

FULL BENCH

Before Mr. Justice Muhammad Raza, Mr. Justice
E. M. Nanavutty and Mr. Justice H. G. Smith

MAQBUL AHMAD (OBJECTOR-APPELLANT) *v.* DURGA
PRASAD AND ANOTHER (DECREE-HOLDERS-RESPONDENTS)*

1933
April, 29

Civil Procedure Code (Act V of 1908), Order XXXIV, rule 6, Schedule I—Lunatic—Guardian of property of lunatic—Guardian executing mortgage of portion of lunatic's property with permission of the District Judge—Mortgage containing covenant about personal liability—Mortgagee's suit for sale on basis of mortgage also praying for preservation of his right to a personal decree—Claim admitted by guardian—Suit decreed by court—Sale-proceeds insufficient to pay up the decree—Plaintiff, whether entitled to a personal decree under Order XXXIV, rule 6.

Where the guardian of a lunatic appointed under the Lunacy Act executed a simple mortgage of a share of the zamindari property of the lunatic with the order of the District Judge and after the expiry of the period fixed for payment the mortgagee brought a suit for sale on the basis of his mortgage deed and in the plaint also prayed that should the sale-proceeds be found insufficient to pay the amount due to him, his right for obtaining a personal decree for the balance be preserved and the guardian admitted the claim of the plaintiff and therefore the court decreed the plaintiff's claim and a preliminary decree was prepared according to form no. 4 given in Appendix D of the Code of Civil Procedure (Act V of 1908) and on sale of the mortgage property the sale-proceeds were found insufficient to pay up the decretal amount and then the plaintiff applied for a personal decree for balance under Order XXXIV, rule 6, schedule I of the Code of Civil Procedure, *held*, that the defendant having admitted the claim there was no necessity for making any adjudication in respect of the plaintiff's right to a personal decree and so the decree was correctly passed and the defendant having preferred no appeal against the decree on the expiration of the period of limitation within which an appeal could be filed, the decree became final and the defendant was precluded under section 97 from disputing its correctness and the insertion of the clause relating to a decree over in the preliminary decree could not be disputed afterwards.

*Second Civil Appeal No. 377 of 1931, against the decree of Chaudhri Akbar Husain, District Judge of Sitapur, dated the 15th of May, 1931, reversing the decree of Sheikh Mohammad Baqir, Additional Subordinate Judge of Sitapur, dated the 3rd of February, 1931.

1933

MAQBUL
AHMAD
v.
DURGA
PRASAD

Lala v. Amir Haider Khan (1), *Ram Nath v. Nageshwar Singh* (2), and *Suraj Bahsh v. Munno Bibi* (3), relied on. *Waghela Rajsanji v. Shekh Masludin* (4), *Swarath Ram, Ram Saran v. Ram Ballabh* (5), and *Gaya Prasad v. Musammat Maharaj Kuar* (6), referred to.

The case was originally heard by a Bench consisting of SRIVASTAVA and NANAVUTTY, JJ., who referred certain questions of law for decision to a Full Bench. The referring order of the Bench is as follows:

1932

December, 5

SRIVASTAVA and NANAVUTTY, JJ.:—The defendant, Maqbul Ahmad, is a lunatic. His brother Sayid Ahmad was appointed his guardian under the Lunacy Act. On the 28th of August, 1917, Sayid Ahmad with the permission of the District Judge executed a mortgage deed for Rs. 1,900 in favour of the plaintiffs in order to raise money for payment of certain debts which had been incurred by Maqbul Ahmad's father and Maqbul Ahmad himself and for other expenses.

The plaintiffs instituted a suit for sale on foot of the mortgage deed. The plaint also contained a prayer that if the sale-proceeds be not sufficient to pay the amount due to the plaintiffs, then the plaintiffs' right for obtaining a decree for the rest be preserved and a decree in respect thereof be passed in favour of the plaintiffs. Saiyid Ahmad admitted the claim and on this admission the trial court passed judgment decreeing the plaintiffs' claim for sale of the mortgaged property. Nothing was said in the judgment about the prayer for a decree over. In pursuance of this judgment, a decree was prepared in the office on the prescribed printed form No. 4, one of the clauses of which provided that "in case the net proceeds of the sale were found insufficient . . . the plaintiff should be at liberty to apply for a personal decree . . ."

The mortgaged property was sold but the proceeds were found insufficient to pay off the judgment debt.

(1) (1929) 6 O.W.N., 969.

