

APPELLATE CIVIL

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

DRIGPAL SINGH (PLAINTIFF-APPELLANT) v. KALKA SINGH
AND OTHERS (DEFENDANTS-RESPONDENTS)**

1936
April, 4

*Civil Procedure Code (Act V of 1908), Order XXXIV, rule 6—
Mortgage decree passed on compromise—Decree providing
for personal decree for balance after sale—Compromise silent
as to mortgagee's title to personal decree—Decree not against
compromise—Mortgagee, whether has right to personal
decree.*

Where a mortgage decree is passed on the basis of a compromise, and expressly authorises the decree-holder to apply for a personal decree under Order XXXIV, rule 6, C. P. C., in case of any balance remaining due after sale of the mortgaged property, and there is nothing in the compromise to show clearly that the mortgagee has consented to forego this remedy, the decree is not contrary to the terms of the compromise but is in accordance with the intention of the parties and the decree-holder is entitled to a personal decree under Order XXXIV, rule 6 against the mortgagor for the balance of the mortgage money.

Mr. *Piarey Lal Varma*, for the appellant.

None for the respondents.

KING, C. J., and ZIAUL HASAN, J.:—This is an appeal against an order rejecting an application for passing a personal decree under order XXXIV, rule 6, C. P. C. against the mortgagor for the balance of the mortgage money.

The mortgage decree was passed upon the basis of a compromise between the mortgagee and defendants 2 to 7 who were the transferees from defendant No. 1, the mortgagor. The compromise provided that a decree for Rs.12,000 odd besides costs of the suit and *pendente lite* and future interests at the rate of Re.0-10-0 per cent. per mensem should be passed in favour of the plaintiff

*First Civil Appeal No. 56 of 1934; against the decree of Pandit Brij Kishen Topa, Subordinate Judge of Malihabad at Lucknow, dated the 16th of December, 1933.

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against the defendants, and the mortgage property should be held liable therefor. The stipulated period for payment was one year. The compromise further provided that if the defendants did not pay the decretal amount within one year, then they would not be entitled to deduct Rs.1,000, which the plaintiff had relinquished, and it would be included in the decree with interest at the rate of Re.0-10-0 per cent. per mensem and the mortgaged property would be held liable therefor.

A decree was passed in terms of the compromise both against defendants 2 to 7, who were parties to the compromise, and also *ex parte* against defendant No. 1 who did not contest the suit. The decree expressly authorised the decree-holder to apply for a personal decree under order XXXIV, rule 6.

After the property had been sold in execution of the decree for sale, a balance of about Rs.2,890 remained due. The decree-holder then applied on the 8th of September, 1933, for having a personal decree passed against the defendants under order XXXIV, rule 6. The defendants Nos. 2, 3 and 5 to 7 on the other hand made an application for amendment of the decree by the exclusion of the clause giving a right to a personal decree under order XXXIV, rule 6.

The learned Subordinate Judge allowed the amendment, holding that the decree was not in accordance with the compromise, and consequently dismissed the decree-holder's application for a personal decree under order XXXIV, rule 6.

The decree-holder comes up in appeal against the order rejecting his application for a personal decree, and applies in revision against the order allowing the amendment of the decree.

It is argued on the merits that the terms of the compromise do not exclude the mortgagee's right to a personal decree against the mortgagor, in the event of the mortgage money not being satisfied by sale of the mortgaged property. We think there is much force in this contention. The compromise is silent on the question

whether the decree-holder would be entitled to a personal decree in the event of any balance remaining due to him after the sale of the mortgaged property. But there is nothing in the terms of the compromise to indicate clearly that the mortgagee had given up his right to a personal decree, to which he was legally entitled. The suit was brought well within time for enforcing the personal remedy against the mortgagor. In such circumstances we think that the terms of the compromise should not be held as prohibiting the mortgagee from applying for a personal decree, in the event of the debt not being satisfied out of the mortgaged property unless the language of the compromise makes it clear that the mortgagee had consented to forego this remedy. There is nothing in the compromise to show this clearly.

