

that under the Hanafi law a mere declaration by the waqif is sufficient to complete a waqf and it is not necessary that possession be delivered to the mutawalli.

Question No. 1(b)—In view of the answer to question no. 1(a) no question arises as to a change in the character of possession when the waqif is himself the first mutawalli.

Question No. 2—The answer is in the negative.

Question No. 3—The answer is in the negative.

Question No. 4—Although it is possible to regard the waqf of 19th February, 1929, in this case to be one for a purely religious purpose and as such beyond the scope of the Mussalman Waqf Validating Act of 1913, yet as that waqf must be held to be invalid for reason of its consisting of mortgaged property the question whether or not it is valid under the aforesaid Act does not actually arise.

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MUSAMMAT
RAHMAN
v.
MUSAMBIAT
BAQRIDAN

King, C.J.
Srivastava
and Ziaul
Husan, J.J.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,
and Mr. Justice E. M. Nanavutty*

PANDIT BRIJMOHAN NARAIN KAUL (PLAINTIFF-APPELLANT) v. SH. MOHAMMAD ABDUL AHAD AND OTHERS (DEFENDANTS-RESPONDENTS)*

1935
December, 1

Civil Procedure Code (Act V of 1908), Order XXXIV, rule 5—Mortgage suit—Preliminary decree passed in terms of compromise—Decree contemplating passing of final decree in terms of certain eventualities—Passing of final decree, if can be refused.

Where in a mortgage suit a preliminary decree for sale is passed in terms of a compromise and the decree is not only headed and described as a preliminary decree for sale, but expressly contemplates and provides for the passing of a final decree in certain eventualities, the making of a final decree under Order XXXIV, rule 5, C. P. C., cannot be refused on the ground that the decree being one based on a compromise no final decree was required and that the decree passed in terms

*First Civil Appeal No. 20 of 1933, against the decree of Pandit Bishwanath Hukku, Subordinate Judge of Hardoi, dated the 26th of November, 1932.

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of the compromise was itself executable. *Ahmad Beg v. The Allahabad Bank, Limited* (1), and *Askari Husain v. Jahangira Mal* (2), distinguished. *Nanku Singh v. Parmatmanand* (3), relied on.

Messrs. *L. S. Misra, Kashi Prasad Srivastava* and *B. N. Chak*, for the appellants.

Messrs. *Ajit Prasad, K. N. Tandon* and *Raj Narain Shukla*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ.:—This is a plaintiff's appeal against the order, dated the 26th of November, 1932, of the Subordinate Judge of Hardoi dismissing his application for the making of a final decree.

The plaintiff brought a suit for a decree for sale on foot of a mortgage deed, dated the 13th of October, 1920. A compromise was arrived at between the plaintiff on the one hand and defendants 1, 2, 5 and 7 on the other. Defendants 3 and 4 did not join in the compromise, and the case proceeded *ex parte* against them. Ultimately a preliminary decree for sale was passed in terms of the compromise. One of the terms of the compromise embodied in the decree was that if in any year the instalment fixed under the compromise "be not paid on the due date and the defendant No. 1 may make default, then after two months from the date of the default the conditions regarding instalments shall not be binding on the plaintiff, and the latter shall have power to get a final decree made" in lieu of the whole amount due with future interest and get the mortgaged property sold. It further provided that if the sale proceeds "be not sufficient to pay off the demand due to the plaintiff then the plaintiff shall have the power to get a decree prepared against defendants 1 to 4 in respect of the outstanding amount under order XXXIV, rule 6 of the Code of Civil Procedure." On the 19th of July, 1932, the plaintiff made an application alleging that the defendant No. 1 had paid the first instalment only at the appointed time and that the 2nd, 3rd and

(1) (1926) 29 O.C., 26.

(2) (1927) I.L.R., 49 All., 297.

(3) (1931) A.L.J., 58.

4th instalments were not paid on the dates fixed for their payment under the compromise. He accordingly claimed that a final decree should be made under order XXXIV, rule 5 of the Code. This application has been rejected by the Subordinate Judge on the ground that the decree being one based on a compromise no final decree was required and the decree passed in terms of the compromise was itself executable. He has relied on a decision of the late Court of the Judicial Commissioner of Oudh reported in *Ahmad Beg v. The Allahabad Bank, Limited* (1), in support of his contention. That case is, in our opinion, not in point. At page 29 of the report the learned Judges who decided that case observed as follows:

“It is also clear that the compromise did not contemplate the necessity of a final decree being prepared, but meant that the debt should be realisable directly in execution proceedings without the intervention of any further decree, that is, of a decree absolute.”

The fact that the compromise in the present case expressly contemplated the necessity of a final decree before the plaintiff could execute the decree for the entire balance due to him clearly differentiates that case from the present one.

The learned counsel for the respondents has relied also on a Full Bench decision of the Allahabad High Court reported in *Askari Husain v. Jahangira Mal* (2). This case also is, in our opinion, distinguishable on the same ground as the case reported in *Ahmad Beg v. The Allahabad Bank, Limited* (1). It may be mentioned that this case was similarly distinguished in a later case of the Allahabad High Court reported in *Nanku Singh v. Parmatmanand* (3), which is very similar to the case before us.

As already stated, the decree in the present case is not only headed and described as a preliminary decree for sale, but expressly contemplates and provides for the passing of a final decree in certain eventualities.

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The learned counsel for the respondent also wished to contend that there has not been any such breach of the terms of the compromise as would entitle the plaintiff to apply for a final decree, and that the application for a final decree was barred by time. These matters have not been gone into by the lower Court, which has disposed of the application on a preliminary ground. They can be urged before the Subordinate Judge when he deals with the merits of the case.

We accordingly allow the appeal with costs, set aside the order of the lower Court, and remand the case to the Subordinate Judge of Hardoi for disposal according to law.

Case remanded.