(3) (1929) 6 O.W.N., 974.

(5) (1925) I.L.R., 47 All., 784.

(2) (1930) I.L.R., 6 Luck., 132.

(4) (1887) L.R., 14 I.A., 89.

(6) (1904) 7 O.C., 46.

The plaintiffs thereupon made an application under Order XXXIV, rule 6 of the Code of Civil Procedure praying for a personal decree for the balance of the amount due with future interest against the defendant-judgment debtor, Maqbul Ahmad. The application was contested on the ground that the plaintiffs were not entitled in law to get a personal decree against the defendant, who is a lunatic. The defendant also asked that the preliminary decree should be amended by deleting the clause relating to a personal decree, as no adjudication in respect of it had been made and it was not in accordance with the judgment.

1933

MAQBUL
AHMAD
v.
DURGA
PRASAD

*Srivastava
and Nana-
vatty, JJ.*

The trial court allowed the amendment and ordered the clause in question to be deleted. It also held that the guardian of the lunatic had no authority to enter in the mortgage deed a personal covenant on behalf of his ward making the other property of the ward liable and that the plaintiffs were not, therefore, entitled to any personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure. The application was accordingly dismissed. On appeal the learned District Judge of Sitapur held that the clause in the preliminary decree regarding the decree-holders' right to obtain a decree over was not inconsistent with the judgment and that the order of the lower court allowing amendment was, therefore, improper. He also held that the plaintiffs were entitled to a decree under Order XXXIV, rule 6 of the Code of Civil Procedure, though the decree could not be executed by the arrest of the judgment-debtor. He accordingly allowed the appeal and ordered a decree to be drawn up under Order XXXIV, rule 6 of the Code of Civil Procedure.

The judgment-debtor has appealed to this Court against this order of the learned District Judge. The two contentions urged in the appeal are (1) that the trial court having made no adjudication in respect of the plaintiffs' right to a personal decree, the learned

1933

MAQRUL
AHMAD
v.
DURG
PRASAD

*Srivastava
and Nona-
vally, JJ.*

Subordinate Judge was right in ordering the amendment of the preliminary decree by deletion of the clause relating to the decree over and (2) that the guardian of the lunatic was not competent to enter into a personal covenant on behalf of his ward and even if he did so, no decree under Order XXXIV, rule 6, could be passed against the lunatic.

The learned counsel for the appellant has relied on the decisions in *Waghela Rajsanji v. Shekh Masludin* (1), *Swarath Ram, Ram Saran v. Ram Ballabh* (2) and *Gaya Prasad v. Musammam Maharaj Kuar* (3) in support of the proposition that the guardian of a minor whose position is analogous to that of a lunatic is not competent to make any covenant imposing a personal liability on the ward. The learned counsel for the decree-holders respondents while admitting this proposition, maintains that it has no application to the present case inasmuch as the mortgage has been executed with the permission of the District Judge and the relief now claimed follows as a necessary result from the said mortgage. He also relies on the stipulation in the said mortgage that in the event of the mortgaged property being found insufficient the mortgagee would have the right to realize the mortgage money by sale of other property belonging to the lunatic. Counsel for both parties admitted before us that they have been unable to find any cases bearing directly on either of the two questions stated above. We are of opinion that under the circumstances and in view of the importance of the questions, they should be decided by a Full Bench. We accordingly refer the following two questions for decision to a Full Bench under section 14(1) of the Oudh Courts Act:

(1) whether in the circumstances of this case, the insertion of the clause relating to a decree over in the preliminary decree is correct or not, and

(1) (1887) L.R., 14 I.A., 89. (2) (1925) I.L.R., 47 All., 784.

(3) (1904) 7 O.C., 46.

(2) whether in the circumstances stated above a decree under Order XXXIV, rule 6, can be passed against the lunatic.

Mr. *Mohammad Ayub*, for the appellant.

Messrs. *Ghulam Hasan* and *S. C. Das*, for the respondents.

RAZA, NANAVUTTY and SMITH, JJ.:—The following two questions have been referred by a Bench of this Court to the Full Bench for decision under section 14(1) of the Oudh Courts Act:

(1) whether in the circumstances of this case, the insertion of the clause relating to a decree over in the preliminary decree is correct or not, and

(2) whether in the circumstances stated above a decree under Order XXXIV, rule 6, can be passed against the lunatic.