The learned Subordinate Judge relied upon the ruling of *Tribeni Singh v. Mohammad Musharraf Ali* (1) but we think that this ruling is distinguishable upon the facts. In that case also the parties had entered into a compromise and the defendant had agreed to pay to the plaintiff the full amount of the suit together with half of the costs of the suit by a certain specified date, and had agreed that a decree against the mortgaged property be passed according to the compromise. The learned Judges found nothing in the compromise to indicate an intention on the part of the defendant to make himself personally liable for any balance which might remain unpaid after the mortgaged property had been sold.

The important point of distinction is this, that in the case cited it was admitted that at the date of the suit the right of the plaintiff to obtain a personal decree had already become barred by time. This was a circumstance which weighed strongly with the learned Judges. Very naturally they held that in such circumstances, if the parties intended that the defendant should be made personally liable for any deficiency arising after the sale, they should have made clear and express provision to

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(1) (1931) 8 O.W.N., 1121.

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that effect. We have nothing to say against the reasoning or decision in that case but it does not apply to the facts of the present case, where the plaintiff's right to a personal decree had not become barred by time. We think that the principle of interpretation to be followed in the present case is that if it had been intended that the plaintiff should forego his existing right to a personal decree, the parties should have provided expressly or by necessary implication that the personal remedy should be barred. In the present case there is nothing in the compromise clearly indicating that the plaintiff should lose his right to a personal decree against the mortgagor, in the event of any balance remaining due after the sale. In our opinion therefore the decree which purported to have been passed in terms of the compromise and which did provide for a personal decree under order XXXIV, rule 6 was not contrary to the terms of the compromise but was in accordance with the intention of the parties.

Taking this view of the terms of the compromise it is unnecessary for us to consider the other points which have been raised on behalf of the appellant. We must, however note that the contention that defendants 2 to 7 had no *locus standi* to make an objection is not valid because the decree-holder expressly asked for a personal decree to be passed against all the defendants and not only against defendant No. 1, the mortgagor. In this Court, however, it has been conceded by the learned Advocate for the appellant that he can only claim a personal decree against the mortgagor, defendant No. 1.

We accordingly allow the appeal and revisional application and set aside the order passed by the Court below rejecting the application for a personal decree and set aside the order allowing the amendment of the decree. We substitute an order that a personal decree be passed under order XXXIV, rule 6 against the mortgagor, defendant No. 1 only, for the balance of the

mortgage money. The appellant will get his costs of the appeal and application.

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Appeal allowed.

REVISIONAL CIVIL

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

SHIVA NARAIN AND OTHERS (PLAINTIFFS-APPLICANTS) v.

BADAL AND OTHERS (DEFENDANTS-OPPOSITE-PARTY)*

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April, 7

Limitation Act (IX of 1908), Article 80—Bond stipulating repayment within fixed period—Interest payable month by month—Creditor allowed right to sue on non-payment of interest—Limitation runs from date of first default—Limitation, when begins—Limitation, whether can stop if once begun—Statute prevails irrespective of creditor's option—Article 66, Limitation Act, applicability of—Article 66, whether applies to bond payable on default in paying interest monthly.

Where a bond contains a promise to repay the loan in two years and provides that interest will be paid month by month, and that in case of non-payment of interest monthly, the creditor will have a right to sue for his money within or after the stipulated period, the cause of action accrues on default of payment of interest and limitation begins to run from the date of first default under Article 80, Limitation Act. *Pherai v. Puda Ram (1)*, followed. *Lasa Din v. Gulab Kunwar (2)*, distinguished. *Jawaher Lal v. Mathura Prasad (3)*, referred to.

When once an amount becomes payable from the date of default in the payment of interest under the terms of a bond, limitation begins to run from the date of default and it cannot be stopped because the bond provides an alternative, starting point for limitation. The creditor cannot be allowed to ignore the earlier starting point of limitation. The matter is one the determination of which rests on the terms of statute and not on the wishes or option of the creditor.

Where a bond provides for payment of interest month by month and entitles the creditor to recover his money in case

*Section 25 Application No. 148 of 1934, against the order of Babu Shiva Gopal Mathur, Judge, Small Causes Court, Lucknow, dated the 1st of November, 1934.

(1) (1924) 1 O.W.N., 647.

(2) (1932) I.L.R., 7 Luck., 442.

(3) (1934) A.I.R., All., 661.