

as being immoral or opposed to public policy or in restraint of marriage. It was further held that a court has power to grant divorce to a Muhammadan wife not only on the ground of habitual ill-treatment by the husband or non-fulfilment by him of ante-nuptial engagements, but for other reasons also, e.g. desertion or neglect. This case was decided by Mr. Justice ROBINSON of the Lower Burma Chief Court in January, 1920. The learned Judge followed Syed Ameer Ali's opinion in his work on Muhammadan law in deciding that case. But that case is no authority for the proposition that mere "incompatibility of temperament" is a sufficient ground for the dissolution of marriage by decree of the Judge.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice Muhammad Raza, Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice H. G. Smith

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Civil Procedure Code (Act V of 1908), order XXXIV, rules 5 and 6—"Mortgaged property", meaning of—Sale of only part of mortgaged property—Other part not available for sale, through no act or fault of mortgagee—Mortgagee, whether entitled to personal decree.

The term "mortgaged property" in its plain sense means the specific immovable property made security by the terms of the mortgage deed. It may be that subsequently the mortgage is found to be invalid with regard to the whole or part of the property entered in the deed, the result of which would be to make the mortgage ineffective with regard to such property; but any such subsequent determination cannot control the meaning to be given to the term "mortgaged property".

*First Civil Appeal No. 115 of 1931, against the decree of Babu Bhagwati rasad, Subordinate Judge of Partabgarh, dated the 9th of September, 1931.

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The term "mortgaged property" used in order XXXIV, rule 5, means property so entered in the decree. Ordinarily the property entered in the decree is the same as that entered in the mortgage deed, but there can be cases in which the court passing the decree might hold that the mortgage is invalid or ineffective in regard to part of the property entered in the decree, in which cases that property would be excluded from the decree.

Order XXXIV, rule 6, does not lay down that the sale must be of the entire mortgaged property. Where a portion of the mortgaged property has been sold and another portion of it is no longer available for sale, but not through any act or fault of the mortgagee, the mortgagee is entitled to a personal decree under order XXXIV, rule 6 of the Code of Civil Procedure. A sale of even a part of the mortgaged property is sufficient to satisfy the letter of the law.

Shyam Behari v. Mohandei (1) distinguished. *Chand Mall Babu v. Ban Behari Bose* (2), and *Samanta Gagarnath Mahapatra v. Lokenath Sukul* (3) relied on.

The case was originally heard by a Bench consisting of Srivastava and Kisch, JJ., who referred certain questions of law involved in the appeal for decision to a Full Bench. The referring order of the Bench is as under :

SRIVASTAVA and KISCH, JJ. :—On the 18th of March, 1911 the appellant Mahadeopal Singh executed a simple mortgage deed in favour of Babu Razawand Singh, father of the plaintiff-respondent, in respect of an eight annas share in village Hadrahi in the Partabgarh District and several villages in the Basti District. Village Hadrahi formed part of the Dandi Kach estate in respect of which Mahadeopal Singh had laid a claim in the mutation court which had been successfully resisted by one Adya Baksh. In 1911 Mahadeopal Singh instituted a suit for possession of the Dandi Kach estate against Adya Baksh which was finally decided by means of a compromise between the

(1) (1930) I. L. R., 6 Luck., 202.

(2) (1923) I. L. R., 50 Cal., 718.

(3) (1921) 61 I. C. 635.

parties. Some time after this compromise the plaintiff-respondent instituted a suit on foot of the mortgage deed dated the 18th of March, 1911, claiming a decree for sale. On the 29th of September, 1924, a sale decree was passed. The decree provided that village Hadrahi was to be sold subject to the rights of Adya Baksh under the compromise. In execution of this decree village Hadrahi was sold for Rs.6,000 and execution was transferred to the court of the subordinate Judge, Basti, for necessary sale proceedings in regard to the villages in the Basti District.

