

not necessary to decide the other point raised by the learned counsel for the appellant.

The result is that the appeal is allowed, the decree passed by the courts below is reversed, the suit filed by the respondent is dismissed with costs throughout.

*Appeal allowed.*

1939

SAHEB DIN  
v.  
GAURI  
SHANKAR

## APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice  
J. R. W. Bennett*

BUNYAD HUSAIN AND ANOTHER (APPELLANTS) v. BALLABH  
DAS AND ANOTHER (RESPONDENTS)\*

1939  
September, 18

*Civil Procedure Code (Act V of 1908), order XXXIV, rules 4 and 6 and section 48—Mortgage suit—Compromise decree providing for preliminary and final decree—Preliminary and final decrees in such case, validity of—Personal decree under order XXXIV, rule 6, Civil Procedure Code, whether can be passed—Execution of personal decree under order XXXIV, rule 6—Limitation under section 48, Civil Procedure Code, when begins to run.*

Where in a mortgage suit a decree is passed on compromise which itself provides that a preliminary and a final decree should be passed then there is no objection to a preliminary decree being passed under order XXXIV, rule 4, and to that decree being made absolute on the expiry of the period provided in the compromise. Nor in these circumstances is there any objection to a personal decree being awarded to the mortgagee-decree-holders afterwards for the balance.

Time for execution of the personal decree under section 48, Civil Procedure Code, would run from the date of the personal decree.

*Brij Mohan Narain Kaul v. Mst. Mujib Fatima (1), relied on. Khulna Loan Company, Limited v. Jnendra Nath Bose (2), Haripada Datta v. Sashi Bhushan Basu (3), Ishan Chandra Kundu v. Nitratan Adikari (4), Ganganand Singh v. Rameshwar Singh Bahadur (5), Askari Hasan v. Jahangira Mal (6), and*

\*Execution of Decree Appeal No. 16 of 1937, against the order, dated the 25th November, 1936, of Shiva Gopal Mathur, Esq., Civil Judge, Mohanlalganj, Lucknow.

(1) (1936) A.I.R., Oudh, 173.

(2) (1917) A.I.R., P.C., 35.

(3) (1928) A.I.R., Cal., 668.

(4) (1923) A.I.R., Patna, 375.

(5) (1927) A.I.R., Patna, 271.

(6) (1927) I.L.R., 49 Ad., 237(F B.).

1939

*Ahmad Mirza Beg v. Allahabad Bank, Limited* (1), distinguished.

BUNYAD  
HUSAIN  
v.  
BALLABH  
DAS

Mr. *Habib Ali Khan*, for appellants.

Mr. *Raj Kumar Srivastava*, for the respondents.

ZIAUL HASAN and BENNETT, JJ.:—This is an execution of decree appeal against the judgment and decree, dated the 25th November, 1936, passed by the learned Civil Judge of Mohanlalganj, Lucknow, dismissing an objection in execution proceedings on a decree, dated the 14th May, 1927, obtained under order XXXIV, rule 6 of the Code of Civil Procedure.

The objection of the judgment-debtors was that execution was time-barred, the application having been made more than 12 years after the date of the preliminary decree in the mortgage suit.

The facts of the case were that the appellants were sued on a mortgage and a decree was passed against them on compromise on the 25th April, 1922. This decree provided that the judgment-debtors should have 14 months' time for payment of the decretal amount as agreed in the compromise, and that in case the money was not paid within this period, the decree should be made absolute. It also provided that if the sale-proceeds of the mortgaged property were found insufficient to satisfy the decree, the plaintiff should be at liberty to apply for a personal decree for the balance.

Payment not having been made the decree was made absolute on the 6th February, 1925. The property covered by the mortgage was put to sale, but as the decree was not satisfied fully out of the sale-proceeds the decree-holder secured a personal decree against the judgment-debtors on the 14th May, 1927.

The compromise decree of the 25th April, 1922 was passed against two of the defendants on compromise a third defendant Mst. *Wajib-un-nisa* not being a party to

it. Proceedings continued against her, and a preliminary decree was eventually passed against her also on the 31st July, 1923. There was an appeal in the Court of the Judicial Commissioner of Oudh and this appeal, so far as the present appellants are concerned, was dismissed on the 20th November, 1924. The decree was made absolute on the 6th February, 1925.

The present appeal has been filed only by the first two judgment-debtors.