The facts of the case are as follows:

The defendant, *Maqbul Ahmad*, is a lunatic. His brother, *Saiyid Ahmad*, was appointed his guardian and manager of his property under the Lunacy Act. On the 28th of August, 1917, *Saiyid Ahmad*, with the permission of the District Judge of Sitapur, executed a simple mortgage in respect of a certain zamindari share, belonging to the lunatic, in favour of the plaintiffs, *Durga Prasad* and *Debi Dayal*, for Rs.1,900 bearing interest at Rs.7-8-0 per cent. per annum with six-monthly rests. The mortgage was executed in order to raise money for payment of certain debts which had been contracted by *Maqbul Ahmad's* father and *Maqbul Ahmad* himself, and for other expenses. The mortgage was to be paid off in seven years. However, nothing was paid, and the cause of action accrued to the plaintiffs on the 28th of August, 1924. On the 30th of November, 1925, they sued to recover Rs.3,488-6-6 by sale of the mortgaged property. The plaint also contained a prayer that should the sale-proceeds be

1933

MAQBUL
AHMAD
v.
DURGA
PRASAD

*Srivastava
and Nana-
vutty, JJ.*

1933

MAQBUL
AHMAD
v.
DURGA
PRASAD

*Srivastava
and Nanav-
tully, JJ.*

found insufficient to pay the amount due to the plaintiffs, their right for obtaining a decree for the balance be preserved, and a decree in respect thereof be passed in their favour. Saiyid Ahmad admitted the claim on the date fixed for hearing, and on his admission the trial court passed a decree on the 8th of July, 1926. The decree in question was passed exactly in the form laid down in decree No. 4, appendix (D) of Act V of 1908 of the Code of Civil Procedure. It was declared by this decree that if the proceeds of the sale were insufficient to pay the amount due to the plaintiffs and subsequent interest and costs in full, the plaintiffs should be at liberty to apply for a personal decree for the amount of the balance. The mortgaged property was sold on the 20th of May, 1930, in execution of the decree, for Rs.693 only. The plaintiffs then applied for a personal decree for the balance against the defendant under Order XXXIV, rule 6, Schedule I of the Code of Civil Procedure on the 21st of July, 1930. The application was contested on the ground that the plaintiffs were not entitled in law to get a personal decree against the defendant, who is a lunatic. The defendant also asked that the preliminary decree should be amended by deleting the clause relating to a personal decree, as no adjudication in respect of it had been made and it was not in accordance with the judgment. The trial court allowed the amendment and ordered the clause in question to be deleted. It also held that the guardian of the lunatic had no authority to enter in the mortgage-deed a personal covenant on behalf of his ward making the other property of the ward liable, and that the plaintiffs were not, therefore, entitled to any personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure. The plaintiffs' application was therefore dismissed. On appeal the learned District Judge of Sitapur held that the clause in question in the preliminary decree was not inconsistent with the judgment, and the order of the lower court, allowing

1933

 MA QEBUL
 AHMAD
 v.
 DURGA
 PRASAD

*Srivastava
 and Nana-
 vutty, JJ.*

amendment, was, therefore, improper. He held further that the plaintiffs were entitled to a decree under Order XXXIV, rule 6 of the Code of Civil Procedure, though the decree could not be executed by the arrest of the judgment-debtor. The result was that he allowed the appeal, and ordered a decree to be drawn up under Order XXXIV, rule 6 of the Code of Civil Procedure. The defendant then appealed to this Court against the order of the learned District Judge of Sitapur.

The two contentions urged in the appeal are :

(1) that the trial court having made no adjudication in respect of the plaintiffs' right to a personal decree, the learned Subordinate Judge was right in ordering the amendment of the preliminary decree by deletion of the clause relating to the decree over, and

(2) that the guardian of the lunatic was not competent to enter into a personal covenant on behalf of his ward, and even if he did so, no decree under Order XXXIV, rule 6, could be passed against the lunatic.