Pateshwaripal Singh, grandson of Mahadeopal Singh, instituted a suit in the Basti court for a declaration that the villages in the Basti District which were included in the deed of mortgage dated the 18th of March, 1911, were joint family properties, that the mortgage made by his grandfather was without legal necessity and that the aforesaid properties could not be sold. The suit was dismissed by the Subordinate Judge, but this decision was reversed by the Allahabad High Court. The High Court held that the properties in dispute were joint family properties and could not be sold. But in the interests of justice it was held that as there was a possibility of Pateshwaripal Singh succeeding to the interest acquired by Mahadeopal Singh in the Dandi Kach estate under the compromise above referred to, the decree in favour of Pateshwaripal Singh should be made subject to the condition that in case Pateshwaripal Singh succeeded to any portion of the Dandi Kach estate or obtained any benefit therein, which was equal to or exceeding in value the amount of the decree, then he would be liable to pay the decretal amount on the property mortgaged. Thereupon the plaintiff made the application which has given rise to the present appeal for a personal decree under order XXXIV, rule 6.

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The application was contested on several grounds, but only one of them has been pressed before us,

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namely that no decree can be passed under order XXXIV, rule 6, because the necessary conditions laid down by that rule have not been satisfied in the case. The learned Subordinate Judge of Partabgarh rejected all the contentions urged on behalf of the defendant and gave the plaintiff a simple money decree for the balance of the decretal amount which still remains unrealized with future interest at 6 per cent. per annum.

Mr. Wasim, the learned counsel for the defendant-appellant, contends that the words "mortgaged property" used in order XXXIV, rule 5, mean the property entered in the mortgage deed and the decree for sale. He does not deny that the Basti property is no longer available for sale, but contends that as the entire mortgaged property has not yet been sold under order XXXIV, rule 5, therefore no personal decree can be passed under order XXXIV, rule 6. It is further argued that in the absence of any statutory provision allowing a personal decree to be passed, where part of the mortgaged property has ceased to be available for sale, no personal decree can be passed independently of the provisions of order XXXIV, rule 6. He has also placed strong reliance upon the Full Bench decision of this Court to which one of us is a party in *Shyam Behari v. Mohandei* (1) in support of his argument that the plaintiff is not entitled to a personal decree under order XXXIV, rule 6 of the Code of Civil Procedure.

Mr. Ali Zaheer, the learned counsel for the respondent, has, on the other hand, contended that the words "mortgaged property" as used in order XXXIV, rule 5, must be taken to mean only property which is subject to the mortgage. He further contends that as the Allahabad High Court has held that the mortgage in regard to the Basti property is invalid, the sale of village Hadrahi should be considered to constitute sufficient

(1) (1930) I. L. R., 6 Luck., 202.

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compliance with the provisions of order XXXIV, rule 5, and that no other mortgaged property being available for sale, he is entitled to a decree under order XXXIV, rule 6. It is further argued that the mortgage being simple, the plaintiff, when he instituted the suit on the basis of it, had a right to get a personal decree at the same time when the decree for sale was passed in his favour. When the court gave him a decree for sale, the plaintiff's right for a personal decree should be deemed to have been kept in suspension, and as it is no longer possible for the plaintiff to recover any part of the decretal amount by sale of the mortgaged property, he is entitled, independent of the provisions of order XXXIV, rule 6, to revive the right which has remained in suspense till now and to claim a personal decree. Reliance has been placed on the decision of a Bench of the Allahabad High Court in *Bisheshar Nath v. Chandu Lal* (1), in support of this contention.

We are of opinion that the decision of the Full Bench in *Shyam Behari v. Mohandei* (2) is limited to the interpretation of the provisions of order XXXIV, rule 6. It expressly leaves undecided the question whether the plaintiff in circumstances like the present can claim a personal decree on any ground outside the provisions of order XXXIV, rule 6 of the Code of Civil Procedure. The question as regards the meaning of the words "mortgaged property" as used in order XXXIV, rule 5, was also never raised or decided by the Full Bench. We think that the questions which arise for determination in this appeal are questions which can arise frequently and are of such importance that it is desirable that they should be authoritatively decided by a Full Bench of the Court.

We accordingly refer the following questions under section 14(1) of the Oudh Courts Act for decision by a Full Bench :

(1) (1927) I. L. R., 50 All., 321.

(2) (1930) I. L. R., 6 Luck., 202.

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(1) Do the words "mortgaged property" in order XXXIV, rule 5 of the Code of Civil Procedure, mean property entered in the mortgage deed and the decree, or property effectively subject to the mortgage?