The objection of the appellants was dismissed by the learned Civil Judge, and after hearing their learned counsel we are of opinion that this decision is right.

It has been argued on behalf of the appellants that when a decree in a mortgage suit is passed on compromise, there is no question of a preliminary or a final decree, and, that therefore in the present case we must look to the decree of 1922, and that it is this decree alone on which execution proceedings can be taken.

We have been referred in support of this argument to a number of authorities, but we do not consider that they are applicable to the facts of the present case. In the case of *Khulna Loan Company Limited, v. Jnendra Nath Bose* (1), it was held by their Lordships of the Privy Council that a decree directing that the mortgaged property should be sold and if the proceeds of the sale were insufficient, the balance should be realised from the other properties and the persons of the judgment-debtors, does not give 12 years to the decree-holder for proceeding against the person and other properties of the judgment-debtor dating from the time when the mortgaged property has been sold, nor can such a decree be regarded as one in which the payment of money is directed to be made at a certain date, namely after the mortgaged property had been sold.

This case is clearly distinguishable from the case under consideration, in that there was only one decree

(1) (1917) A.I.R., P.C., 85.

1939

BUNYAD  
HUSAIN  
v.  
BALLABH  
DAS

Ziaul Hasan  
and  
Bennett, JJ.

1939

BUNYAD  
HUSAIN  
v.  
BALLABH  
DAS

which itself provided that execution proceedings might be taken against the person and other properties of the judgment-debtor for the balance if the proceeds of the sale were insufficient.

Ziaul Hasan  
and  
Bennett, J.J.

In *Haripada Datta v. Sashi Bhushan Basu* (1) a compromise decree was passed in a mortgage suit whereby the decretal amount was payable in instalments, and in default of two successive *kists* the amount could be realised at once and the properties under the "solehnama" were to remain under mortgage. On default a final decree was passed in 1911, and the property under the "solehnama" was sold. In 1920 a decree under order XXXIV, rule 6 was obtained against the person of the judgment-debtor. An application for execution was made in 1925. The Calcutta High Court held that this application was time-barred, having been made more than 12 years from the date of the "solehnama" decree passed in 1909, and that order XXXIV, rule 6 does not apply in the case of a "solehnama" decree. The reason given was that under the "solehnama" decree in that case the decree-holder was entitled to execute the decree on default and there was no necessity of obtaining a personal decree. This was not the position in the case under consideration.

Learned counsel for the appellants has contended on the basis of this and other rulings, namely *Ishan Chandra Kundu v. Nilratan Adikari*, (2); *Ganganand Singh v. Rameshwar Singh Bahadur*, (3); *Askari Hasan v. Jahangira Mal* (4); and *Ahmad Mirza Beg v. Allahabad Bank, Limited* (5), that in all cases where there has been a compromise no question of a preliminary or final decree arises, and consequently no question of a subsequent personal decree for the balance.

In *Ishan Chandra Kundu v. Nilratan Adikari* (2) it was held by the Patan High Court that where the

(1) (1928) A.I.R., Cal., 668.

(2) (1928) A.I.R., Patna, 375.

(3) (1927) A.I.R., Patna, 271.

(4) (1927) I.L.R., 49 All., 297(F.B.).

(5) (1926) A.I.R., Oudh, 385.

compromise petition upon which the decree in a mortgage suit was made, expressly stated that the decree will be considered as final and absolute there was no necessity for any other decree.

In *Ganganand Singh v. Rameshwar Singh Bahadur* (1) the same High Court held a final decree under order XXXIV, rule 5, is only necessary where there is a preliminary decree in existence under order XXXIV, rule 4, and that where in the preliminary decree there is neither a direction as to accounts being taken between the parties nor a declaration as to what sum would be due to the mortgagee at the date fixed for payment the decree is not one under XXXIV, rule 4 either in form or in substance.

In *Askari Hasan v. Jahangira Mal* (2), the Allahabad High Court ruled that where a compromise decree provides for the payment of mortgage money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4 has no application to the case, and consequently it is necessary to apply for a final decree in the terms of order XXXIV, rule 5.

