

written statement, it was hardly necessary for the Government Advocate to put in appearance in the case. Under the circumstances we make no order as to costs.

APPELLATE CIVIL

*Before Sir C. M. King, Knight, Chief Judge and
Mr. Justice H. G. Smith*

THAKUR MAHIPAL SINGH (DEFENDANT-APPELLANT) *v.*
KAMTA PRASAD (PLAINTIFF-RESPONDENT)*

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Civil Procedure Code (Act V of 1908), section 73 and Order XXXIV, rule 6—Decrees for sale against same judgment-debtor—Execution of both decrees—Sale in Execution of one decree—Rateable distribution asked for in respect of other decree—Sale, whether to be deemed to be in execution of both decrees—Personal decree under Order XXXIV, rule 6, whether could be obtained in the decree in which rateable distribution was claimed.

Where a person obtains a decree for sale from the Court of the Sub-Judge and another decree from the Court of the Munsif and applies for execution of both of them and then applies to the Court of Sub-Judge for rateable distribution in respect of the other decree and after the sale, both the decrees being only partly satisfied, he applies for personal decrees under Order XXXIV, rule 6 C. P. C. for the balance left in each decree, *held*, that it must be deemed in law that the sale took place in execution of both the decrees and an application under Order XXXIV, rule 6. Even in respect of the decree relating to which rateable distribution was claimed was maintainable. *Shyam Behari v. Mohāndei* (1), *Mahadeo Prasad Pal Singh v. Jai Karan Singh* (2), *Kamta Prasad v. Saiyid Ahmad* (3), and *Deoraji Kuar v. Jadunandan Rai* (4), referred to and distinguished.

Mr. *Ali Zaheer*, for the appellant.

Messrs. *M. H. Kidwai* and *Rishad Shahid Husain*, for the respondent.

*Second Civil Appeal No. 14 of 1934, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Gonda, dated the 14th of November, 1933, upholding the decree of Pandit Bishun Narain Shukla, Munsif of Gonda, dated the 22nd of March, 1933.

(1) (1930) I.L.R., 6 Luck., 202.
(3) (1909) I.L.R., 31 All., 373.

(2) (1932) I.L.R. 8 Luck., 217.
(4) (1931) A.I.R., All., 92.

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KING, C.J. and SMITH, J.:—These appeals are connected and can be disposed of by one judgment. They arise out of a decision, dated the 14th of November, 1933, of the learned Subordinate Judge of Gonda, by which he dismissed two appeals against orders, dated the 22nd of March, 1933, of the learned Munsif of Gonda.

The facts briefly are that on the 22nd of July, 1925, one Kamta Prasad sold 14'66 acres of land for Rs.6,000 to one Mahipal Singh, the entire consideration money being left with the vendee for payment to two creditors of the vendor, named Bhabuti and Raghbir, Kurmi. The vendee, Mahipal Singh, did not pay those creditors and, in consequence, Kamta Prasad had to pay them himself. He afterwards sued the vendee in the Court of the Additional Subordinate Judge at Gonda, in respect of the amount that he had to pay to Bhabuti. He obtained a decree in that Court on the 31st of March, 1928. Afterwards, he brought a similar suit in the Court of the Munsif of Gonda in respect of the money that he had to pay to the other creditor, Raghbir Kurmi. He obtained a decree in that Court on the 15th of August, 1929. Both the decrees took the form of preliminary decrees for sale, the money not paid by the vendee to the creditors being regarded as a charge upon the property. A final decree was obtained from the Additional Subordinate Judge on the 5th of March, 1930, and a final decree was obtained from the Munsif on the 26th of April, 1930. The plaintiff applied on the 1st of April, 1930, to the Additional Subordinate Judge for execution of the decree he had obtained in that Court, and on the 21st of May, 1930, he applied for execution of the decree he had obtained in the Court of the Munsif. That application was transferred to the Additional Subordinate Judge. Afterwards, on the 2nd of December, 1930, the decreeholder, Kamta Prasad, asked for rateable distribution, in respect of the decree he had obtained in the Court of the Munsif, out of the proceeds of the property that was

about to be sold in execution of the decree obtained from the Additional Subordinate Judge. The property was in the end sold, apparently some time in the month of March, 1931, and out of the sale proceeds a sum of Rs.267-12-9 was applied in part satisfaction of the decree obtained in the Court of the Munsif, the rest of it being applied in part satisfaction of the decree obtained from the Court of the Additional Subordinate Judge. The decree-holder afterwards applied to both the Courts under order XXXIV, rule 6 of the Code of Civil Procedure for personal decrees against the judgment-debtor for the balance of the decretal amounts. Both the Courts gave him those decrees. No question has been raised as to the correctness of the personal decree as regards the case in the Court of the Additional Subordinate Judge. As regards the case in the Munsif's Court, the judgment-debtor made objections, and those objections were disposed of, along with the decree-holder's application, by the Munsif's judgment of the 23rd of March, 1933, by which he allowed the decree-holder's application and rejected the judgment-debtor's objections. The judgment-debtor preferred separate appeals against the order allowing the decree-holder's application, and the order rejecting his own objections. These appeals were both dismissed by the learned Subordinate Judge on the 14th of November, 1933, and it is against that judgment that the judgment-debtor has preferred these second appeals in this Court.

