of April, 1928 maintainable in the circumstances of this case?"

Mr. *L. S. Misra*, for the appellant.

Mr. *H. D. Chandra*, for the respondent.

HASAN, C. J. RAZA, and SRIVASTAVA, JJ. :—The question referred to the Full Bench for decision is :—

Is the application of the 23rd of April, 1928, maintainable in the circumstances of this case?

Now the circumstances are as follows :—The appellant obtained a decree for sale of immoveable property on the 25th of September, 1922, on the foot of a mortgage of the 4th of March, 1916. The decree was made final on the 8th of September, 1923, but before the appellant could proceed to bring the mortgaged property to sale the property was sold in the year 1927 in pursuance of another decree for sale in favour of a mortgagee prior to the appellant. The appellant was a party to the decree of the prior mortgagee. On the 23rd of April, 1928, the appellant made the application, to which the question refers for a personal decree against the mortgagaor under order XXXIV, rule 6, of the Code of Civil Procedure for the amount of the mortgage money. In the

first instance the application was rejected on the ground that it was barred by limitation but on appeal this order was set aside and now both the lower courts have dismissed the application on the ground that it was not maintainable because there had been no sale under the appellant's mortgage decree and consequently the requirements of rule 6 of order XXXIV, of the Code are not fulfilled.

The question, therefore, which is covered by the reference and which we have to decide, is as to whether the view taken by the courts below is correct or not. We have heard arguments at great length in this case and have also taken time to consider our judgment. On behalf of the appellant the following cases were cited :— *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (1); *Sheo Din* v. *Bhawani Bakhsh* (2); *Ram Raghubir* v. *Imami Begam* (3); *Brij Behari Lal* v. *Indarpal Singh* (4); *Syed Wasi Ali* v. *Jang Bahadur Singh* (5); and *Adhar Chandra Naskar* v. *Sarnwamoyi Dasi* (6).

Before proceeding to give our answer to the question under reference we want to make it perfectly clear that we do not wish to express our opinion on any question other than the question as to whether the application which purports to have been made under order XXXIV rule 6 of the Code of Civil Procedure is or is not maintainable having regard to the sole fact that no sale of the mortgaged property in pursuance of the decree passed in favour of the appellant on the 8th of September, 1923, had taken place. The reason for making this observation is that it was argued on behalf of the appellant that the relief for a personal decree could be granted to the appellant independently of the provisions of rule 6 of order XXXIV, of the Code of Civil Procedure and in support of the argument reliance was placed on

(1) (1918) L.R., 46 I.A., 294.
(2) (1911) 14 O.C., 62.
(3) (1909) 14 O.C., 217.
(4) (1920) 23 O.C., 145.
(5) (1915) 2 O.L.J., 614.
(6) (1928) 32 C.W.N., 1160.

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a recent decision of a Bench of the High Court at Allahabad in the case of *Sahu Bisheshar Nath* v. *Chandu Lal* (1).

Hasan, C. J. Raza and Srivastava, JJ.

The decision of their Lordships of the Judicial Committee in the case of *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (2), does not in our opinion support the view that a personal decree in pursuance of the provisions of rule 6 of order XXXIV, of the Code can be made even where no sale under the final decree has as a matter of fact taken place. All that was decided in that case was that a decree of the nature contemplated by rule 6 could be made in anticipation of the sale directed to take place by the terms of the preliminary decree; and as a matter of fact, before action was taken under section 90 of the Transfer of Property Act then in force, a sale had taken place. As regards the other cases cited by the learned Counsel for the appellant it must be admitted that they support the argument that a decree under rule 6 of order XXXIV, could be made where the mortgaged property is not available for sale for some reason or another and thus no sale as a matter of fact takes place. This view is supported in the judgments of those cases on some equitable principle and analogy is taken generally from the principle that a mortgagee has a right to abandon his security in part or in whole and proceed to realize the debt either from the person or from other properties of his debtor. We think, however, that in a case of the nature which we have before us we have only to interpret the provisions of rule 6 of order XXXIV of the Code of Civil Procedure and to give effect to those provisions. That the appellant may have a right in law or in equity to the relief of a personal decree outside the provisions of that rule is a question which, as we have already said, we are not called upon to decide. With great respect to the learned Judges who decided the cases mentioned above, it seems

(1) (1927) 25 A.L.J., 1042. (2) (1918) L.R., 46 I.A., 294.

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to us that they felt themselves free to disregard the requirements of rule 6 as stated therein and not to interpret it. We are of opinion that we are not free to do so.

Hasan, C. J Raza and Srivastava. JJ.

As a pure question of interpretation there can be no doubt that an application for a personal decree under order XXXIV, rule 6 of the Code of Civil Procedure is not maintainable unless a sale in pursuance of the preceding rule has as a matter of fact taken place. This is the view which has recently been taken by a Bench of the High Court at Allahabad in *Darbari Lal* v. *Mula Singh* (1). In the case of *Chand Mall* v. *Ban Behari Bose* (2), MOOKERJEE and RANKIN, JJ. (now Sir GEORGE RANKIN, C.J.), after quoting rule 6 of order XXXIV, of the Code of Civil Procedure said :—

> "It is plain that the expression 'any such sale' has reference to rule 5, sub-rule (2), which ordains that if payment is not made as directed by the preliminary decree, the court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4. Consequently, before the plaintiff can invoke the aid of the provisions of rule 6, he must establish that the mortgaged properties have been sold as contemplated by sub-rule (2) of rule 5."

We think that the quotation given above, well expresses, if we may respectfully say so, the view which we take on the question of the interpretation of rule 6. We are not concerned with the actual decision in that case nor with the actual decision which may be given in the present case by the courts below or by the Bench from which this reference has come on any ground other

(1) (1920) I.L.R., 42 All., 519. (2) (1923) I.L.R., 50 Calc., 718.

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than the interpretation of rule 6 of order XXXIV, of the Code of Civil Procedure. Accordingly we answer the question in the negative.

REVISIONAL CRIMINAL.

Before Mr. Justice A. G. P. Pullan.

1930 *May*, 19.

LACHHMAN AND OTHERS (ACCUSED-APPLICANTS) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY).*

Gambling Act (III of 1867), sections 3 and 4.—Diwali *gambling, when an offence.*

It is true that the law will not countenance gambling even at *Diwali* if it is in contravention of the Gambling Act, and if such gambling takes place in a public place or if the owner of the premises is making a profit out of the gambling the conviction will not be illegal. But where in such a case the only evidence of anything being done in contravention of the Gambling Act was that the owner of the house had in front of him a small pot containing a few annas and there was no reason whatever for supposing that this represented his profits or that it was what is known as *nal* it may very well have been the small sum which he had won or which be proposed to stake, it was an ordinary case of *Diwali* gambling in a private house and no offence was committed under the Gambling Act. *Ram Shankar* v. *King-Emperor* (1), and *King-Emperor* v. *Shankar Dayal* (2), referred to.

The festival of *Diwali* is recognized by all Hindus as a time when gambling is not only permissible but praiseworthy and the law has never interfered with this practice as such and it is highly undesirable to issue warrants to the police in order that they may interfere with persons engaged in *Diwali* gambling as it encourages the police to run in numbers of perfectly innocent persons in order to get a reward.

Mr. *J. N. Prasad Kapoor*, for the accused.

The Assistant Government Advocate (*Mr. H. K. Ghose*), for the Crown.

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*Criminal Reference No. 22 of 1930.

(1) (1916) 20 O.C., 4. (2) (1922) 9 O.L.J., 667.