In *Ahmad Mirza Beg v. Allahabad Bank Limited* (3), this Court held that order XXIII, rule 3 does not contemplate the necessity of two decrees, that is a preliminary and a final, but only of one decree. In this case the Chief Court drew a distinction between a case where the plaintiff succeeds and the case where the matter is compromised, and observed that order XXXIV, rule 4 refers to a case where a plaintiff succeeds. This is perhaps the strongest case cited on behalf of the appellants but we do not think that it applies where the compromise specially provides for the passing of a preliminary and a final decree.

We are supported in this view by a later decision of this Court in *Brij Mohan Narain Kaul v. Mst. Mujib Fatima* (4) in which it was held that where a compro-

1939

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 BUNYAD  
HUSAIN  
vs.  
BALLABH  
DAS

*Ziaul Hasan  
and  
Bennett, J.J.*

(1) (1927) A.I.R., Patna, 271.  
(3) (1926) A.I.R., Oudh, 385.

(2) (1927) I.L.R., 49 All., 297(F.B.)  
(4) (1936) A.I.R., Oudh, 173.

1939

BUNYAD  
HUSAIN  
v.  
BALLABH  
DAS.

mise decree in a mortgage suit 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, an application for a final decree is not barred on the ground that the decree being one based on a compromise no final decree is required.

Ziaul Hasan  
and  
Bennett, J.J.

We have considered all the cases cited and we are of opinion that they are no authority for the proposition that where, as in the present case, the compromise itself provides for a preliminary and a final decree, no such decrees should nevertheless be passed. In the present case the compromise does clearly provide that a preliminary and a final decree should be passed and we see no objection therefore to a preliminary decree being passed under order XXXIV, rule 4, and to that decree being made absolute on the expiry of the period provided in the compromise. Nor in these circumstances do we see any objection to a personal decree being awarded to the mortgagee-decree-holders afterwards for the balance. It is clear that in the present case the decree-holders could not have executed their claim for the balance on either the preliminary or the final decree, nor was any such provision made by the compromise. Consequently the authorities cited do not apply to the facts of the present case.

The learned Civil Judge appears to have thought that time would run for the purpose of section 48 of the Civil Procedure Code from the date of the final decree and if not from that date, then from the date when the judgment-debtors' appeal against the preliminary decree was dismissed by the Judicial Commissioner. We have not been shown any reason why it should not be computed from the date of the personal decree, that is from the 14th May, 1927, this being the decree which it is sought to execute.

We must note that the learned Civil Judge is not quite accurate, in his dates and this makes his judgment rather confusing. In one place he states, that the

personal decree was passed on the 4th May, 1927, in another on the 14th May, 1927. In one place he says that the decree absolute was passed on the 14th May, 1927, while in another place he gives the 6th February, 1925, as the date. The decree absolute was actually passed on the latter date and the personal decree was granted on the 14th May, 1927.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

1939

BUNYAD  
HUSAIN  
v.  
BALLABH  
DAS.

## APPELLATE CIVIL

*Before Mr. Justice J. R. W. Bennett*

1939  
September  
20

MAHMUDUL HAQ KHAN AND OTHERS (DEFENDANTS-APPELLANTS) v. DEPUTY COMMISSIONER, GONDA, AS THE MANAGER, COURT OF WARDS, UTRAULA (RESPONDENT)\*

*Malikana at 10 per cent. on land revenue decreed by Settlement Officer, to superior proprietor—Remission of land revenue allowed temporarily by Government—Malikana, if can be reduced on remission of land revenue.*

Where by a judgment of the Settlement Officer, the superior proprietor is allowed 10 per cent. on the land revenue as *malikana*, it is implied that the percentage should be levied on the land revenue as assessed, and there is no legal justification for a reduction in the *malikana* by the court merely because remissions have been allowed by the Government, as remissions do not constitute a permanent reduction in the assessment, and it cannot be doubted that the *malikana* is based on the permanent assessment. *Rampal Singh, Raja v. Lal Surendra Bikram Singh* (1), referred to.

Mr. *Ghulam Hasan*, for the appellants.

Mr. *H. K. Ghose*, for the respondent.

BENNETT, J.:—This is a second civil appeal against the judgment and decree dated the 17th December, 1936, passed by the learned Additional Civil Judge, Gonda, modifying the judgment and decree, dated the 18th July, 1936, passed by the learned Munsif of Gonda, decreeing the plaintiff's suit in part. A reduction was

\*Second Civil Appeal No. 155 of 1937, against the order of Pundit Hari Kishan Kaul, Additional Civil Judge, Gonda, dated the 17th December, 1936.