The contention on behalf of the appellant is that the sale that took place was in connection with the decree that had been obtained from the Additional Subordinate Judge, and that no sale can be said to have been held in respect of the decree that had been obtained from the Court of the Munsif. It is accordingly contended that it was not possible for any personal decree to be passed under the provisions of order XXXIV, rule 6 against the judgment-debtor in respect of the balance due under the Munsif's decree. On the other side, the

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contention is that the sale must be deemed to have taken place in execution of both the decrees, and that, therefore, the courts below were right in holding the decree-holder entitled to a personal decree under order XXXIV, rule 6 of the Code of Civil Procedure.

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It was held by a Full Bench of this Court in a ruling reported in *Shyam Behari v. Mohandei; Musammat (1)*, that 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. In a later decision, also by a Full Bench of this Court, of which one of us was a member, it was held that where a portion of the mortgaged property has been sold, and the other portion is no longer available for sale, through no fault of the mortgagee, the mortgagee is entitled to a personal decree under order XXXIV, rule 6, *Mahadeo Prasad Pal Singh, Babu v. Jai Karan Singh, Babu (2)*. Those decisions do not really assist us for the determination of the present matter, since the question here is whether a sale can be said to have taken place in execution of the Munsif's decree. The learned counsel for the appellant referred us to a ruling reported in *Kamta Prasad and another v. Saiyed Ahmad and another (3)*. In that case two decrees had been obtained by a mortgagee on two separate mortgages. The first decree was made absolute and, in execution of it, the decree-holder himself purchased the property. The first decree was thus satisfied, and the second decree was partially satisfied. The decree-holder then applied for a decree under section 90 of the Transfer of Property Act, which was at that time the section applicable to such matters, but it was held that he could not have such a decree, since the second mortgage decree had not been made absolute, and no sale had taken place in execution

(1) (1930) I.L.R., 6 Luck., 202. (2) (1932) I.L.R., 8 Luck., 217.
(3) (1909) I.L.R., 31 All., 273.

of it. The facts of the present case can readily be distinguished from those of that case, inasmuch as in the present case, both the decrees were made absolute.

For the respondent, it was argued in the first place that there is a finding of fact by the learned Court below that the sale took place in satisfaction of both the decrees. We do not think that this can be said to be a pure finding of fact. More correctly stated, the view of both the courts below was that, in the circumstances of the case, it must be deemed in law that the sale took place in execution of both the decrees. That view, we think, is the correct one. In support of it we may make reference to a ruling reported in *Musamat Deoraji Kuar v. Jadunandan Rai* (1). In that case section 73 of the Code of Civil Procedure was under discussion, and it was said :

“When an application for rateable distribution is made after an attachment has already taken place the attachment readily enures for the benefit of all claimants and is as effective as if it had been brought about separately by each of them provided of course they had, before the assets were realized, applied for execution of their decrees. In such cases it is quite sufficient for them to ask that the sale should take place and the sale proceeds distributed amongst them proportionately. As we interpret the application there was in substance an implied prayer for the sale of the property and rateable distribution.”

Similarly, in the present case, in his application of the 2nd of December, 1930, under section 73 of the Code of Civil Procedure (*vide* exhibit 10), the decree holder, though the application is not clearly worded, meant to ask that the property that was going to be sold in execution of the decree of the Additional Subordinate Judge should be sold also in execution of the decree of the Munsif.

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The result is that we see no reason to differ from the view taken by the courts below, and we dismiss these appeals, with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir C. M. King, Knight, Chief Judge and
Mr. Justice Ziaul Hasan*

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M. FARIDUDDIN AHMAD, KHAN SAHIB, DEPUTY COLLECTOR (PLAINTIFF-APPELLANT) v. MURTAZA ALI KHAN AND OTHERS (DEFENDANTS-RESPONDENTS).*

Jurisdiction—Privy Council appeal—Party becoming insane pending appeal—Guardian ad litem not appointed—Appeal decided by Privy Council—Jurisdiction of Courts in India to declare the decree illegal and void—Remedy of party aggrieved—Act 3 and 4 Will. IV, C. 14 (1833), section 23—Civil Procedure Code (Act V of 1908), Order XXXII, rule 15, whether applies to Privy Council appeals—Insanity in a party pending appeal before Privy Council, effect of—Specific Relief Act (I of 1877), section 42—Declaratory suit—Possession not claimed though party out of possession—Suit for more declaration that Privy Council decree is illegal and void, maintainability of.

The provisions of section 23 of the Act 3 and 4 Will. IV, C. 41 (1833) bar by necessary implication the jurisdiction of a Court in India to grant a declaration that a Privy Council decree is illegal and void and not binding upon a party. If the order in Council is vitiated for any reason the party aggrieved has his remedy by a petition or application to their Lordships of the Judicial Committee praying for a rehearing or review. Where, therefore, during the pendency of a Privy Council appeal one of the parties becomes insane and no guardian *ad litem* is appointed to represent him at the hearing and the appeal is decided, the remedy is to apply to the Privy Council for a rehearing or review but no Court in India can pass a declaratory decree that an order in Council is void, or can record a finding on any point which is alleged to invalidate

*First Civil Appeal No. 111 of 1933, against the decree of Saiyid Qadir Hasan, Additional Subordinate Judge of Bara Banki, dated the 18th of November, 1933.