

not to the rules for breach of which he was convicting the accused. Section 16 of the Act applies to all contraventions of the provisions of the Act or of the rules made thereunder so that a mere reference to that section in the summons can give absolutely no idea to the accused of the exact nature of the offence with which he is being charged.

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Ziaul Hasan,  
J.

I accept the reference in both the cases and set aside the accused's conviction and sentence in each case. As the offences were not very serious the sentence being of fine only, and as the accused has had his driving licence suspended for several months and as he has been sufficiently punished for breaches of the rules, I do not consider it necessary to order a retrial of the cases.

*Reference accepted*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,  
Chief Judge and Mr. Justice H. G. Smith*

N. ULFAT HUSAIN KHAN AND OTHERS (DEFENDANTS-APPELLANTS) v. GIRDHARI LAL AND ANOTHER (PLAINTIFFS-RESPONDENTS)\*

1936  
December, 8

*Civil Procedure Code (Act V of 1908), order XXXIV, rule 6—Sale of part of mortgaged property—Decree-holder releasing part of mortgaged property in favour of one mortgagor on receipt of some money—Personal decree under order XXXIV, rule 6, if can be allowed—Execution of decree—Compromise—Person party to legal proceeding but not compromise, if barred by compromise.*

Where a portion of the mortgaged property has been sold and the other portion is no longer available for sale owing to the decree-holder's own conduct in releasing that portion in favour of one of the judgment-debtors on receipt of a sum of money from him, then an application for a personal decree under order XXXIV, rule 6, Civil Procedure Code is not maintainable as the decree-holder's inability to sell that portion of the property is due to his own conduct. *Mahadeo Prasad Pal*

\*First Civil Appeal No. 26 of 1936, against the decree of Saived Shaukat Husain, Civil Judge, Mohanlalganj, Lucknow, dated the 30th of November, 1935.

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*Singh v. Jai Karan Singh* (1), and *Shyam Behari v. Mohandei* (2), relied on. *Bisheshar Nath v. Chandu Lal* (3), referred to.

Where a legal proceeding is decided on the basis of a compromise, the compromise is not binding on the persons who, though parties to the legal proceedings, were no party to the compromise.

Messrs. *Makund Behari Lal* and *Khwaja Abdul Ali*, for the appellants.

Messrs. *Radha Krishna Srivastava* and *S. M. Rafi* for the respondents.

SRIVASTAVA, C. J. and SMITH, J.:—This is an appeal by the defendants judgment-debtors against the decree of the learned Civil Judge of Mohanlalganj, Lucknow. The facts of the case are that on the 2nd of October, 1926, three persons, namely, Ramzani Begam, Ulfat Husain Khan, and Ghulam Husain Khan, executed a deed or mortgage in favour of the decree-holder respondents hypothecating two houses, one of which was described as the kitchen. The respondents brought a suit on foot of this mortgage, but did not include the second house described as the kitchen in their plaint. They obtained a preliminary decree for sale in respect of the other house which was also made final. In execution of this decree the house was put to sale and purchased by the respondents themselves. Thereafter the respondents made an application for amendment of the plaint, the preliminary decree and the final decree for sale, by inclusion of the second house, namely the kitchen, which they said had been omitted from the suit by oversight. The Civil Judge granted the application and ordered the plaint and the preliminary and the final decrees to be amended as prayed for. One of the persons who was a party to this application for amendment was Kazim Raza Khan, one of the heirs of Ramzani Begam who had died before the institution of the suit. Kazim Raza Khan applied to this Court for revision of the order of the Subordinate Judge allowing the

(1) (1932) I.L.R., 8 Luck., 217.

