circumstances contemplated in Order VII, rule 11(*c*), did not arise because no order had been made upon the plaintiff to pay a deficit court-fee at all, and, therefore, it was not a case in which he had failed to comply with an order made by the Court and the Court was under no obligation under Order VII, rule 11, to reject the plaint. That was the only ground which was put before us in this application, but it does not seem to me that the point really arises. No ground has been made out why we should interfere in revision with the order made by the learned District Judge, an order which, in my opinion, he had absolute jurisdiction to pass.

The application is rejected with costs.

KULWANT SAHAY, J.—I agree.

Application rejected.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

CHAURASI MAHASARICK

v.

BHAGAN SAHU.*

1923.
June, 5.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 14, Order XXI, rule 17—Mortgage suit—compromise decree—decree-holder entitled, in default, to sell other properties of judgment-debtors and then the mortgaged property—application for sale of mortgaged properties, whether maintainable—Execution of decree, amendment of application for, what amounts to.

A suit to enforce a mortgage on a 4-annas share in a certain village was compromised, the defendant undertaking to pay a certain sum by instalments. The compromise decree also stipulated that in the event of there being default in respect

* Appeal from Appellate Order No. 14 of 1923, from an order of R. E. Russell, Esq., District Judge of Santal Parganas, dated the 7th December, 1922, confirming an order of Babu S. Chandra, Subordinate Judge of the Santal Parganas, dated the 21st December, 1921.

1923.

CHAURASI MAHASARIK v. BHAGAN SAHU.

of three consecutive instalments the decree-holder would be entitled to realise the entire amount remaining due from the person and other properties of the judgment-debtors, and, in the event of the amount due not being so realised, the decree-holder was to be entitled to realise the amount from the mortgaged property by sale. There having been default in respect of three consecutive instalments, the decree-holder applied for execution of the decree first by attachment and sale of the movable properties of the judgment-debtor and, secondly, by attachment and sale of the mortgaged properties.

Having failed to find any movable properties of the judgment-debtor the decree-holder applied for sale of the mortgaged properties. The judgment-debtor contended that Order XXXIV, rule 14, Civil Procedure Code, barred the sale of the mortgaged properties unless a separate suit was brought for that purpose and that the application for sale of the mortgaged properties was in fact an amendment of the execution petition which was not permissible after registration of the petition. *Held*, (*i*) that the case did not fall within Order XXXIV, rule 14, and, therefore, that rule was not a bar to the sale of the mortgaged properties on the present application, and (*ii*) that the application to proceed against the mortgaged properties was not an amendment of the original petition for execution which also contained a prayer for attachment and sale of such properties.

Asgar Ali v. *Troilokya Nath Ghose*(1), *Gnanendra Kumar Roy* v. *Bishendra Kumar Roy*(2) and *Ram Sumran Prasad* v. *Babu Ram Bahadur*(3), referred to.

Appeal by the judgment-debtors.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

S. K. Mittra (with him *Saroshi Charan Mittra*), for the appellants.

Tribhuan Nath Sahay, for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of the judgment-debtors in a suit brought upon a mortgage in which a compromise decree was passed. The respondents, who are the decree-holders, sought to execute their decree. The judgment-debtors raised

(1) (1890) I. L. R. 17 Cal. 631, F.B (2) (1917-18) 22 Cal. W. N. 540.
(3) (1923) Cal. W. N. (Pat.) 61.

1923.

CHAURASI MAHASARIK v. BHAGAN SAHU.

DAWSON MILLER, C. J.

certain objections. The Court rejected those objections and on appeal the District Judge affirmed the decision of the Subordinate Judge. From the decision of the District Judge the judgment-debtors have appealed to this Court.

It appears that the decree-holders instituted a suit against the judgment-debtors in order to enforce a mortgage executed in their favour by the judgment-debtors. The result of that suit was a compromise. The compromise provided that the judgment-debtors should pay the sum due upon the mortgage amounting to Rs. 3,800 by certain instalments, and in the event of default of three consecutive instalments, the decree-holders were to be allowed to realize the entire amount remaining due from the person and other properties of the judgment-debtors, and, in the event of the amount due not being so realized, the decree-holders were to be entitled to realize the amount from the mortgaged property, by sale. The mortgaged property is a 4-annas share of *mauza* Ghat Majbonarah, *Tauzi* No. 445, and if the whole amount was not realized in that manner then certain provision was made for proceeding against other property which is not material for the purpose of this appeal.

In June, 1921, the decree-holders applied for execution of the decree, there having been a default in respect of three consecutive instalments under the terms of the decree. It is important to bear in mind how the application for execution was framed. The application for execution was framed as an application for execution against the property referred to in the compromise decree and for execution against that property in the order in which it became liable under the compromise decree. The mode in which the assistance of the Court was required was, first of all, by attachment and sale of the movable properties of the judgment-debtors and, secondly, by attachment and sale of the mortgaged properties. The movable properties were set out in a schedule, the mortgaged properties were merely mentioned under the description

1923.

CHAURASI MAHASARICK v. BHAGAN SAHU.

DAWSON MILLER, C. J.

given in the decree as the 4-annas share of *mauza* Ghat Majbonarah, *Tauzi* No. 445. The movable properties apparently could not be found; at all events they were not attached, and, as far as one can gather from the judgment of the lower Courts, the judgment-debtors contended that they had no such movable properties. Having failed to effect execution by attachment of those movable properties, the decree-holders applied to the Court for attachment and sale of the mortgaged properties. In objection to that application certain points were taken on behalf of the judgment-debtors. As already stated both the lower Courts dismissed those objections and ordered the execution to proceed by attachment and sale of the mortgaged properties.