In our opinion there is no substance in these contentions and they must be overruled. The plaintiffs had prayed for certain reliefs, including the relief for a personal decree. The plaintiffs' claim was admitted by the defendant's guardian, who made the following statement on the 8th of July, 1926: "I do not contest the suit. It is a true claim. It may be decreed". There was thus no occasion or necessity for making any adjudication in respect of the plaintiffs' right to a personal decree. The learned trial Judge decreed the suit with costs, and he was perfectly right in doing so. Nothing else could be done in the circumstances of the case. The entire claim was thus decreed by the learned trial Judge, and it must be held that in decreeing the suit in this way, he granted all the reliefs prayed for in

1933

MAQBUL
AHMAD
v.
DURGA
PRASAD

*Srivastava
and Nana-
vutty, JJ.*

the plaint. One of the reliefs was the relief for a personal decree, as is stated above. The relief in question, thus decreed by the learned trial Judge, was properly entered in the decree dated the 8th of July, 1926. In our opinion, the learned District Judge was perfectly right in holding that the clause in the preliminary decree regarding the decree-holders' right to obtain a decree over was not inconsistent with the judgment, and the order of the learned Subordinate Judge allowing the amendment was therefore improper. The defendant, who is the appellant here, preferred no appeal against the decree, and on the expiration of the period of limitation within which an appeal could be filed, the decree became final against him. He is now precluded from disputing the correctness of the preliminary decree upon that point.

It was held by a Bench of this Court in *Lala v. Amir Haider Khan* (1) that Order XXXIV, rule 6 of the Code of Civil Procedure reproduces the effective portion of the old section 90 of the Transfer of Property Act, and the words used in Decree Form No. 4 are intended to give effect to Order XXXIV, rule 6. The preliminary decree contemplated by that Order means that if the sale-proceeds are insufficient, the plaintiffs then can take out a personal decree against the defendants for the balance, which provision gives the plaintiffs an actual right, the existence of which is detrimental to the defendant. The defendant is thus aggrieved by that portion of the preliminary decree, and if he takes exception to that portion of the decree, he has to appeal against the preliminary decree within the period of limitation, and if he does not do so, he is subsequently precluded under the provisions of section 97 of the Code of Civil Procedure from disputing the correctness of the preliminary decree upon that point. This ruling was relied on in another case *Suraj Bakhsh v. Munno Bibi* (2).

(1) (1929) 6 O.W.N., 969.

(2) (1929) 6 O.W.N., 974.

In *Ram Nath v. Nageshwar Singh* (1), it was held by a Full Bench of this Court (BISHESHWAR NATH, J., dissenting) that a preliminary decree for sale on a mortgage under Order XXXIV, rule 6 of the Code of Civil Procedure passed exactly in the form of decree laid down in No. 4 of Appendix D of Act V of 1908, declaring that "if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance", constitutes an adjudication which is detrimental to the defendant, and which must be regarded as awarding the plaintiff a personal decree in the event of the proceeds of the sale being insufficient, but merely leaving it open to him to apply for a personal decree in such event, and if a party aggrieved by a preliminary decree does not appeal from it, he is, under section 97, precluded from disputing its correctness afterwards. If a court passes a composite decree combining a decree for sale and a personal decree, the decree is valid, and the personal decree though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt.

We find nothing objectionable in the decree passed by the trial court on the 8th of July, 1926. The insertion of the clause relating to a decree over in the preliminary decree is quite correct in the circumstances of the case. The decree has become final against the defendant, and he is now precluded from disputing the correctness of the decree upon that point, as is stated above.

Therefore, our answer to the first question is as follows:

In the circumstances of this case, the insertion of the clause relating to a decree over in the preliminary decree is correct.

1933

 MAQBUL
 AHMAD
 v.
 DURGA
 PRASAD

*Srivastava
 and Nana-
 vutty, JJ.*

1933

MAQBUL
AHMAD
v.
DURGA
PRASAD

*Srivastava
and Sana-
vathy, JJ.*

The second question also must be answered in the affirmative. The net proceeds of the sale are found to be insufficient to pay the amount due to the plaintiffs. The decree declaring "that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the plaintiffs shall be at liberty to apply for a personal decree for the amount of the balance" has become final against the defendant, who is now precluded from disputing the correctness or validity of the decree. The balance is, of course, legally recoverable from the defendant otherwise than out of the property sold. In these circumstances, we see no reason why a decree under Order XXXIV, rule 6, should not be passed against the defendant on the plaintiffs' application. In our opinion, the question whether the guardian of the defendant was or was not competent to make any covenant imposing a personal liability upon the defendant is of a purely academic interest in the circumstances of the case. The decree has become final against the defendant, and he is now precluded from disputing its correctness upon that point. The mortgage had been executed with the permission of the District Judge, and the relief now claimed follows as a necessary result from the said mortgage and the decree dated the 8th of July, 1926.

These are our answers to the questions referred to us for decision under section 14(1) of the Oudh Courts Act. We answer both the questions in the affirmative and in favour of the plaintiffs.