

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge, and Mr. Justice Ziaul Hasan

MAHRAJ RAM BILAS (APPELLANT) v. SRIPAL SINGH
(RESPONDENT)*

1934
August, 30

Civil Procedure Code (Act V of 1908), section 97 and Order XXXIV, rule 6—Mortgage suit—Preliminary decree providing that plaintiff would be entitled to apply for personal decree—Appeal not filed against preliminary decree—Correctness of decree cannot be subsequently disputed.

A provision in a decree for sale in a mortgage suit that if the net proceeds of the sale are insufficient to pay the amount of the decree 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 and not merely leaving it open to him to apply for a personal decree in such event under Order XXXIV, rule 6, C. P. C., and if a party aggrieved by such personal decree does not appeal from it he is, under section 97, C. P. C., precluded from disputing its correctness afterwards. *Ram Nath v. Nageshwar Singh* (1), relied on.

Mr. *Hyder Husain*, for the appellant.

Mr. *N Banerji*, for the respondent.

SRIVASTAVA, A. C. J., and ZIAUL HASAN, J. :—This is a second appeal against an order of the learned District Judge of Sitapur, dated the 5th of December, 1932, by which the order of the Munsif of Sitapur rejecting the appellant's application under Order XXXIV, rule 6 of the Code of Civil Procedure was confirmed.

The respondent mortgaged his property to one Narain Prasad in 1914. Narain Prasad sued on his mortgage in 1923 and obtained a decree for sale. In order to pay off this decree, Sripal Singh, the respondent, mortgaged

*Second Civil Appeal No. 72 of 1933, against the decree of Chaudhri Akbar Husain, I.C.S., District Judge of Sitapur, dated the 5th of December, 1932, upholding the decree of Babu Avadh Behari Lal, Munsif of Sitapur, dated the 3rd of September, 1932.

(1) (1930) I.L.R. 6 Luck., 132 (F.B.).

1934

MAHRAJ
RAM BILAS
v.
SRIPAL
SINGH

Srivastava,
A. C. J., and
Ziaul Hasan,
J.

the same property to the present appellant in 1924 and the money so obtained was applied to the satisfaction of Narain Prasad's decree. The appellant brought a suit on his own mortgage in 1929. The mortgage in his favour was by way of conditional sale but as he had been subrogated to the rights of Narain Prasad, a decree was passed in his favour for sale of the property. The proceeds of the sale proving insufficient to satisfy the decree, the appellant applied for a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure. This application was rejected by the first Court and that Court's order was upheld in appeal by the learned District Judge on the ground that the appellant's personal remedy against the mortgagor was barred by time.

The learned counsel for the appellant has referred us to the Full Bench case of this Court reported in *Ram Nath and another v. Nageshwar Singh and another* (1) and it is contended that as the preliminary decree passed in favour of the appellant itself contained a provision that "if the net proceeds of the sale are insufficient to pay such amount (the amount of the decree) and such subsequent interest (on the decretal amount) and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance", the application for a personal decree was not barred by time. In the Full Bench case it was held that a provision like this in a decree for sale 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 and not merely leaving it open to him to apply for a personal decree in such event and that if a party aggrieved by a preliminary decree does not appeal from it, he is, under section 97, precluded from disputing its correctness afterwards. We are bound to follow this Full Bench decision of our Court, though one of us dissented from the view of the majority in that case. The

(1) (1930) I.L.R., 6 Luck., 132 (F.B.).

respondent is therefore precluded, in view of this decision, from objecting to the appellant's application for a personal decree.

The learned counsel for the respondent has tried to distinguish the present case from the Full Bench case by saying that while in that case there was in the plaint a prayer for the relief of a personal decree, in the present case there was no such prayer. We think, however, that the wording in which relief B of the plaint, namely the general relief, was asked for did include a prayer for a personal decree. In relief A of the plaint, the appellant prayed for foreclosure and in the alternative for sale of the mortgaged property and in relief B he claimed "any other or further relief which the Court should consider just and which the nature of the suit should admit of." The words "which the nature of the suit should admit of" are significant. As a prayer for a personal decree is usual in a suit for sale, relief B should in our opinion be presumed to have included such prayer.

We therefore allow this appeal with costs and setting aside the orders of the courts below, order that a decree under Order XXXIV, rule 6 of the Code of Civil Procedure be passed in favour of the appellant.

Appeal allowed.

REVISIONAL CRIMINAL

*Before Mr. Justice E. M. Nanavutty and Mr. Justice
Ziaul Hasan*

ONKAR SINGH (APPELLANT) *v.* KING-EMPEROR
(COMPLAINANT-RESPONDENT)*

1934
September, 7

Criminal Procedure Code (Act V of 1898), sections 233, 342 and 537. Arms Act (XI of 1878), section 19(d)—Indian Penal Code (Act XLV of 1860), section 411—Possession of stolen gun without licence—Charge under section 19(d), Arms Act, and section 411, I. P. C.—Separate trial in respect of each offence,

*Criminal Revision No. 81 of 1934, against the order of Mr. G. B. Chatterji, Additional Sessions Judge of Hardoi, dated the 19th of March, 1934.

1934
MAHRAJ
RAM BILAS
v.
SRIPAL
SINGH

*Srivastava,
A. C. J., and
Ziaul Hasan,
J.*