The only two points which have been urged before us in this appeal are, first, that the case comes within the provisions of Order XXXIV, rule 14, and therefore a further suit is necessary before the mortgaged properties can be sold, and, secondly, that the application for sale of the mortgaged properties in the present execution proceedings is in fact an amendment of the execution petition which, under the decided cases, the Court has no power to grant after registration of the petition.

With regard to the first point, I think it is clear that the decree obtained in the present case is something more than a decree for the payment of money in satisfaction of a claim arising under the mortgage. Order XXXIV, rule 14, applies to a decree of that nature and it provides that the mortgagee, having obtained such a decree, shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage; and it further provides that he may institute such suit notwithstanding anything contained in Order II, rule 2. The class of case contemplated in Order XXXIV, rule 14, appears to me to be that class of case in which a suit is brought upon the covenant to repay contained in the mortgage deed or upon the

debt arising out of that covenant or in respect of some other obligation arising out of the mortgage and not to a suit which is brought in order to enforce a sale of the mortgaged properties. This rule corresponds with, or rather takes the place of, section 99 of the Transfer of Property Act which is repealed by the Civil Procedure Code, and under the previous Act it had been held that a suit of the nature described in Order XXXIV, rule 14, did not entitle the mortgagee to put to sale the mortgaged properties. The old enactment was, with a slight modification, re-enacted in the Civil Procedure Code and still remains the rule. It seems quite obvious that there may be very good reasons for refusing to allow the mortgaged properties to be sold merely because the mortgagee has obtained a decree against the mortgagor, not in the form of a mortgage decree but merely in the form of a personal decree against the mortgagor, a decree which does not in any way affect the mortgaged properties. In such a case it is clearly desirable that before the charge upon the mortgaged properties can be enforced there should be a decree directing the enforcement of that charge. The present case is one entirely different. The decree obtained in the present case was, with a slight modification, exactly the sort of decree obtained in an ordinary mortgage suit. The suit was a mortgage suit and a suit praying for the sale of the mortgaged properties; but by a compromise between the parties, instead of the ordinary form of mortgage decree being passed, which would order the judgment-debtor to pay the decretal sum within a certain time, failing which it would order the mortgaged properties to be sold, the compromise decree provided that the judgment-debtor should pay the decretal amount by certain instalments and if he should fail in the payment of three consecutive instalments then execution for the whole amount due should issue against the other properties of the judgment-debtors and in the event of the amount not being realized in that manner against the mortgaged properties. It is, therefore, clear that

1923.

CHAURASI MAHASAIRICK v. BHAGAN SAHU.

DAWSON MILLER, C. J.

the decree itself in this case orders in the event of default and in the event of the other properties of the judgment-debtors proving insufficient, a sale of the mortgaged property itself, and I can see no reason why it should be necessary, in the event which has happened, for the decree-holders to have to bring another suit asking again for the sale of the property merely because the other remedy given under the decree has proved infructuous. This case is altogether different, to my mind, from the case contemplated in Order XXXIV, rule 14, and the appeal on that ground must fail.

With regard to the second point, it has no doubt been held in the case of *Asgar Ali* v. *Troilokya Nath Ghose* (1) that, under the provisions of Order XXI, rule 17, no amendment of the execution petition is permissible after the petition has been registered. It would follow, therefore, that if the decree-holder wishes to execute his decree in some manner not provided for by the execution petition he must bring a fresh execution case for that purpose. In later cases, however, more particularly in the case of *Gnanendra Kumar Roy* v. *Rishendra Kumar Roy* (2) and a more recent case in this Court, *Ram Sumran Prasad* v. *Babu Ram Bahadur* (3), it has been held that an application to file a fresh list of properties against which execution is sought is not an amendment of the execution petition. The present case, however, is even a clearer case than either of those mentioned because in the present case, upon looking at the execution petition filed, it appears that execution was asked for not merely by attachment and sale of the movable properties of the judgment-debtors but also by attachment and sale of the mortgaged properties, if the former should prove to be insufficient. It is, therefore, abundantly clear that the present application to be allowed to proceed against the mortgaged properties comes directly within the execution petition itself, and it requires no amendment of the execution petition to enable the Court to proceed against those properties.

(1) (1890) I. L. R. 17 Cal. 631, F.B. (2) (1917-18) 22 Cal. W. N. 540.
(3) (1923) C. W. N. (Pat.) 91.

1923.

CHAURASI MAHASARIK v. BHAGAN SAHU.

For these reasons I think that this appeal must fail on both grounds. The result is that the appeal is dismissed with costs to the respondents who have appeared.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mullick and Bucknill, J.J.

1923.

June, 8.

ABDUL HAMID

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 205—*personal attendance of accused, whether may be dispensed with.*

Section 205 of the Code of Criminal Procedure, 1898, applies only to cases in which the Magistrate has issued a summons in the first instance and not where the accused has been arrested without or after the issue of a warrant.

Except in a case in which a summons is issued in the first instance a Magistrate has no jurisdiction to try a case in the absence of the accused even though the latter applies to be permitted to appear by his pleader.

The four accused persons were tried by the Subdivisional Magistrate of Araria. Bati Lal appeared on the 8th July, 1921, Abdul Razak and Sultan on the 23rd August, 1921, and Abdul Hamid on the 2nd September, 1921. The next material date was the 17th March, 1922; on that date all the accused, with the exception of Abdul Hamid, were present and the Court recorded the following order:

"Accused Hamid absent. Said to be ill. Applies for appearance by Mukhtar. Permitted. 6 prosecution witnesses examined at length. To-morrow for further hearing."

* Criminal Revision No. 257 of 1923 from a decision of H. R. Meredith, Esq., I.C.S., Sessions Judge of Purnea, dated the 3rd April, 1923, affirming an order of Maulavi A. Majid, Subdivisional Magistrate, Araria, dated the 31st January, 1923.