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

(3) (1927) I.L.R., 50 All., 321.

amendment. Ulfat Husain Khan, the only mortgagor now surviving, and Zakia Begam and Bakhtawar Begam the heirs of Ghulam Husain Khan, who are the appellants before us, were no parties to the revision application made in this Court. This application was decided on the basis of a compromise arrived at between the decree-holders and Kazim Raza Khan. The terms of the compromise were that the decree-holders gave up their claim to the house known as "kitchen" on receipt of Rs.200 from Kazim Raza Khan. It further provided that the compromise "will not affect any legal rights which the parties may have arising out of the original decree in favour of the decree-holder". Subsequent to this the plaintiffs decree-holders made an application under order XXXIV, rule 6 for a personal decree in respect of the balance of the decretal amount which remained unpaid. The application was opposed by the appellants on the ground that a portion of the mortgaged property had been released by the decree-holders in favour of Kazim Raza Khan. The learned Civil Judge disallowed the objection relying on the provision of the compromise which we have quoted above, namely, that it would not affect the legal rights which the parties may have arising out of the original decree, and passed a decree under order XXXIV, rule 6 of the Code of Civil Procedure in favour of the plaintiffs.

We are of opinion that the order of the lower court cannot be supported. The provision in the compromise relied on by the learned Civil Judge is not binding on the appellants because they were no "parties" to it. We are clearly of opinion that the word "parties" as used in the sentence which we have quoted from the compromise must relate to the persons who were parties to the compromise, and cannot include persons, who, though parties to the application for amendment, were not parties to the compromise. In this connection we should also note that the interest of Kazim Raza Khan

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appears to have been in conflict with the interest of the appellants, inasmuch as Kazim Raza Khan as an heir of Ramzani Begam could not be personally liable, whereas at least one of the appellants, Ulfat Husain, who is one of the mortgagors, was personally liable for any balance of the mortgage money which remained unpaid.

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The learned counsel for the plaintiffs-respondents has however tried to support the judgment of the lower court on other grounds. He has in the first place pointed out that all the property entered in the final decree for sale has been sold, and therefore urges that he is entitled to a personal decree even in terms of order XXXIV, rule 6. In support of this argument the learned counsel wants to take advantage of the omission of the lower court to make the necessary correction in the final decree. It is not denied that the order for amendment relates not only to the plaint and the preliminary decree, but also to the final decree. It appears that this amendment was actually made in the plaint as well as in the preliminary decree for sale, but by some oversight the amendment was not actually carried out in the case of the final decree. In the circumstances we are of opinion that the respondents cannot be allowed to take advantage of this omission, evidently due to the negligence of the office of the Civil Judge. In view of the clear order directing the amendment of the final decree also we must take it that the decree related to the house described as "kitchen" also.

In *Shyam Behari v. Mohandei* (1) it was held by a Full Bench of this court of which one of us was a member 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 other words, before the plaintiff can invoke the aid

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

of the provisions of rule 6 he must establish that the mortgaged properties have been sold as contemplated by sub-rule 2 of rule 5. In a later Full Bench decision to which both of us were parties, *Mahadeo Prasad Pal Singh v. Jai Karan Singh* (1), 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. The learned counsel for the respondents has relied on the last mentioned decision, and has contended that it is not material that the portion of the mortgaged property which is no longer available for sale should have ceased to be so available through any act or default of the mortgagee. He argued that where a sale of part of the mortgaged property has taken place, this is sufficient to satisfy the letter of the law, irrespective of the consideration whether the mortgagee was in any way at fault or not. We regret we are unable to accede to this contention. As was held in the earlier Full Bench decision in *Shyam Behari v. Mohandei* (2), the expression "any such sale" has reference to rule 5, sub-rule (2), and therefore the property entered in the decree must be sold before the mortgagee can seek the aid of order XXXIV, rule 6. This decision was distinguished in the later case on the ground that in that case it was impossible for the decree-holder to sell the whole of the mortgaged property, and further because the situation had arisen owing to the action of other claimants, and not through any act or default of the mortgagee. In the present case we are satisfied that the inability of the decree-holders to sell the house known as "kitchen" is due to their own conduct in releasing that house in favour of Kazim Raza on receipt of a sum of Rs.200 from him. The case of *Mahadeo Prasad Pal Singh v. Jai Karan Singh* (1) cannot therefore help the respondents.