(2) If order XXXIV, rule 6, does not in terms apply to the case, can the court on any grounds independent of that rule give a personal decree to the mortgagee in cases where no portion of the mortgaged property is any longer available for sale?

Mr. *Ali Mohammad*, for the appellant.

Messrs. *Ali Zaheer, Radha Krishna, Radhey Behari,* and *Ghulam Imam*, for the respondent.

RAZA, SRIVASTAVA, and SMITH, JJ. :—The facts of the case which has given rise to this reference have been stated at length in the order of reference and in the judgment of the lower court. We would therefore state them very briefly, just in so far as they are essential for the elucidation of the questions referred to the Full Bench.

The appellant, Mahadeopal Singh, on the 18th of March, 1911, executed a mortgage deed without possession in favour of Razawand Singh, father of the plaintiff-respondent, in respect of an eight annas share in village Hadrahi, in the Partabgarh District, and certain shares in five villages in the Basti District. On the 29th of September, 1924, the plaintiff obtained a decree for sale from the court of the Subordinate Judge of Partabgarh on the basis of this mortgage. After village Hadrahi had been sold in execution of this decree, execution was transferred to the court of the Subordinate Judge of Basti for sale of the shares in the villages situate in that district. Pateshwaripal Singh, grandson of the mortgagor, Mahadeopal Singh, instituted a suit in the court of the Subordinate Judge

of Basti for a declaration that the shares in the five villages in that district which were included in the deed of mortgage were joint family properties, and were not liable to sale in execution of the decree passed on the foot of the mortgage dated the 18th of March, 1911. The Subordinate Judge dismissed the suit, but on appeal the Allahabad High Court held that the shares in the villages in the Basti District were joint family properties and could not be sold. The decree contains some further provisions, but they are not material for the purposes of this reference. Thereupon the plaintiff made an application under order XXXIV, rule 6 of the Code of Civil Procedure, for a decree over for the balance of the decretal amount left unrealized after the sale of village Hadrahi. One of the objections raised against the application was that no decree could be passed under order XXXIV, rule 6, because the whole of the mortgaged property had not yet been sold. The learned Subordinate Judge of Partabgarh rejected the objection and gave the plaintiff a simple money decree for the balance due, with future interest at 6 per cent. per annum. The defendant appealed to this Court.

When the appeal came up for hearing before a Division Bench of this Court, the learned counsel for the defendant-appellant admitted that the Basti property was no longer available for sale, but maintained that no personal decree could be passed under order XXXIV, rule 6, as the entire mortgaged property had not been sold under order XXXIV, rule 5 of the Code of Civil Procedure. The learned counsel for the respondent, on the other hand, contended that the words "mortgaged property" as used in order XXXIV, rule 5, must be taken to mean only property which is effectively subject to the mortgage. He further contended that even if order XXXIV, rule 6, did not apply to the case, he was entitled to a personal decree independent of that rule. The Division Bench, being of opinion

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that the questions raised were of considerable importance, has referred the following two questions for decision by a Full Bench :

(1) Do the words "mortgaged property" in order XXXIV, rule 5 of the Code of Civil Procedure, mean property entered in the mortgage deed and the decree or property effectively subject to the mortgage?

(2) If order XXXIV, rule 6, does not in terms apply to the case, can the court on any grounds independent of that rule give a personal decree to the mortgagee in cases where no portion of the mortgaged property is any longer available for sale?

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Section 58 of the Transfer of Property Act defines a mortgage as the transfer of an interest in specific immovable property for one or other of the purposes mentioned in the definition. Thus an important ingredient of a mortgage is that the property transferred by way of security must be specified. Though the term "mortgaged property" has not been defined, yet we are clearly of opinion that the term in its plain sense must be held to mean the specific immovable property made security by the terms of the mortgage deed. It may be that subsequently the mortgage is found to be invalid with regard to the whole or part of the property entered in the deed. The result of this would be to make the mortgage ineffective with regard to such property. But in our opinion any such subsequent determination cannot control the meaning to be given to the term "mortgaged property". At the time of execution of a mortgage deed, it should be possible to predicate of certain property as the mortgaged property, and the term must, therefore, in relation to the mortgage deed, mean the property entered in the deed as forming the subject of the mortgage. The term "mortgaged property" used in order XXXIV, rule 5, in our opinion means property so entered in the decree. Ordinarily the property

entered in the decree is the same as that entered in the mortgage deed. But there can be cases in which the court passing the decree might hold that the mortgage is invalid or ineffective in regard to part of the property entered in the deed. In such cases that property would be excluded from the decree. We would answer the first question accordingly.

