

party. When a suit is allowed to proceed on an insufficient court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable litigants to be defeated on technicalities. In the case of *Rachappa-subarao v. Shidappa Venkatrao*(¹) their Lordships of the Privy Council said,

“The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State.”

Where an order in regard to court-fees happens to be in favour of the plaintiff, it does not mean that it is against the defendant though it may operate to the detriment of the revenue.

I see no reason for interfering with the order passed in the present case or for departing from the usual practice of this Court not to interfere in revision with interlocutory orders. The application is, therefore, dismissed with costs. Hearing fee two gold mohurs.

VARMA, J.—I agree.

Rule discharged.

APPELLATE CIVIL.

Before Macpherson and Khaja Mohamad Noor, JJ.

SHEO BALAK PRASAD AWASTHI

v.

JUGAL KISHORE NARAIN.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 6—preliminary mortgage decree based on compromise—stipulation that other properties could be sold if mortgage properties be not sufficient—application for personal decree, whether necessary.

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GOSAIN
DEBRAJ GIR.

AGARWALA,
J.

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December,
21.

*Appeal from Original Order no. 294 of 1934, from an order of Babu Gajadhar Prasad, Subordinate Judge of Chapra, dated the 5th October, 1934.

(1) (1918) I. L. R. 43 Bom. 507.

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Where a mortgage decree was passed on a compromise and it was stipulated in the compromise that after the sale of the mortgaged properties the decree-holder could proceed against the other properties of the judgment-debtor and the decree-holder proceeded to execute the decree as a personal decree, the judgment-debtor contended that as no decree was passed under Order XXXIV, rule 6, of the Code, the execution could not proceed.

Held, that there is nothing in Order XXXIV of the Code which debars a Court from determining the personal liability of the mortgagor at the time when the preliminary decree is passed in a mortgage suit. Order XXXIV, rule 6, gives the plaintiff a right to apply for a personal decree after the sale of the mortgaged property. But this need not be done where a personal decree has already been passed at the time of the passing of the mortgage decree.

Usafali Ibrahim v. Faizullahbai Sheikh Mahomedbhai(1), *Samanta Jagannath Mahapatra v. Lokenath Sukul*(2), and *Haripada Dutta v. Sashi Bhushan Basu*(3), followed.

Karimulla Shuh v. Mirza Muhammad Raza(4), explained.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor. J.

Bhuvaneshwar Prasad Sinha, for the appellant.

Rai Gurusaran Prasad (with him *D. N. Varma* and *G. P. Singh*), for the respondents.

KHAJA MOHAMAD NOOR, J.—This is an appeal against an order of the Subordinate Judge of Saran, dated the 5th October, 1934, disallowing the appellant's objection to the execution of a compromise decree passed in a mortgage suit. After the sale of the mortgaged properties the decree-holders under the terms of the compromise proceeded against the other properties of the judgment-debtor. There was

(1) (1930) I. L. R. 54 Bom. 352.

(2) (1921) 2 Pat. L. T. 736.

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

(4) (1918) 3 Pat. L. J. 649.

an objection to the effect that the execution against the person and other properties of the judgment-debtor could not proceed as there was no decree under Order XXXIV, rule 6, of the Code of Civil Procedure. The learned Subordinate Judge has disallowed this objection and the judgment-debtor has preferred this appeal.

The learned Advocate for the appellant has referred us to the preliminary and final decrees passed in the suit, dated the 25th March, 1931, and 26th June, 1933, respectively. The final decree refers to the preliminary decree and makes it final. The preliminary decree is in the usual form and there is no mention of any personal remedy, but it refers to the petition of compromise which has been attached to it in which a clear provision is made that if the sale proceeds of the mortgaged properties be not sufficient other properties of the judgment-debtor will be liable to be sold. The learned Advocate for the appellant has contended that in spite of there being a provision in the petition of compromise, which was attached to the preliminary decree, the personal properties of the judgment-debtor could not be proceeded against without there being a fresh decree under Order XXXIV, rule 6. He relied upon a decision of this Court in *Karimulla Shah v. Mirza Muhammad Raza*⁽¹⁾ where it was held that a formal order under Order XXXIV, rule 6, is necessary before the decree-holder can pursue properties not covered by the mortgage even where the original decree is a compromise decree declaring the judgment-debtor's other properties liable in the event of the mortgaged properties not fetching a sufficient amount to cover the decretal debt and the judgment-debtor is entitled to know for how much money he is liable after the mortgaged properties have been sold. But in that case the learned Judges did not dismiss the execution proceeding. They directed that a proper