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Lastly, it was argued that even independently, of the provisions of order XXXIV, rule 6, the plaintiffs-respondents should be held entitled to a personal decree, as the mortgage-deed contains a covenant of personal liability in case the whole of the mortgage money is not realized by sale of the mortgaged property. Reliance has been placed in support of this argument on the decision of a Bench of the Allahabad High Court in *Bisheshar Nath v. Chandu Lal* (1). It was held in this case that "where property the subject of a suit for sale on a mortgage has ceased to be available for sale *owing to no fault of the mortgagee*, the mortgagee is entitled to a personal decree, the whole right to which the mortgagee has had all along, but which right has merely been suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable. Such a decree is not within order XXXIV, rule 6 of the Code of Civil Procedure, nor based by analogy with order XXXIV, rule 6, on any legal fiction that there has been a sale." In *Mahadeo Prasad Pal Singh v. Jai Karan Singh* (2) the Full Bench expressed some doubt about the correctness of this view, but did not think it necessary to decide the question. It seems unnecessary for us to decide the question in the present case either. It will be enough to say that in the present case it was owing to the act of the mortgagees themselves that part of the mortgaged property has ceased to be available for sale. Further, even assuming that the mortgagee has any such right independent of the provisions of order XXXIV, rule 6, such right must be controlled by the terms of the mortgage. In the present case the mortgage-deed expressly provides that the mortgagees shall in the first instance have power to realize their mortgage money from the mortgaged property alone, and the personal liability of the mortgagors would arise only

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

(2) (1932) I.L.R., 8 Luck., 217.

after the entire mortgaged property has been exhausted. We must therefore overrule this contention also.

The result therefore is that we allow the appeal, with costs, and set aside the personal decree passed under order XXXIV, rule 6 of the Code of Civil Procedure.

*Appeal allowed.*

## APPELLATE CIVIL

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

ABDUL WAHID ALIAS CHHANGA AND OTHERS (OPPOSITE PARTY-APPELLANTS) *v.* RAHMAT ULLAH AND OTHERS (APPLICANTS-RESPONDENTS)\*

1936

December, 17.

*Partition suit—Decree—Final decree for partition passed—Limitation for filing stamp paper for preparation of final decree—Limitation Act (IX of 1908), Article 181, applicability of.*

Where the order for a final decree for partition is made and it is laid down in it that the decree be prepared when the necessary stamp is filed, an application made more than three years after that order offering to file the stamp paper and asking to have the final decree engrossed on it, is merely a step in the proceedings for preparation of the final decree and is not subject to any rule of limitation as after the making of the order for final decree the proceedings must be deemed to be pending until the decree is engrossed on a stamp paper. *Bisheshwar Gir Goshain v. Satish Chandra Chatterji* (1), *Lalta Prasad v. Brahma Din* (2), *Jotindra Mohan Tagore v. Bejoy Chand Mahtap* (3), and *Ramanathan Chetty v. Alagappa Chetty* (4), referred to.

Mr. Sri Ram, for the appellants.

Mr. Moti Lal Saksena, for the respondents.

SRIVASTAVA, C. J. and NANAVUTTY, J. :—The facts of the case are that a preliminary decree for partition was passed in favour of the plaintiffs-appellants. On an

\*Execution of Decree Appeal No. 25 of 1934, against the order of Babu Pratap Shankar, Civil Judge of Mohanlalganj at Lucknow, dated the 20th of December, 1933.

(1) (1929) A.I.R., Oudh, 117.

(2) (1929) I.L.R., 5 Luck., 280.

(3) (1904) I.L.R., 32 Cal., 433.

(4) (1929) I.L.R., 53 Mad., 378.