Next as regards the second question. There can be no doubt that in the first instance the remedy of the mortgagee is against the mortgaged property. He is therefore expected to exhaust such property before any personal liability is imposed on the mortgagor. But the question arises whether the mortgagee can obtain a personal decree if a portion of the mortgaged property has ceased to be available for sale for reasons beyond his control. Strong reliance has been placed on behalf of the appellants on the decision of a Full Bench of this Court in *Shyam Behari v. Mohandei* (1). In this case no sale at all had taken place under order XXXIV, rule 5, because before the property could be put to sale, it had already been sold in execution of a decree held by a prior mortgagee. The Full Bench held 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." It may also be pointed out that the Full Bench in that case prefaced their decision with the following remark :

"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

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of the mortgaged property in pursuance of the decree passed in favour of the appellant on the 8th of September, 1923, had taken place."

This case, therefore, has no application to the present case in which a sale has taken place and one of the items of the mortgaged property, namely village Hadrahi, has been sold. We think that this sale, even though only of part of the mortgaged property, is sufficient to satisfy the letter of the law. The relevant words of order XXXIV, rule 6, are :

"Where the net proceeds of any sale held under the last preceding rule . . ."

In this case, as just stated, a sale under order XXXIV, rule 5, did take place. Rule 6 does not lay down that the sale must be of the entire mortgaged property. As it is admitted that the portion of the mortgaged property which has not been sold is no longer available for sale, and as it is further clear that this situation has arisen owing to the action of other claimants, and not through any act or default of the mortgagee, we are of opinion that the plaintiff mortgagee is entitled to a personal decree under order XXXIV, rule 6. Some amendment was made in this rule recently by the Transfer of Property (Amendment) Act, 1929. It is a pity that the hardship which has sometimes arisen in cases in which the whole or a portion of the mortgaged property has ceased to be available for sale through no fault of the mortgagee, does not appear to have attracted the attention of the Legislature and nothing has been done to remove it. We hope that it will be possible for the Legislature to remove it at some future date. We have little doubt that it could not be the intention of the Legislature that in such cases the mortgagee should be deprived of his personal remedy and of the benefit of the provisions of order XXXIV, rule 6. The Full Bench deciding the case of *Shyam Behari v. Mohandei* (1), was constrained

on an interpretation of the terms of this rule to exclude the mortgagees, in cases in which no sale has taken place under rule 5, from the benefit of rule 6. Fortunately it is possible for us to save the plaintiff in the present case from this hardship by taking the view indicated above. It may be that the interpretation which we have placed upon the words "any sale" used in order XXXIV, rule 6, is strictly literal. But we feel justified in doing so in order to meet the defendant's plea, which is only of a technical character. A similar interpretation appears to have been placed upon the provisions of order XXXIV, rule 6, by the Calcutta High Court in *Chand Mall Babu v. Ban Behari Bose* (1) and by the Patna High Court in *Samanta Gagarnath Mahapatra v. Lokenath Sukul* (2). We feel somewhat doubtful about the right of the plaintiff to obtain a personal decree by means of an application in the mortgage suit on grounds independent of order XXXIV, rule 6. However, as we have held that the case falls within the terms of order XXXIV, rule 6, it is not necessary for us to express any opinion on that question.

Our answer therefore is as follows :

(1) The words "mortgaged property" in order XXXIV, rule 5 of the Code of Civil Procedure, mean property entered in the mortgage deed and the decree.

(2) Order XXXIV, rule 6, applies to the case. Therefore no question about the plaintiff's right to get a personal decree independent of that rule arises.

(1) (1923) I. L. R., 50 Cal., 718.

(2) (1921) 61 I. C., 635.

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