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order under rule 6 be made by stating the amount of the liability of the judgment-debtor and formally authorizing the decree-holder to proceed against the properties not covered by the mortgage. This clearly indicates that the learned Judges were of opinion that, in such a case, the passing of an order under Order XXXIV, rule 6, was a mere formality and an order to that effect can be passed in the course of the execution proceeding also. Later on, however, in *Samanta Jagannath Mahapatra v. Lokenath Sukul*⁽¹⁾ another Bench of this Court of which Jwala Prasad, J., who was a member of the Bench which decided the previous case, was also a member, held that a decree-holder need not apply under Order XXXIV, rule 6, for a personal decree where the decree drawn up is not merely a mortgage decree but is also a personal decree against the mortgagor. In the present case, as I have already stated, the final decree, which is under execution, makes the preliminary decree final which in its turn refers to the petition of compromise in which the judgment-debtor's personal liability for sums found due after the sale of the mortgaged properties has been clearly stated. I do not find anything in Order XXXIV of the Code of Civil Procedure which debars a Court from determining the personal liability of the mortgagor at the time when the preliminary decree is passed in a mortgage suit. Order XXXIV, rule 6, gives the plaintiff a right to apply for a personal decree after the sale of the mortgaged property. But this need not be done in a case where a personal decree has already been passed at the time of the passing of the mortgage decree. The same view seems to have been taken in the case of *Usafali Ibrahim v. Faizullahbai Sheikh Mahomedbhai*⁽²⁾. In that case the mortgage decree was based on an award which made no mention of any personal remedy against the mortgagor. It was held that when the personal relief against the

(1) (1921) 2 Pat. L. T. 736.

(2) (1930) I. L. R. 54 Bom. 352.

mortgagor was not expressly excluded by the terms of the mortgage or of the decree or both, the mortgagee after exhausting his remedy against the mortgage security had a right to recover the balance personally from the mortgagor. In the case of *Haripada Dutta v. Sashi Bhusan Basu*⁽¹⁾ it was held that a fresh decree is not necessary when the personal remedy is provided for in the mortgage decree itself; and that Order XXXIV, rule 6, does not apply in the case of a *sulehnama* decree. The decree in that case was held to be incapable of execution as more than twelve years had expired after the *sulehnama* decree and the personal decree which was obtained in the meantime was held to be ineffective.

In this case the objection of the judgment-debtor apart from the question that it has no foundation seems to me to be frivolous. The order-sheet of the execution case shows that the decree-holders proceeded to execute the decree against the mortgaged properties and also against the personal properties at one and the same time. The Court first proceeded against the mortgaged properties which were sold on 14th July, 1934, and the sale was confirmed on 15th August, 1934. It was then that the sale proclamation against the other properties of the judgment-debtor was issued. On the 4th September, 1934, the judgment-debtor applied for time in order to enable him to raise money and waived his rights for the issue of a fresh sale proclamation. The sale was adjourned till 2nd October, 1934. Then the judgment-debtor filed the present objection which was disallowed on the 5th October. We are informed that the properties have been sold. It is clear that the judgment-debtor on a previous occasion never took exception to the execution on the ground that there was no decree. He waived his right to a fresh sale proclamation and on that understanding took time from the Court. He

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cannot now turn round and question the execution on the ground that there was no decree.

I see no merit in this appeal and would dismiss it with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before James and Saunders, JJ.

SARAT CHANDRA DAS MAHAPATRA

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v.

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KING-EMPEROR.*

Orissa Tenancy Act, 1913 (Act II of 1913), sections 65 and 67—order of fine passed against landlord for not granting rent receipts, if revisable by High Court.

An order of fine passed by the Subdivisional Officer against a landlord under section 67 of the Orissa Tenancy Act, 1913, for not granting receipts as required by section 58 is an order passed by a Revenue officer and is subject to appeal to the Collector under the Act and the High Court has no jurisdiction to revise that order.

Naik Pandey v. Bidya Pandey(1) and *Emperor v. Mahant Ramdas*(2), distinguished.

The facts of the case material to this report are set out in the judgment of James, J.

G. P. Das and *G. C. Das*, for the petitioners.

No one for the Crown.

JAMES, J.—On the 11th of December, 1934, a number of raiyats petitioned the Collector of Balasore,

*Criminal Revision nos. 539 to 548 of 1935, from an order of R. C. Das, Esq., District Magistrate of Balasore, dated the 16th August, 1935.

(1) (1916) 1 Pat. L. J. 149.

(2) (1904) 9 Cal. W. N. 816.